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## Human Rights Council

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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Working Group on Arbitrary Detention**

### Addendum

### **Opinions adopted by the Working Group on Arbitrary Detention\***

*Chair-Rapporteur:* El Hadji Malick Sow

#### *Summary*

The present document contains the opinions adopted by the Working Group on Arbitrary Detention at its fifty-sixth, fifty-seventh and fifty-ninth sessions, held in November 2009, May 2010 and August 2010, respectively. A table listing all the Opinions adopted by the Working Group and statistical data concerning these Opinions are included in the main report of the Working Group to the Human Rights Council at its sixteenth regular session (A/HRC/16/47).

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\* Late submission.

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## **Opinion No. 18/2009 (Ukraine)**

### **Communication addressed to the Government on 30 April 2009**

**Concerning: Mr. Olexander Oshchepkov**

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended by Commission's resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102 and extended it for a further three-year period by resolution 6/4 of 28 September 2007. Acting in accordance with its methods of work, the Working Group forwarded the above-mentioned communication to the Government.

2. The Working Group conveys its appreciation to the Government for having provided the requested information.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III).

4. The case summarized hereafter has been reported to the Working Group on Arbitrary Detention as set out below.

5. Mr. Olexander Oshchepkov was arrested on 22 July 1998 at 4.00 a.m. and taken to a detention facility at the Minsk District in Kiev and charged with a crime. He was interrogated without a lawyer being present before his detention was documented. During the interrogation he was beaten and plastic packaging material was put over his head. He was tortured with electric current applied to his genitals. Both earlobes were cut off. As a result of the torture sustained, he fell unconscious and had blood in his urine for about a month. On 23 July 1998, he was forced to write a statement that the investigator had dictated to him in which he confessed guilty to the crime of murder he was charged with.

6. During two days at the Police Department three statements of confession were signed by Mr. Olexander Oshchepkov which, despite the many contradictions and lack of further investigations into the crime, formed the basis of his indictment before the court.

7. On 17 February 1999, the Kiev City Court sentenced Mr. Oshchepkov to death for murder. The sentence was later commuted to life imprisonment. Neither the court nor the prosecution took into account that Mr. Oshchepkov revoked his confessions as having been obtained under threats and intimidation. A medical certificate establishing that he had been tortured and pictures of him taken on 23 July 1998 were ignored by the court. His defence

lawyer argued that the investigation into the crime had not been properly conducted, in violation of article 22 of the Ukrainian Criminal Procedure Code (CPC).

8. Upon appeal, the Supreme Court upheld the sentence. Repeated requests by his mother addressed to various Government authorities for a revision of Mr. Oshchepkov's criminal case have been turned down, inter alia, on the grounds that "there was no torture in Ukraine".

9. The source argues that the arrest, detention and imprisonment of Mr. Oshchepkov is arbitrary as he did not enjoy his right of defence, which is in violation of articles 21, 43, and 46 of the Criminal Procedure Code, and because his confessions were obtained illegally, in violation of article 65 of the CPC.

10. The Working Group transmitted the communication to the Government on 30 April 2009 with the request to render the reply providing with detailed information about the current situation of Mr. Olexander Oshchepkov and the legal provisions justifying his continued detention.

11. The Working Group, by a note verbal dated 21 August 2009, reminded the Permanent Mission of Ukraine to the United Nations Office and other International Organizations at Geneva for response from the Government to its communication. The Permanent Mission of Ukraine transmitted the reply of the Government (in Russian). The reply confirms that Mr. Oshchepkov was arrested on 22 July 1998 under order of the Prosecutor's Office of the Minsk District in Kiev and was charged with a crime under art. 93 (g) of the Penal Code of Ukraine. On 4 September 1998, he was taken to the Kiev Investigating Detention Ward by the decision of the Prosecutor's Office of the Minsk District in Kiev. The Prosecutor's Office of the Minsk District in Kiev prolonged the term of detention twice till 22 December 1998. The pre-trial investigation was over on 16 December 1998 and the materials of the case were brought before Mr. Oshchepkov and his lawyer for study. The case was brought before the Kiev's City Court on 6 January 1999.

12. On 17 February 1999, the Kiev City Court sentenced Mr. Oshchepkov to death under Articles 93 (g) (e), 140 (2) and 42 of the Ukrainian Penal Code. Upon appeal dated 10 March 1999, the Supreme Court of Ukraine upheld the sentence by the decision of 24 June 1999. By the decision of the Kiev City Court dated 21 August 2000, Mr. Oshchepkov was sentenced to life imprisonment under articles 93 (g) (e), 140 (2) and 42 of the Ukrainian Penal Code. From 17 January 2001, Mr. Oshchepkov has been serving his sentence in the Vinnitsky penal facility. The Government states that the findings of the investigation do not cover any violation committed by persons working for the internal affairs authorities.

13. On 24 August 2009, the Working Group asked the source to inform it of its comments or observations to the Government's reply at its earliest convenience. Additionally, on 22 October 2009, the Working Group requested the source to submit the following information before 16 November 2009:

- (a) When Mr. Oleksander Oshchepkov did get legal assistance?
- (b) What happened during the period 22 July 1998 to 4 September 1998?
- (c) Had he adequate facilities for his defence?
- (d) A copy of the medical certificate establishing that Mr. Oshchepkov was victim of ill-treatment and torture;
- (e) Copies of the pictures which would demonstrate that he was victim of acts of ill-treatment and torture;

(f) What was the conduct of the police officers who arrested and held Mr. Oshchepkov in pre-trial detention between June and December 1998?

14. The Working Group also requested to be provided with more detailed information on this case and copies of legal documents about the allegations contained in the source's letter received of November 2008.

15. The reply from the source has not been received.

16. The Working Group is in position to adopt an Opinion on the case, taking into consideration the following:

(a) The source has not informed when Mr. Oshchepkov got legal assistance or if he had adequate facilities for his defence;

(b) The source also has not produced a medical certificate establishing that Mr. Oshchepkov had been tortured nor pictures which could confirm the acts of torture and ill-treatment;

(c) The source has not brought any concrete proof for the allegations contained in its communication of November 2008.

17. In the light of the foregoing, the Working Group decides to file provisionally the case attending further information from the source, according to paragraph 17 (d) of its Methods of Work.

Adopted on 19 November 2009

## **Opinión N.º 19/2009 (Colombia)**

### **Comunicación dirigida al Gobierno en junio de 2009, reiterada el 12 de noviembre de 2009**

**Relativa a: Sr. Andrés Elías Gil Gutiérrez**

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

1. El Grupo de Trabajo sobre la Detención Arbitraria fue establecido por la antigua Comisión de Derechos Humanos mediante su resolución 1991/42. El mandato del Grupo de Trabajo fue aclarado y extendido por la Comisión en su resolución 1997/50. El Consejo de Derechos Humanos asumió el mandato en su decisión 2006/102 y lo extendió por tres años en su resolución 6/4 de 28 de septiembre de 2007. Actuando de conformidad con sus métodos de trabajo, el Grupo de Trabajo transmitió la mencionada comunicación al Gobierno.

2. El Grupo de Trabajo lamenta que el Gobierno no le proporcionase la información solicitada sobre las alegaciones transmitidas.

3. El Grupo de Trabajo considera arbitraria la privación de libertad en los casos siguientes:

a) Cuando es manifiestamente imposible invocar fundamento jurídico alguno que la justifique (como el mantenimiento en detención de una persona tras haber cumplido su condena o a pesar de una ley de amnistía que le sea aplicable) (categoría I);

b) Cuando la privación de libertad resulta de un enjuiciamiento o una condena por el ejercicio de derechos o libertades proclamados en los artículos 7, 13, 14, 18, 19, 20 y 21 de la Declaración Universal de Derechos Humanos, y, además, respecto de los Estados

Partes, en los artículos 12, 18, 19, 21, 22, 25, 26 y 27 del Pacto Internacional de Derechos Civiles y Políticos (categoría II);

c) Cuando la 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 es de una gravedad tal que confiere a la privación de libertad, en cualquier forma que fuere, un carácter arbitrario (categoría III).

4. Los hechos expuestos señalan que el Sr. Andrés Elías Gil Gutiérrez es un dirigente de una organización de campesinos, la Asociación Campesina del Valle del Río Cimitarra (ACVC), dedicada a lograr el respeto de los derechos humanos de los campesinos. Dicha organización, desde 2002, ha sido acusada de ser un organismo de apoyo a las Fuerzas Armadas Revolucionarias de Colombia (FARC). Las acusaciones provienen de los servicios de inteligencia del Batallón Calibío de la XIV Brigada del Ejército, organismo que habría reconocido haber iniciado un proceso de judicialización en contra de la ACVC, sobre la base de participación remunerada de “reinsertados”, expresión que se emplea en relación a desmovilizados de las guerrillas y de grupos paramilitares en Colombia.

5. En su condición de dirigente, el Sr. Gil había participado en marchas campesinas en 1998, en las que su movimiento logró acuerdos firmados por las organizaciones sociales y por el entonces Presidente de la República, Andrés Pastrana. En 2002 participó en un proceso que permitió que el valle del río Cimitarra fuese declarado Zona de Reserva Campesina por el Instituto Colombiano de Reforma Agraria.

6. El Sr. Gil fue detenido el 29 de septiembre de 2007, en el caserío Cagui, del municipio de Cantagallo (departamento de Bolívar), por agentes de la Regional de Bucaramanga del Departamento Administrativo de Seguridad (DAS), en operativo conjunto con soldados del Ejército y de la Marina de Colombia. Fue, en todo caso, un civil quien identificó a las personas que debían ser detenidas. La captura se produjo en cumplimiento de una orden emanada de la Fiscalía Tercera Seccional de Barrancabermeja, de 12 de julio del mismo año. No obstante, el proceso policial en su contra en procura de su judicialización se había iniciado en 2005, incluyendo investigaciones e, incluso la interceptación de su teléfono, y desde esa fecha se encontraba en situación de imputado, si bien nunca fue formalmente notificado de esta medida, la que también afectó a otros dirigentes como él. La falta de notificación de su condición de imputado, permitió a la Fiscalía recibir testimonios sin la presencia de los afectados, que no pudieron contrainterrogar a las personas que hacían las veces de testigos.

7. Luego de su detención, el Sr. Gil fue conducido a las oficinas del DAS y luego a la Cárcel Modelo de Bucaramanga, y posteriormente a otros establecimientos carcelarios.

8. El 8 de mayo de 2008, el Sr. Gil fue llamado a juicio por la Fiscalía Especializada de Derechos Humanos y Derecho Internacional Humanitario. El Juzgado Penal del Circuito de Barrancabermeja ha denegado su libertad provisional al menos en dos ocasiones, el 18 de noviembre de 2008 y el 22 de abril de 2009. De acuerdo con la ley colombiana, transcurridos seis meses de la ejecutoria de la resolución de acusación (de 8 de noviembre de 2008), no podía negarse al acusado su excarcelación, beneficio que le fue denegado en todas las instancias a las que se recurrió. El argumento para la denegación fue que la audiencia no había terminado dado que se encontraba suspendida con el argumento de que la defensa no había sufragado el costo de fotocopias, que la ley no obliga al acusado a pagar.

9. Una segunda petición de libertad bajo caución fue también denegada, aduciéndose que la Fiscalía no había logrado la comparecencia “en condiciones de seguridad, de testigos bajo protección”, hecho del todo de responsabilidad de la Fiscalía, y en ningún caso del

inculpado. Estas determinaciones son contrarias a los criterios de la Corte Constitucional colombiana.

10. La segunda parte del párrafo 3 del artículo 9 del Pacto Internacional de Derechos Civiles y Políticos dispone que “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”. Ni los fiscales y jueces que han intervenido en el proceso, ni el Gobierno han sostenido que existe necesidad de asegurar al Sr. Gil para realizar las diligencias procesales, impedir su fuga o no presentarse al cumplimiento de la sentencia. Los argumentos invocados son muy distintos: dificultades o impericias de la parte acusadora, e imputación de incumplimiento de una obligación que no existe.

11. No ha gozado tampoco el acusado del derecho a “hallarse presente en el proceso y a defenderse personalmente o ser asistido por un defensor de su elección; a ser informada, si no tuviera defensor, del derecho que le asiste a tenerlo, y, siempre que el interés de la justicia lo exija, a que se le nombre defensor de oficio, gratuitamente, si careciere de medios suficientes para pagarlo”, consagrado en el inciso *d* del párrafo 3 del artículo 14 del Pacto. En la investigación de la Fiscalía, el Sr. Gil es sindicado como responsable de determinadas conductas, por testigos a los que desconoce, a los que nunca ha visto, ni ha podido contrainterrogar. Ni siquiera se le informó de que existía una investigación en su contra.

12. Los hechos expuestos constituyen infracciones de tal gravedad a las reglas del debido proceso de ley, que confieren a la privación de libertad de la persona por la que se recurre el carácter de arbitraria, según la categoría III de las consideradas por el Grupo de Trabajo.

13. Por otra parte, y a falta de toda información en contrario, el Grupo de Trabajo estima que el motivo de la detención del Sr. Gil ha sido su trabajo como dirigente gremial de organizaciones campesinas legítimas, en beneficio de los asociados. El objetivo de la ACVC es la defensa de los derechos humanos y el bienestar integral de los campesinos de ese valle. Se trata de una labor noble y que ha sido reconocida por la Asamblea General, al adoptar la Declaración sobre el derecho y el deber de los individuos, los grupos y las instituciones de promover y proteger los derechos humanos y las libertades fundamentales universalmente reconocidos (resolución 53/144 de la Asamblea, de 9 de diciembre de 1998). Esa función es, al mismo tiempo, una manifestación de los derechos humanos a la libertad de pensamiento, de opinión y de expresión; a la libertad de asociación; al derecho a la vida privada; y al derecho de reunión pacífica, derechos y libertades reconocidos tanto en la Declaración Universal de Derechos Humanos, como en el Pacto Internacional de Derechos Civiles y Políticos.

14. Habida cuenta de lo que antecede, el Grupo de Trabajo emite la siguiente Opinión:

La privación de libertad del Sr. Andrés Elías Gil Gutiérrez es arbitraria, ya que contraviene lo dispuesto en los artículos 9, 10, 11, 12, 18, 19 y 20 de la Declaración Universal de Derechos Humanos, y 9, 10, 14, 17, 18, 19, 21 y 22 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.

15. Consecuentemente con la Opinión emitida, el Grupo de Trabajo pide al Gobierno que ponga remedio a la situación de esta persona, 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.

Aprobada el 19 de noviembre de 2009

## **Opinion No. 20/2009 (Papua New Guinea)**

### **Communication addressed to the Government on 19 May 2009**

**Concerning: Messrs. David Ketava; Peter Meteo; Peter Ripo; Kavini Varo; Jimmy Saki and Stephen Lakore.**

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

1. (Same text as paragraph 1 of Opinion N° 18/2009)
2. The Working Group regrets that the Government has not replied within the 90-days deadline and despite two reminders.
3. (Same text as paragraph 3 of Opinion N° 18/2009)
4. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government. Notwithstanding that the Government has failed to offer its version of the facts and explanation on the circumstances of the case, the Working Group believes that it is in a position to render an Opinion.
5. The case summarized below was reported to the Working Group as set out below.
6. Mr. David Ketava, a 24-year-old citizen of Papua New Guinea, was arrested without a warrant on 6 November 2003 by police officers at the Gerehu market, Port Moresby, and detained on the same day.
7. Mr. Peter Meteo, 23 years of age, a citizen of Papua New Guinea, was arrested on 6 November 2003 by police agents who showed an arrest warrant. He was detained on 8 November 2003.
8. Mr. Peter Ripo, aged 31, also a citizen of Papua New Guinea, dock worker by profession, was arrested on 28 November 2003 without a warrant by police forces in a church at Tete settlement in Gerehu.
9. Mr. Kavini Varo, a 22-year-old citizen of Papua New Guinea was arrested in Gerehu by police officers producing an arrest warrant issued by the police.
10. Mr. Jimmy Saki, aged 22, a citizen of Papua New Guinea was arrested without a warrant by police officers at Gerehu market and detained on 6 November 2003.
11. It was reported that all the above-mentioned five persons are co-defendants. As of the beginning of January 2009, they have been in pretrial detention at Bomana prison for more than five years.
12. In April 2007, all these five persons were found not guilty of murder by the Waieani National Court and have been detained on remand by the same court ever since. They are now awaiting trial on the remaining charges of armed robbery, breaking and entering, arson and rape. A trial date has not yet been set. All five are being represented by a lawyer.
13. Mr. Stephen Lakore, a citizen of Papua New Guinea, was arrested without a warrant by the police on 8 January 2004 in Lariau village, Ihu district, Gulf province and detained on the same day. At first he was held in Kerema prison before being transferred to Bomana prison. He has been charged with murder but no date has yet been set or his trial. The last

time he attended court was in 2006. Mr. Lakore is represented by a public solicitor who does not respond to his requests to apply for bail.

14. The source considers the detention of the above mentioned persons as arbitrary as all have spent time in prolonged detention.

15. Having examined the information received and in the absence of a reply from the Government, the Working Group considers that a number of lapses in due process have occurred in the detention of the six persons mentioned above.

16. Mr. David Ketava, Mr. Peter Ripo, Mr. Jimmy Saki and Mr. Stephen Lakore were arrested without a warrant, which is contrary to the international human rights obligation of Papua New Guinea and is also in variance of its domestic laws.

17. In April 2007, at trial, the first five co-defendants were absolved of the charge of murder; yet they were held in detention without an opportunity for being released on bail or other pre trial release conditions.

18. The right to a fair trial also includes the right not to be detained for unduly long periods. A delay of more than six years in pretrial period constitutes an unnecessary period of detention when release on bail might have been offered while the trial was being set up, even in view of the seriousness of the charges put forward against all six pretrial detainees. This follows from the right to be untried without undue delay (art. 14, para. 3 (c), of the International Covenant on Civil and Political Rights) as well as the right to be presumed innocent until proven guilty according to law (art. 14, para. 2, of the International Covenant on Civil and Political Rights).

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

The deprivation of liberty of Messrs. David Ketava, Peter Meteo, Peter Ripo, Kavini Varo, Jimmy Saki and Stephen Lakore is arbitrary, being in violation 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 category III of the categories applicable to the consideration of cases submitted to the Working Group.

20. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of these 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. This would include, inter alia, an opportunity for release on bail pending trial or other forms of conditions of pre trial release as well as expediting the trial in keeping with the right to a fair trial that includes a speedy trial.

Adopted on 20 November 2009

## **Opinion No. 21/2009 (Saudi Arabia)**

### **Communication addressed to the Government on 11 May 2009**

**Concerning Mr. Khalid Said Khalid Al-Shammari.**

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

1. (Same text as paragraph 1 of Opinion N° 18/2009)

2. The Working Group notes with appreciation the information received from the Government in respect of the case in question.
3. (Same text as paragraph 3 of Opinion N° 18/2009)
4. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.
5. The case summarized below was reported to the Working Group by the source as follows: Mr. Khalid Said Khalid Al-Shammari (hereafter Mr. Al-Shammari), is a stateless person (Bedouin), born on 7 September 1980, residing with his family in Kuwait City, Kuwait.
6. During the month of January 2007, while he was on pilgrimage in Mecca, Mr. Al-Shammari was arrested by agents of an undetermined Saudi Arabian security service, probably the Saudi General Intelligence (Al Mabahit Al Aama). Mr. Al-Shammari had left Kuwait City on 27 December 2006.
7. The exact circumstances of his arrest are not known. Nevertheless, the facts that Mr. Al-Shammari was indeed in Mecca and that he conducted his pilgrimage have been confirmed to the source.
8. Mr. Al-Shammari was technically in a situation of a disappeared person until August 2007, seven months after his detention, when he did phone his relatives and informed them that he had been arrested in January 2007 by intelligence services officers and was since then kept in detention in Jizan prison. His father then stepped up efforts to try to visit him; to learn the reasons for his detention; and to provide his son with a lawyer in order to assist him. He addressed himself to the Saudi Arabia embassy in Kuwait and directly to the Jizan prison administration; however, to no avail.
9. It was not until May 2008 that Mr. Al-Shammari's family was authorized to establish direct contact with him. Mr. Al-Shammari's father was able to visit him at Abha prison to where Mr. Al-Shammari had just been transferred. According to the information received, Mr. Al-Shammari could confirm that he had neither been brought before a judge since his arrest; nor tried; nor otherwise made subject of any legal proceedings.
10. The source argues that Mr. Al-Shammari is being arbitrarily deprived of his liberty. His detention is contrary to both Saudi Arabian domestic laws and relevant international standards set forth in the Universal Declaration of Human Rights.
11. In its reply, the Government confirmed that Mr. Al-Shammari was indeed arrested in Riyadh on 6 or 7 January 2007 on a security-related charge. He was then transferred to the competent sharia court of first instance, which sentenced him to six years of imprisonment. According to the Government, throughout the period of his detention, Mr. Al-Shammari has been treated in accordance with Saudi Arabia's judicial regulations, derived from the sharia, under which human rights and international covenants and conventions in this regard are respected.
12. In its observations on the Government's reply, the source observes that in January 2009, Mr. Al-Shammari, together with a number of other individuals, was brought into a room where several persons were present. He was not given the opportunity to speak or to express himself in relation to the vague accusations against him. The sentence of six years of imprisonment was not announced to Mr. Al-Shammari. In fact, until present he is not even aware that he was participating in a court hearing, also because it was conducted in closed session. In addition, the source points out that Mr. Al-Shammari's conditions of detention since his arrest have been particularly difficult for him, affecting his physical and mental state of health.

13. Finally, the source reports that Mr. Al-Shammari has been transferred to a prison in Damman, where he is being detained to date.

14. The Working Group considers that, given the seriousness of the detailed allegations by the source, the Government replied evasively and summarily, without providing specific information justifying the lawfulness of detention of Mr. Al-Shammari; on the procedures followed and the judgement rendered; all information that it owed to the Working Group.

15. Indeed, if the source submits without having been contradicted by the Government that Mr. Al-Shammari was allowed a visit by his father only about one hour and a half years after his arrest and that during this visit, Mr. Al-Shammari confirmed that he had neither been tried, nor produced before a magistrate, the Government, in its reply, made no apparent effort to enlighten the Working Group on his case.

16. The Government also does not point out to us in what circumstances Al-Shammari was stopped; if it was brought before a magistrate for the delays requested to make its arrest official; if he could benefit from a legal defence; if it was judged by an independent, competent and impartial jurisdiction; if he could formed an appeal against the judicial decision: No detailed information was provided by the Government to the Working Group on these points.

17. The Working Group notes that the Government confirms the arrest and detention of Mr. Al-Shammari and does not deny the allegations from the source. Before and during the trial before the court in Riyadh, he was never allowed access to his criminal case file and was denied a lawyer despite his repeated requests and that of his family.

18. In these conditions, the Working Group considers that Mr. Al-Shammari could not benefit from the norms and guarantees requested for a fair trial and an equitable judgement. Consequently, the Working Group considers that the detention of Mr Al-Shammari is arbitrary and falls under category III of the categories applied by the Working Group to its consideration of cases of detention.

19. Accordingly, the Working Group asks the Government to take measures for the immediate release of Mr Al-Shammari and to envisage to concede him a reparation for the dammage suffered.

20. The Working Group further recommends the State to consider the convenience of becoming a Party to the International Covenant on Civil and Political Rights.

Adopted on 20 November 2009

## **Opinion No. 22/2009 (Palestinian Authority)**

### **Communication addressed to the Palestinian Authority on 29 May 2009**

#### **Concerning: Mr. Mohammad Abu Alkhair.**

1. (Same text as paragraph 1 of Opinion N° 18/2009)
2. The Working Group regrets that the Palestinian Authority has not replied within the 90-day deadline.
3. (Same text as paragraph 3 of Opinion N° 18/2009)
4. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Palestinian Authority.

5. 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 Palestinian Authority has not offered its version of facts and explanations on the circumstances of the case.
6. The case summarized below was reported to the Working Group on Arbitrary Detention as set out in the paragraphs below.
7. Mr. Mohammad Abu Alkhair (hereafter Mr. Abu Alkhair), a Palestinian, born on 11 May 1971, residing at Nour Shams Camp – Tulkarm, West Bank, and a social assistant at Al-Zakat hospital in Tulkarm, is reportedly suffering from diabetes and has different cardiac perturbations, being in need of special nutrition and continuous medical treatment.
8. As a social assistant at Al-Zakat Hospital in Tulkarm, Mr. Abu Alkhair handled health dossiers for patients with financial difficulties. He was also a member of a charity association named Zakat Association, as well as a member of the Electricity committee in the Nour Shams Camp – Tulkarm. Those jobs have reportedly given to Mr. Abu Alkhair a wide popularity among the camp's inhabitants.
9. According to the source, on 23 April 2009, Mr. Abu Alkhair was arrested at his home in Nour Shams Camp by agents of two different security bodies; the Palestinian Preventive Security Service (PSS) and the General Intelligence Forces as well as by other armed men, who did not shown any arrest warrant or judicial order. Mr. Abu Alkhair was taken to the Preventive Security Service's local compound.
10. No reasons were communicated to Mr. Abu Alkhair for his arrest and detention. According to the source, the motive of his detention may be related to his functions as a social assistant at Al-Zakat Hospital and to his popularity as a member of several associations and committees.
11. The source expresses its fears that Mr. Abu Alkhair may be subjected to physical or psychological torture or other forms of ill-treatment, with serious consequences on his deteriorated health. The source mentions different methods of torture allegedly used by the security services against prisoners, particularly political prisoners and supporters of Islamist movements in the West Bank, including that known as the "Shabh": the prisoner's legs are tied to a small stool and his hands are tied behind his back with a bag covering his head; sometimes during more than 20 hours and depriving him from sleeping.
12. The source adds that Mr. Abu Alkhair has been put in a cold, rotting and narrow cell. He has been prevented from meeting his relatives and to contact a defence lawyer. Some lawyers were asked to defend Mr. Abu Alkhair; however they did not have any possibility to contact him and to ensure his defence. His case was reported to the Palestinian Parliament; to the International Committee of the Red Cross (ICRC) as well as to two different human rights organizations in Ramallah.
13. The source adds that Mr. Abu Alkhair's detention is contrary to articles 10, 11.1, 12, 13, 14, 19, 26, 75 and 103 of the 2002 Palestinian Basic Law. It provided to the Working Group the order of the Palestinian court declaring the detention of Mr. Abu Alkhair as without any legal basis and his arrest by the military authorities as outside their competence. This order is dated 12 July 2009 but Mr. Abu Alkhair was not released immediately after this ruling, as required by law.
14. The Working Group transmitted the above stated information to the Palestinian Authority requesting detailed information about the current situation of the above-mentioned person and to clarify the legal provisions justifying his continued detention.
15. The source informed the Working Group that Mr. Abu Alkhair was released by the authorities on 29 July 2009

16. Having examined the information received and in the absence of a reply from the Palestinian Authority, the Working Group considers that Mr. Abu Alkhair was detained without having been brought before a judicial authority, without a hearing and without the perspective of a trial. Consequently, the Working group considers that:

(a) The deprivation of liberty of Mr. Abu Alkhair during the period 23 April 2009-29 July 2009 was arbitrary; being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and falls under category I and III of the categories applicable to the consideration of cases submitted to the Working Group;

(b) Considering that Mr. Abu Alkhair was released on 29 July 2009, the Working Group, according with paragraph 17 (a) of its methods of work, decided to file the case.

17. The Working Group, bearing in mind the release of Mr. Abu Alkhair, requests the Palestinian Authority to take all necessary steps to provide him immediate compensation for the harm and damages he has suffered during the period of his arbitrary detention.

Adopted on 20 November 2009

## **Opinión N.º 23/2009 (México)**

### **Comunicación dirigida al Gobierno el 10 de junio de 2009, reiterada el 25 de agosto de 2009**

**Relativa a: Sr. Álvaro Robles Sibaja.**

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

1. (Texto del párrafo 1 de la opinión N.º 19/2009)
2. El Grupo de Trabajo agradece al Gobierno por haberle proporcionado la información solicitada.
3. (Texto del párrafo 3 de la opinión N.º 19/2009)
4. En el presente caso el contencioso consiste en saber cómo ha de hacerse el cómputo del tiempo que debe servir al Sr. Robles Sibaja para cumplir las condenas que le fueron impuestas en dos procesos por hechos diferentes y desconectados, a saber:
  - (a) El proceso pensal Rol 20/1990, en el que se concretó su privación de libertad el 23 de noviembre de 1989, y en el que fue en definitiva condenado a la pena de 15 años de privación de libertad, contados desde el día de su arresto;
  - (b) El proceso penal Rol 40/1990, en el que se le condenó a la pena de 13 años y 6 meses, los que se ha contado también el plazo desde su arresto.
5. Sostiene la fuente que las penas deben computarse en forma simultánea, y no sucesiva, como según ella se ha hecho. De ser así, infiere que, de hecho, sólo cumpliría la pena máxima. Apoya su tesis en la reforma al artículo 25 del Código Penal reformado que establece que “las penas se compurgarán en forma simultánea”.
6. De esta manera, la única eventual violación de derechos humanos que pudiere invocarse con precisión como causal de detención arbitraria, sería la de la frase final del párrafo 2 del artículo 11 de la Declaración Universal de Derechos Humanos y , que dispone que a nadie “se impondrá pena más grave que la aplicable en el momento de la comisión del delito”, disposición reiterada en el Pacto Internacional de Derechos Civiles y Políticos (art. 15, párr. 1, frase intermedia).

7. El Grupo de Trabajo observa que la cita del artículo 25 del Código Penal Federal de México que hace la fuente es sólo parcial, y no permite descubrir su sentido. La cita completa del texto vigente al 18 de septiembre de 2009 establece lo siguiente, en el título denominado “De la prisión”:

“Artículo 25. La prisión consiste en la privación de la libertad corporal. Su duración será de tres días a sesenta años, y solo podrá imponerse una pena adicional al límite máximo cuando se cometa un nuevo delito en reclusión. Se extinguirá en las colonias penitenciarias, establecimientos o lugares que al efecto señalen las leyes o la autoridad ejecutora de las penas, ajustándose a la resolución judicial respectiva.

La privación de libertad preventiva se computará para el cumplimiento de la pena impuesta así como de las que pudieran imponerse en otras causas, aunque hayan tenido por objeto hechos anteriores al ingreso a prisión. En este caso, las penas se compurgaran en forma simultánea”.

8. El precepto deja en claro que el tiempo de la pena que se contabilizará simultáneamente es sólo aquel que corresponde a “la privación de libertad preventiva”, es, decir, aquella que tuvo lugar durante el juicio, como medida de aseguramiento, y no las penas que son consecuencia de las distintas sentencias definitivas que afecten a la persona.

9. El Grupo de Trabajo considera que la orden de prisión del Sr. Robles emana de autoridad competente, con fundamento de derecho, lo que permite descartar la categoría I de las aceptadas por el Grupo de Trabajo para calificar el carácter legal o ilegal de una privación de libertad; no emana del ejercicio de algún derecho internacionalmente reconocido, lo que impide aplicar la categoría II; ni se observa una infracción a las normas del debido proceso de ley, de aquellas a que se refiere la categoría III.

10. Habida cuenta de lo que antecede, el Grupo de Trabajo emite la siguiente Opinión:

La privación de libertad del Sr. Álvaro Robles Sibaja no es arbitraria.

Adoptada el 22 de noviembre de 2009

## **Opinión N.º 24/2009 (Colombia)**

### **Comunicación dirigida al Gobierno el 15 de junio de 2009, reiterada el 13 de noviembre de 2009**

**Relativa a: Sr. Príncipe Gabriel González Arango.**

#### **El Estado es Parte del Pacto Internacional de Derechos Civiles y Políticos.**

1. (Texto del párrafo 1 de la opinión N.º 19/2009)
2. El Grupo de Trabajo expresa su apreciación al Gobierno por haber proporcionado la información solicitada el 19 de noviembre de 2009
3. (Texto del párrafo 3 de la opinión N.º 19/2009)
4. Estudiada la comunicación de la fuente, y la respuesta del Gobierno, y teniendo en cuenta que la persona por la cual se recurre ha sido puesta en libertad, y en conformidad con lo dispuesto en el inciso a del artículo 17 de sus Métodos de Trabajo, el Grupo de Trabajo decide archivar el presente caso, sin que existan razones para pronunciarse sobre el carácter arbitrario o no de la detención sufrida por el Sr. Príncipe Gabriel González Arango.

Adoptada el 24 de noviembre de 2009

## **Opinion No. 25/2009 (Egypt)**

### **Communication addressed to the Government on 18 May 2009**

**Concerning:** The source has specifically requested that the names of the 10 individuals concerned not be published; the Government was fully informed of their identities.

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

1. (Same text as paragraph 1 of Opinion N° 18/2009)
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 N° 18/2009)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government and appreciates its response. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
5. The case summarised below was reported to the Working Group on Arbitrary Detention as follows:
6. The ten persons were arrested on 2 January 2009 for allegedly engaging in consensual sexual relations with others of the same sex. All 10 men have been charged under case No.169/2009 Al-Agouza Misdemeanours pursuant to article 9, lit. (c) of Law 10/1961 (Law on Combating Prostitution). This provision criminalizes the “habitual practice of debauchery”, which is interpreted to include consensual sexual behaviour between men. In addition, one person has been charged with “managing a residence for the practice of debauchery”, under Article 8 of Law 10/1961. It may lead to imposition of a sentence of up to three years of imprisonment and a fine of up to 300 Egyptian pounds.
7. It was alleged that their arrest dates were falsified in the police reports to suggest that they were arrested on 4 January 2009. The 10 men were arrested in an apartment rented by one of them in Mohandesine, Giza. The police officers who arrested them allegedly failed to produce any arrest warrants.
8. Initially, the 10 individuals were taken to the Morality Police Department in Mogamma’a al-Tahrir in central Cairo, where they were held until they were taken to al-Agouza prosecution office on 4 January 2009. All were denied the right to inform a person of their choice about their arrest, in violation of article 71 of the Constitution of Egypt and article 139 of the Code of Criminal Procedure.
9. Some of those detained allege that they were ill-treated by police while being held at the Morality Police Department, including by being insulted, beaten on the back with a stick, slapped on the face and repeatedly kicked.
10. On 4 January 2009, the al-Agouza prosecution office ordered their preventive detention for four days, which was extended on 6 January 2009 for a further 15 days. The Prosecutor also ordered the transfer of all 10 men to the Forensic Medical Authority without their consent to be subjected to anal examinations and to the Ministry of Health laboratories for HIV testing.
11. Following their appearance before the al-Agouza prosecution office, the 10 individuals were moved to the al-Agouza police station, where they remained until 6 January 2009. While at the al-Agouza police station, they were reportedly subjected to further ill-treatment, including verbal abuse and physical beatings by police officers. On

one occasion, a police officer is reported to have ordered all ten individuals to remove their clothes and then to have beaten them.

12. On 6 January 2009, the individuals were moved to the Giza police station. On 20 January 2009, before the expiration of the initial 15-day extension, they appeared before a district judge who renewed their preventive detention for another 15 days. This order was appealed before the Appellate Court of Misdemeanours on behalf of the defendants by an Egyptian human rights organization. The court dismissed the appeal on 21 January 2009 and upheld the district judge's decision.

13. On 3 February 2009, the 10 individuals' preventive detention was renewed for a further 15 days by the district judge, apparently because the results of the anal examinations and HIV tests carried out had not yet been lodged.

14. On 19 February 2009, the individuals' detention was renewed for a further 45 days by the Appellate Court of Misdemeanours. The individuals are now being held at el-Qatta prison, where they were transferred following the latest renewal of their preventive detention period. The appeal of the renewal decision on 26 February 2009 before the Giza Criminal Court was rejected.

15. The Prosecutor General argues that the individuals were prostitutes and that while Egyptian law does not criminalize individual sexual orientation per se, it does criminalize promoting or trading in same-sex sexual relations as it criminalizes prostitution. In addition, it was argued that the arrests were carried out in order to protect public health, specifically with relation to HIV/AIDS.

16. The Prosecutor General's Office maintains that the police entered Mr. Mohamed Ragab Mohamed's home on the basis of a warrant issued by the Office of the Prosecution. It further asserts that the individuals confessed during both the police and public prosecutor investigations to having accepted money in exchange for same-sex sexual relations. The prosecution further argues that interrogations took place in the presence of lawyers and that their confessions were voluntary and made in the presence of their lawyers, who did not object or comment on them. Following their confessions, the defendants were subjected to preventive detention and presented before a judge four days after the arrests, who renewed their detention. The prosecution also confirms that the individuals were referred for forensic anal examinations and that this procedure was used to establish whether or not the accused had engaged in same-sex sexual conduct, either to confirm an accusation or to secure an acquittal.

17. In its response, the Government of Egypt states the following: the 10 persons referred to in the request were arrested at a furnished flat in Agouza district by a police officer from the Morality Police Department. They confessed to engaging in sodomy, an offence under Egyptian law, which criminalizes prostitution and all acts of public indecency, in order to preserve public order.

18. Agouza police station crime report No. 169/2009 was filed on the incident. When the accused were brought to the Public Prosecutor's Office, the latter took the following decisions:

(a) To detain the accused for four days pending investigations; to compile files containing background information on them; to request their criminal records; to re-impound the items seized at the time of their arrest and to deposit them in the police depot until the case had been heard;

(b) To designate a forensic doctor to examine the accused in order to establish whether sexual intercourse had taken place and to collect and analyse samples;

(c) To ask a doctor from the Ministry of Health central laboratories to examine the accused and to conduct tests in order to establish whether or not any of them was suffering from a particular disease and, if so, the nature and mode of transmission of the disease;

(d) To ask the Morality Police Department to conduct further investigations into the incident and to identify other suspects, based on information provided by those who had been arrested.

19. When the accused were again brought to the Public Prosecutor's Office, the Office decided to detain them for a further 15 days pending investigation and to reclassify the case as a serious offence, since one of the accused (a minor) had admitted to having sex in exchange for material reward. The reclassification was carried out in conformity with article 291 of the Children's Act No. 126 of 2008, which prescribes a penalty of five years' rigorous imprisonment for crimes involving the sexual exploitation of young persons.

20. On 28 May 2009, the South Giza Assize Court decided to release the accused on condition that they provided it with details of their place of residence.

21. The interviews conducted by the Public Prosecutor's Office with the accused resulted in the following:

(a) Seven of the accused admitted to the charges, while three stated that they had witnessed the other seven engaging in sodomy with one another and with others but that they themselves had not taken part;

(b) One of the accused admitted to renting the furnished apartment and to equipping it for the purpose of paid prostitution;

(c) One of the accused (the minor) admitted to having sex for money and stated that the person renting the flat had previously brought a person there to have paid sex with him (the minor). The minor had also received extra money from the person renting the flat;

(d) The allegations that the accused were beaten or tortured during their detention were not borne out by the test results. Furthermore, due process was followed throughout and the medical examination that the accused underwent was conducted in accordance with a decision of the Public Prosecutor's Office.

22. The source's comment on the Government's reply makes the following points:

(a) The raid on the flat and arrests of these 10 individuals were made without a warrant;

(b) Upon arrest in the flat, they were asked if they confessed to committing debauchery with men 'habitually' and as a practice 'without distinction'. The defendants, not having assistance of a lawyer at the time of this questioning, made confessional statements to this effect, which were later retracted before a judge;

(c) The combination of these terms implies the overriding concern of the arresting authorities relating to homosexuality and their objective to obtain statements along those lines. The Egyptian authorities continue to detain individuals on the basis of their real or alleged sexual orientation on the basis that this is done to protect public order and morality. Private consensual acts of individuals do not fall within this purview and violate basic human rights of individuals under national and international law;

(d) The source observes that in relation to forced medical examination of the defendants, reports indicate that five of the 10 detainees were subjected to anal examinations without any further detail as to the nature of the tests. The source challenges the scientific use of these tests as well as the intrusive nature of these procedures which violate bodily rights and amount to torture and other ill-treatment;

(e) The only results provided by the laboratory analysing the tests were in relation to AIDS which incidentally were negative. The source argues that an AIDS test does not prove or disprove the crime of debauchery and is thus unnecessary in the offences under which the 10 men were arrested and charged;

(f) The source states that whilst the defendants have been released on bail, two trials are coming up in which they are implicated as follows: all 10 defendants will face the charge of the “habitual practice of debauchery” under article 9(c) of law 10/1961; in the same trial and before the same court, 9 of the 10 defendants will face the additional charge of ‘assault on honour without the use of force or intimidation’ against the defendant aged 17 years under article 269 of the Penal Code; the first defendant Mr. Mohammad Ragab will face two additional charges under law 10/1961 i.e., of managing a furnished house for the practice of debauchery, and enticing and assisting the other nine defendants in the practice of debauchery;

(g) The source also mentions that in the approximately five months of preventive detention that the defendants spent, the case was being dealt with as a misdemeanour attracting sentence of upto 3 years of imprisonment. According to the Code of Criminal Procedures and Instructions of the Prosecution of 2006, the maximum period stipulated for preventive detention for a felony, not misdemeanour, is five months. The defendants have spent time in detention beyond that allowed by law for misdemeanours.

23. The Working Group notes that a number of procedural lapses have occurred in the current case. For instance, it appears that the arresting authorities entered the premises without a warrant. The defendants were questioned and asked to record statements without the presence of a lawyer. Third, no apparent distinction appears to have been meted out in the treatment of the arresting and detaining authorities towards the defendant under the age of 18 and those who were adults. Fourth, preventive detention of the defendants was extended for reasons of supposedly obtaining evidence from medical examinations and tests. These tests, forcibly undertaken, are in and of themselves intrusive in nature and violative of bodily rights of the individual under human rights law.

24. The Working Group views with concern that cases where individuals are being detained, prosecuted, imprisoned and discriminated on the basis of their sexual orientation, appear to be of an ongoing nature and one of which the Working Group as well other human rights bodies are being seized of. To this effect, the Working Group brings to the attention of the Government its Opinions (Opinion No. 7/2002 (Egypt) of 21 June 2002 and Opinion no. 42/2008 (Egypt) of 30 May 2008). It also refers to the concluding observations of the Human Rights Committee (Egypt, CCPR/CO/76/EGY; 28 November 2002).

25. The Working Group would like to bring to the attention of the Government of Egypt its concern over the wide margin of discretion given to the Morality Police, which has been charged with oversight of “moral” and “immoral” behaviour. This wide discretion given to the police to determine what constitutes immoral actions, does not bode well for basic human rights such as privacy; freedom; liberty; freedom of opinion and expression.

26. As stated in its Opinion no. 42.2008 (Egypt) 30 May 2008, the Working Group would like to repeat its view that homosexual behaviour appears to be the focus of crackdown by the authorities, even if it is in a private and consensual environment. Further, that there appears to be an incorrect assumption that homosexual relationships are responsible for HIV/AIDS and thus detrimental to public health. “The Working Group is unable to agree with the Government’s view that these tests are in the best interests of her citizens, especially in view of the fact that a huge stigma is attached to HIV/AIDS and when seen in conjunction with homosexuality, sufficient to marginalize and victimize a person for life. The investigation and prosecution procedures as well as treatment meted out

to such detainees, is one of multiple discriminations and falls far short of a fair trial, equality before law and equal protection of the law”.

27. The Working Group would also like to reiterate its position that the provision on public morals and public health and safety for restricting a right, be invoked where undesirable and controversial acts are being committed in the public domain and likely to be disruptive of the public order. The present case does not appear to be of this nature. Furthermore, the Government would be well aware of the social consequences for individuals convicted (or even accused) of being a homosexual in Egyptian society thus demanding extreme caution and sensitivity when arresting persons on the basis of ‘habitual debauchery’ and same sex relationship.

28. Accordingly, the Working Group considers that the arrest and detention of these 10 persons is arbitrary, as forced anal examinations contravene the prohibition of torture and other cruel, inhumane and degrading treatment, whether if, like in the present cases, they are employed with a purpose to punish, to coerce a confession, or to further discrimination.

29. In addition, they are medically worthless for the determination whether or not a person has engaged in same-sex sexual conduct or whether the person has been involved in the practice of habitual debauchery or the prostitution of men.

30. The Working Group has been advised of the release of the detainees pending trial but would like to request and urge strongly that all the requirements of a fair trial be ensured and monitored in accordance with national and international human rights law.

31. In light of the above, the Working Group is of the opinion that the detention of these 10 people is arbitrary, and falls under categories I and II of the categories applied by the Working Group detention. The detention of these persons is in violation of article 2 of the Universal Declaration of Human Rights and articles 2 and 26 of the ICCPR.

32. Consequently, the Working Group requests the immediate release of these persons.

33. In addition, the Working Group reiterates its earlier call (vide Opinion No. 42/2008) upon the Government to reconsider the Anti-Prostitution Law and to bring it in conformity with the international human rights obligations undertaken by the State.

Adopted on 24 November 2009

## **Opinion No. 26/2009 (Yemen)**

### **Communication addressed to the Government on 29 May 2009**

#### **Concerning Mr. Karama Khamis Saïd Khamicen.**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. Acting in accordance with its methods of work, the Working Group forwarded a communication addressed to the Government on 29 May 2009. A reminder was sent on 13 November 2009. The Working Group regrets that the Government has not replied within the 90-day deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. According to the source, Mr. Karama Khamis Saïd Khamicen, a Yemeni national, born on 29 September 1970, residing in Kishan, Muhafadhat Al Mahra Governorate and an ambulance driver for Kishan Hospital, was arrested on 16 March 2009, leaving the Mosque

in Al Shahir, by an agent of the Political Security Services (Al-Amn Assiyassi). The agent of the Political Security Services did not show any arrest warrant.

5. Mr. Khamicen was detained at the United States naval base of Guantánamo Bay in Cuba for over three years before being released on 15 September 2005 to the authorities of Yemen. On his return from Guantánamo, he was kept in incommunicado detention for several months. On 13 March 2006, he was brought before the State Security Court on charges of trafficking narcotics. He was acquitted by the Court on the same day. The acquittal was later confirmed by the Appeal Court on 30 April 2006. Mr. Khamicen was released on 10 May 2006.

6. Mr. Khamicen had gone to consult his regular medical doctor in Al-Shahir for a serious stomach ulcer, a condition the source informs us that he contracted as a result of the torture suffered at the Guantánamo Bay detention facilities in Cuba. Mr. Khamicen was held in incommunicado detention and his arrest was not communicated to his relatives. His family had no news from him for more than a week. Some time later, Mr. Khamicen's brother discovered that he was being kept in detention in the local Headquarters of the Political Security Services in Al-Ghaida, Muhafadhat Al Mahra Governorate.

7. The source reports that Mr. Khamicen's brother was allowed to visit him in prison once. He noticed that his brother's health has deteriorated because of the absence of medical treatment.

8. Mr. Khamicen's brother was told that Mr. Khamicen would be released only if Mr. Khamicen collaborated with the services detaining him, which Mr. Khamicen had refused. He has had no visit since his brother's initial visit and is being kept without any contact with the outside world.

9. Mr. Khamicen has not been informed of the reasons for his detention. No charges have been brought against him and no case has been filed.

10. According to the source, the incommunicado detention of Mr. Khamicen without any legal procedure is in contravention of Yemeni domestic law.

11. An official communication by the local human rights organization HOUD was sent to General Ghaleb Al-Rokn Qamsh, Head of the Political Security Services, asking for the urgent release of Mr. Khamicen, but without any result.

12. Fears have been expressed that Mr. Khamicen might be subject to torture and ill-treatment during his incommunicado detention. His current state of health and the absence of medical treatment only reinforced these fears.

13. Having examined the information received and in the absence of a reply from the Government, the Working Group considers that Mr. Khamicen is being arbitrarily detained in contravention of articles 3, 9 and 11 of the Universal Declaration of Human Rights.

14. The detention in this case is also in violation of article 9 of the International Covenant on Civil and Political Rights, and in particular 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".

15. Mr. Khamicen's detention is also in violation of article 14 of the International Covenant on Civil and Political Rights, which requires that everyone shall be informed promptly of the nature and cause of the charge against them, and have the right to be tried without undue delay.

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

The deprivation of liberty of Mr. Karama Khamis Saïd Khamicen is arbitrary, being in contravention of articles 3, 9 and 11 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.

17. 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 adequate reparation to, Mr. Khamicen.

18. The Working Group would emphasize that the duty to immediately release Mr. Khamicen will not allow further detention, even if the further actions taken against him should satisfy the international human rights obligations of Yemen. Furthermore, the duty to provide adequate reparation under article 9, paragraph 5, of the International Covenant on Civil and Political Rights is based on the arbitrary detention that has taken place and subsequent proceedings or findings in these cannot limit the State's responsibility.

Adopted on 23 November 2009

## **Opinion No. 27/2009 (Syrian Arab Republic)**

### **Communication addressed to the Government on 16 March 2009**

**Concerning: Messrs. Sa'dun Sheikhu, Mohammad Sa'id Omar, and Mustafa Jum'ah.**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
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. 18/2009)
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, however, has not received any comments from it.
5. The case summarized below was reported to the Working Group on Arbitrary Detention as set put in the paragraphs below.
6. Mr. Sa'dun Sheikhu and Mr. Mohammad Sa'id Omar, two Syrian Kurdish political activists and senior members of the Leadership Committee of the Kurdish "Azadi (Freedom) Party" in Syria, were arrested on 25 October 2008 by Military Intelligence officers, who raided their homes in the north-eastern cities of Ras al-'Ayn and Ramellan.
7. They were held in incommunicado detention for nearly three and a half months, at first at a detention centre in the northwestern city of Aleppo, about 500 kilometres from their homes. Following their transfer, in November 2008, they were held at the Palestine Branch, an interrogation and detention centre in Damascus run by Military Intelligence. Later, they were transferred to 'Adra Prison in Damascus.
8. Mr. Mustafa Jum'ah, a Syrian Kurdish political activist who had been carrying out some of the duties of the Party's Secretary General who is living in exile, was arrested on 10 January 2009 by Military Intelligence officers when he presented himself to the Palestine Branch for questioning.

9. It was further reported that, on 6 January 2009, four days before his arrest, Mr. Jum'ah was summoned to the Military Intelligence's interrogation and detention centre in Aleppo, where he lives. The centre referred his case to the Palestine Branch, to which he was summoned on two occasions on 8 January before having to present himself for questioning on 10 January 2009. He was held in incommunicado detention at the Palestine Branch for almost one month.
10. On 8 February 2009, these three persons were transferred from the Palestine Branch to 'Adra prison. Two days later, they were charged with "weakening national sentiments" under article 285 of the Syrian Penal Code; establishing an "organization with the aim to changing the financial or social status of the State" (art. 306) and "inciting sectarian strife" (art. 307).
11. As of 17 February 2009, they were allowed to meet their relatives every week, but have been unable to hold private conversations with them because of the presence of prison guards. At least one lawyer has also been allowed to meet them, but was unable to hold confidential conversations as prison guards were also present during these meetings.
12. The three above-mentioned persons were said to be awaiting trial before the Damascus Criminal Court.
13. It was further alleged that they were verbally insulted and intimidated while in detention at the Palestine Branch, where many cases of torture and other forms of ill-
14. According to the source, the detention of the above-mentioned persons is arbitrary. They have been arrested and are held in detention solely for the peaceful exercise of their rights to freedom of opinion, expression and association as senior members of the Kurdish "Azadi Party".
15. Mr. Mohammad Sa'id Omar (Mohammad Saed Hossein Al-Omar) was already the subject of a joint urgent appeal sent to the Government on 10 November 2009 by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. In addition, the Chair-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Independent Expert on Minority Issues; and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression addressed a joint urgent appeal to the Government on 2 February 2009 concerning Messrs. Sa'dun Sheikhu (Sadoon Mahmoud Shekhu), Mohammad Sa'id Omar (Mohammed Saed Hossein Al-Omar), and Mustafa Jum'ah (Mustafa Jum'a), as well as two other Syrian nationals of Kurdish origin.
16. By note verbale, dated 17 March 2009, the Government, with reference to the communication sent pursuant to the Working Group's regular procedure leading to the adoption of an Opinion, informed it that the above names had been sent to the Government previously as part of the above-mentioned urgent appeal, dated 2 February 2009, and confirmed that it was forwarded to the relevant authorities in the Syrian Arab Republic for a response. While the Government further expressed its readiness to cooperate permanently with the Special Rapporteurs, it was surprised to receive from the Working Group an additional letter concerning these same persons, and asked for clarification, in the light of the spirit of cooperation that exists between the Syrian Arab Republic, the Working Group and all the human rights mechanisms for the promotion and protection of human rights.
17. By note verbale, dated 18 August 2009, the Government responded to the allegations contained in the urgent appeal of 2 February 2009. According to the

Government, the individuals to whom the urgent appeal referred are Syrian nationals who enjoy the full rights of citizenship accorded by Syrian law – which is entirely in conformity with all international treaties and instruments – in addition to the protection of the Constitution of the Syrian Arab Republic. The Government's explanation of their individual situations can be summarized as set out in the paragraphs below.

18. Mr. Sa'dun Shaikhu and Mr. Mohammad Sa'id Omar (Muhammad Sa'd Hussain-al-Umar) were arrested on 26 October 2008 and Mr. Mustafa Jum'ah (Mustafa Jum'ah Bakr) was arrested on 10 January 2009 on the basis that all three were members of a secret organization banned in the Syrian Arab Republic. This organization, according to the Government, aims to divide the State by encouraging acts of terrorism designed to undermine national unity, including through the distribution of publications that fabricate lies intended to create discord among citizens.

19. The Government stated that the three accused were presented to the Public Prosecutor's office in Damascus where a public prosecution case was initiated against them. The investigating judge in Damascus accused them of heading a political association and disseminating unauthorized printed materials with the intention of inciting unrest, weakening national sentiment, undermining national unity and altering the nature of the State, which acts are offences under articles 217, 285, 298, 306 and 307 of the Criminal Code. Further to his investigations and the measures that he had taken, the investigating judge issued decision No. 153 on 23 February 2009, referring the accused to the indictment division of a Damascus court for inciting unrest among fellow citizens and weakening the national sentiment by heading an unauthorized secret association and disseminating unauthorized printed materials, acts which are serious offences under articles 298, 285 and 306 of the Criminal Code, and for undermining national unity, which is a major offence under article 307 of the Criminal Code. The investigating judge requested that the accused should stand trial for the major offence at the same time as the serious offences for which indictment had been requested pursuant to the Syrian Code of Criminal Procedures.

20. The investigating judge in Damascus then reviewed the case and issued his decision No. 162 on 23 February 2009 charging the accused with using propaganda for the purpose of weakening national sentiment, stirring up racial strife, inciting unrest and civil war and altering the nature of the State and basic conditions in society by means of terrorism. Such acts are offences under articles 285, 298, 304 and 306 of the Criminal Code. The accused were to be tried by the Damascus Criminal Court for the major offence of undermining national unity together with the serious offences with which the investigating judge had decided to charge them.

21. The accused lodged an appeal against the decision of the indictment division with the Syrian Court of Cassation which reviewed the case and the legality of the procedures followed and issued decision No. 1126 of 18 May 2009, dismissing the appeal of the merits and upholding the decision of the indictment division. The case file was then forwarded to the Damascus Criminal Court to try the accused for the offences listed in the bill of indictment.

22. The legal grounds for the arrest of the defendants and for their referral to the relevant courts consist of their engagement in unlawful activities through their membership of secret organizations that aim to undermine national unity by creating division and discrimination between Syrian citizens and by making propaganda that favours the dismemberment of the Syrian State by all means including through the incitement of unrest and civil war. These are offences under Syrian law and the defendants must be prosecuted for them in the competent courts. These offences are not related to political and cultural activities, which the Syrian Constitution and legislation defends and protects in order to ensure freedom of opinion in accordance with international standards, including those set out in the International Covenant on Civil and Political Rights, the Universal Declaration of

Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

23. In the absence of a separate response by the Government to the allegations contained in the communication dated 16 March 2009 forming the basis of this Opinion, the reply of the Government to the urgent appeal, dated 2 February 2009, was sent to the source for its final observations; it has not responded.

24. At the outset, the Working Group clarifies that the transmission of an urgent appeal to the concerned State on a humanitarian basis does not exclude the transmission of the same case pursuant to its regular procedure leading to the adoption of an Opinion. According to its methods of work, the two communications procedures are distinct, as in the former case the Working Group does not take a stance on the question as to whether or not the detention of the individual(s) concerned is arbitrary. Only in an Opinion does the Working Group take a definite decision on the case, declaring the detention arbitrary or not, or taking any other appropriate decision in accordance with paragraph 17 of its methods of work. Accordingly, States are requested to provide separate replies to each of the communications.

25. The Working Group is of the view that, based on the initial information and clarifications and response of the Government, it is able to render an Opinion. The Working Group, while appreciating the cooperation of the Government regarding this case by sending a response, believes that its observations do not allay the concerns raised in the communication. Neither does the response refute specific allegations made by the source.

26. The Working Group notes that in order to determine whether a detention is arbitrary or not, a number of critical procedural safeguards need to be confirmed by the Government. For instance, the Working Group has not received an unequivocal confirmation that the three detainees were arrested pursuant to a warrant; that they had access to a lawyer; that they were able to have private meetings with their lawyer; that they were presented before a judge within the stipulated period following arrest; or that they were allowed meetings with their family respecting their privacy.

27. Coming to the actual conditions of detention, the Government has not refuted the allegation that the detainees have been held in incommunicado detention (for three and a half months in the case of Mr. Sa'dun Sheikhu and Mr. Mohammad Sa'id Omar and almost one month in the case of Mr. Mustafa Jum'ah).

28. The Government has not responded to allegations of ill-treatment of the detainees at the hands of the detaining authorities, but the Working Group is unable to assess these allegations from the source due to lack of substantiation.

29. Regarding the specific articles of the Criminal Code under which the said detentions have been made, the Government mentions vague accusations including "undermining national unity"; "weakening national sentiments"; "stirring up racial strife"; "inciting unrest and civil war" or "altering the nature of the State and basic conditions in society by means of terrorism". These general accusations, however, have not been substantiated by particular examples of acts for which the accused were incriminated.

30. Furthermore, the Government does not provide information on the actual contents of each of the criminal provisions applied, some of which the Working Group has on previous occasions already considered as too vague and overbroad (Opinion Nos. 5/2008 and 10/2008<sup>1</sup>). The Government has failed to provide justification for the limitation of the right to freedom of opinion and expression and of association by means of the criminal

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<sup>1</sup> A/HRC/10/21/Add.1, pp. 98 and 117.

provisions used against Messrs. Sa'dun Sheikhu, Mohammad Sa'id Omar, and Mustafa Jum'ah, and whether the criminalization complies with the requirements of articles 19, paragraph 3, and 21, paragraph 2, of the International Covenant on Civil and Political Rights.

31. It appears that the three detainees are members of a political party and were exercising their right to freedom of opinion and expression and association as accepted under national and international law. These expressions of their rights and their leadership role in their political party are the apparent cause of their detention. The Government has not further elaborated on the reasons for or the circumstances of the ban of the "Azadi Party".

32. The Working Group thus believes that in the instant cases, a number of articles of the Universal Declaration of Human Rights stand violated, including articles 9 (freedom from arbitrary arrest and detention), 19 (freedom of opinion and expression) and 20 (freedom of peaceful assembly and association). Similarly, the Working Group considers that articles 9, 14, 19, and 21 of the International Covenant on Civil and Political Rights have been violated.

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

The detention of Messrs. Sa'dun Sheikhu, Mohammad Sa'id Omar and Mustafa Jum'ah is arbitrary, falling within category II and III of the categories applicable to the consideration of cases submitted to the Working Group.

34. Accordingly, the Working Group calls upon the Government to release the detained persons forthwith, to give serious consideration to its domestic laws on "serious" and "major" offences under its Criminal Code and bring these in conformity with the State's international human rights law obligations.

Adopted on 24 November 2009

## **Opinion No. 28/2009 (Ethiopia)**

### **Communication addressed to the Government on 27 May 2009**

#### **Concerning Ms. Birtukan Mideksa Deme.**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. Acting in accordance with its methods of work, the Working Group forwarded a communication addressed to the Government on 27 May 2009. An extension of two months of the 90-day time limit for a reply was granted by the Working Group on 4 September 2009 in response to a request by the Government in accordance with paragraphs 15 and 16 of the methods of work of the Working Group. The Working Group conveys its appreciation to the Government for having provided it with information in its reply concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. According to the source, Ms. Birtukan Mideksa Deme, a citizen of Ethiopia, born in 27 April 1974, is a former judge and the chairperson of the political opposition party "Unity for Democracy and Justice" (UDJ). Ms. Birtukan is currently incarcerated in Kaliti Central Prison, Addis Ababa.

5. Ms. Birtukan was arrested in 2005, together with other leaders and supporters of the predecessor party of the UDJ, the “Coalition for Unity and Democracy” (CUD), following demonstrations against the counting and aggregation of the results of the May 2005 parliamentary and regional elections in Ethiopia.
6. According to the source, after the situation had deteriorated, resulting in the death of almost 200 persons in 2006, a group of Ethiopian elders initiated a mediation process to negotiate a traditional reconciliation between the Government and the detained CUD leaders. In this context, the elders convinced Ms. Birtukan and other CUD leaders to sign a document dated 18 June 2006, asking the public and the Government for forgiveness. An agreement had been reached that all persons detained because of their affiliation with the CUD would be released on the condition that they would not seek to change the constitutional order by unlawful means and would accept the institutions established by the Constitution, that the political dialogue between the Government and the CUD would resume and that the CUD would be able to continue its work without restrictions.
7. On 11 June 2007, the Federal High Court in Lideta, Addis Ababa, convicted Ms. Birtukan and 37 co-defendants, most of whom were also CUD leaders, of treason and other offences, and, according to information presented by the source, contrary to the promise made by the Government to the elders during the negotiation process. During the trial, the defendants, including Ms. Birtukan, had refused to defend themselves and to recognize the competence of the Court. On 16 July, Ms. Birtukan was sentenced to life imprisonment. On 20 July, the Ethiopian President pardoned her, as well as the 37 other persons, upon recommendation of the Pardon Board, to which the Prime Minister had submitted the document dated 18 June 2007, in which Ms. Birtukan, through the elders, had asked the public and the Government for forgiveness. The same day, she was released from prison.
8. According to information presented by the source, in November 2008, during a visit to Sweden Ms. Birtukan publicly stated that she had never applied for a pardon to the Pardon Board, while not denying that she had signed the document dated 18 June 2006 at the elders’ request, for the sake of reconciliation. On 10 November 2008, the Federal Police Commissioner summoned Ms. Birtukan to his office, where he questioned her about the statement that she had made in Sweden. On 24 December, he summoned her to his office again. Instead of asking her any of the questions indicated in the warrant, he informed her that her pardon would be revoked and that she would be imprisoned again unless she retracted her statement made in Sweden within three days. She refused to comply with the three-day ultimatum. On 27 December, the Pardon Board reportedly met and decided to revoke her pardon, re-imposing her original life sentence passed in 2007.
9. On 29 December 2008, Ms. Birtukan was arrested by the police without a court order in a manner, which, according to information presented by the source, was degrading and accompanied by violence, and brought to Kaliti Central Prison in Addis Ababa. Prof. Mesfin Woldemariam, a 78-year old human rights advocate, who was with Ms. Birtukan during her arrest, and her driver were beaten by the police when they protested against her treatment. Mr. Woldemariam sustained injuries to his leg which required treatment at hospital.
10. Subsequently, the Ministry of Justice issued a statement explaining that Ms. Birtukan’s pardon had been revoked because she had not complied with the condition for its granting.
11. Ms. Birtukan has since her arrest been detained in solitary confinement in a small cell in isolation from other prisoners. Only her mother and her four-year old daughter have been allowed to visit her. She was reportedly denied access to her lawyer prior to 29 January 2009, as well as to medical treatment, despite the fact that she had been on hunger strike and her state of health was deteriorating. On two occasions, her lawyer asked for

permission to visit her at Kaliti prison but was denied access, allegedly on the ground that Ms. Birtukan had refused the assistance of a lawyer when she had first been charged with treason and other offences in 2006.

12. In March 2009, her lawyer filed a complaint against the prison administration challenging that Ms. Birtukan was not allowed to receive any visitors except for her mother and daughter and that she was kept in isolation from the general prison population. On 13 April 2009, the Federal High Court ruled in favour of Ms. Birtukan's visitation right. However, it held that her solitary confinement was a matter to be decided by the prison administration.

13. According to the Ethiopian Ministry of Justice, the ground for revoking her pardon was her failure to comply with the conditions for the pardon. Article 16(3) of Proclamation No. 395/2004 on the Procedure of Pardon provides that "the decision of pardon shall be of no effect if it is known that the condition for its granting has not been met". The source argues that Ms. Birtukan and the other CUD leaders had been released on the basis of the agreement negotiated by the elders, rather than on the basis of the procedure laid down in Proclamation No. 395/2004. The official pardon procedure was inapplicable in her case, as she had never applied for a pardon to the Pardon Board. Pursuant to article 12(1) of Proclamation No. 395/2004, individuals who are convicted may apply for a pardon in person or through their spouse, close relatives, representatives or lawyer. The document dated 18 June 2006 signed by Ms. Birtukan had been submitted to the Pardon Board by Prime Minister Meles Zenawi, whom Ms. Birtukan had not authorized to act on her behalf. The source concludes that there was no legal basis for revoking Ms. Birtukan's pardon.

14. Procedural rules for revoking a pardon had not been complied with. Article 17 of Proclamation 395/2004 requires that the grantee of a pardon shall be furnished with a written notice of the cause for revocation of pardon, against which he or she may submit his or her reply within 20 days. Ms. Birtukan had not been furnished with a written notice. Instead, the Federal Police Commissioner had told her that her pardon would be revoked and that she would be imprisoned again unless she retracted her statement made in Sweden within three days. Apart from non-compliance with the requirements of article 17, including the 20-day period to reply, the Federal Police Commissioner was not the competent organ to notify her of the cause for revocation of pardon. The source reiterates that the revocation of her pardon was thus unlawful.

15. The ground for revoking Ms. Birtukan's pardon was the statement that she had made in Sweden. By stating that she had never asked for a pardon within the sense of the official pardon procedure, she had exercised her right to freedom of expression. The source contends that the true reason for Ms. Birtukan's re-arrest is that the Prime Minister saw his authority challenged by her statement, and that the Government wishes to silence dissent and opposition in the wake of the parliamentary elections in 2010. As the charismatic leader of the opposition party UDJ, Ms. Birtukan was one of the most prominent figures of the democratic opposition in Ethiopia. The revocation of her pardon and the resulting deprivation of liberty were therefore also based on her exercise of the rights to freedom of association and assembly and of the right to take part in the conduct of public affairs.

16. Ms. Birtukan was already the subject of three joint urgent appeals by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on 14 January 2009; by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the question of torture and the then Special Representative of the Secretary-General on the situation of human rights defenders

on 3 November 2005; and by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the then Special Representative of the Secretary-General on the situation of human rights defenders on 18 November 2005. The Government of Ethiopia responded on 23 November 2005 and on 12 February 2009

17. In its response to the allegations of the source, the Government refers to previous information provided, *inter alia*, to the mandate holders in response to the above-mentioned urgent appeals. The Government states that the 2005 violence resulted in the unfortunate death of several civilians and law enforcement officers, and the destruction of public property worth millions of dollars. The Government continued that it took constitutional measures to maintain law and order, but also stirred a number of inquiries into the crisis. The findings of the Parliamentary Commission clearly showed the extent to which some members of the opposition instigated, and in some instances were directly involved in, the violence.

18. According to the Government, the particular circumstance of the arrest and detention of Ms. Birtukan has also been a subject of a great deal of interest mainly due to the fact that she is the only opposition member who remained in custody after all of those who were arrested were released following an amnesty granted by the Government. She and others in the leadership of the former Coalition for Unity and Democracy (CUD) party were granted conditional pardon on 19 July 2007 by the President on the basis of the Procedure of Pardon Proclamation No. 395/2004. Ms. Birtukan and others in their plea for pardon apologized for the crimes committed against the constitutional order for which they were convicted and sentenced to life imprisonment. They requested pardon from the people and Government of Ethiopia. Upon recommendation by the Board of Pardon, the President granted these leaders of the CUD, including Ms. Birtukan, conditional pardon.

19. Most of these beneficiaries of the pardon are carrying out their political and social activities in accordance with the laws of the country. Some of them are already participating in public activities in preparation for the next parliamentary elections to be held in May 2010. However, Ms. Birtukan on different occasions misrepresented the circumstances of the pardon by making an open statement to her supporters saying “she did not make any plea for pardon” and that the pardon was rather granted through the intervention of elders and because of the pressure exerted on the Government by her supporters. In effect, Ms. Birtukan denied her request for pardon to the people and Government of Ethiopia. She violated the very premise and basis of the pardon by making it manifest she was not remorseful and did not have regrets about her former illegal acts.

20. Specifically, she acted in contravention of the first and second conditions of the pardon, namely, acceptance of individual and collective responsibility for the destructive acts committed and to refrain from such acts in the future. By denying that she ever petitioned the Government for pardon, Ms. Birtukan has in effect disavowed the first condition of the pardon, by which she in effect also disavowed the second one. As such, violation of any of the conditions of pardon in the case of constitutional pardon inevitably triggers the provisions of Proclamation No. 395/2004 relating to the revocation of pardon with all its legal consequences.

21. After Ms. Birtukan’s denial, the Government argues that it took immediate and appropriate measures. The Federal Police, discharging its responsibility of ensuring compliance with the conditions of pardon and protecting the constitutional order from criminal acts, talked to Ms. Birtukan on more than one occasion hoping her statement might have been an innocent mistake and could be rectified without difficulty. The Federal Police advised her to renounce the statements she made and set the record straight. However, Ms. Birtukan made it clear that she made no request for pardon. Once this had become clear, the Federal Police asked her to officially rectify her statement within three days, failing which

appropriate legal action would be taken to revoke the pardon granted to her by the Government. Again this cooperative gesture on the part of the Federal Police did not meet with any positive response from Ms. Birtukan. Contrary to expectations and the spirit of the pardon, Ms. Birtukan stuck to her position and issued press statements rejecting her previous request for pardon, which was the very basis for her release.

22. The Government continues to state that, on the basis of Proclamation No. 395/2004, the Federal Police, having observed Ms. Birtukan's final statements of refusal to renounce her misrepresentation of the condition for her release, requested the Board of Pardon to revoke the pardon. The Board of Pardon, according to Proclamation No. 395/2004, has the power to examine such cases and submit recommendations of revocation to the President when persons granted conditional pardon by the President have allegedly failed to meet such conditions or have violated the same. The Board, having considered the lapse of time given to her to renounce her denial of pardon and having been convinced of the existence of sufficient ground for revocation, submitted its recommendation to the President of Ethiopia for revocation of pardon. This is the lawful process through which the conditional pardon for Ms. Birtukan is revoked. It is fully in line with the procedure provided for in Proclamation No. 395/2004. Due to the conditional nature of the pardon, the penalty of life imprisonment imposed by the Federal High Court was reactivated starting from the day of revocation of the pardon.

23. According to the Government, Ms. Birtukan is being detained in humane manner, a treatment accorded to any detainee under custody in full compliance with the laws of the country and the international obligations of Ethiopia with respect to individuals under custody. Ms. Birtukan and other detainees in Ethiopia are visited by their family members every Saturday and Sunday. In her case the visitors included her mother, sister and her daughter. She receives food items every day from her family. No restriction is placed in this regard with respect to her family meeting her special requests. She has never been denied meeting with her attorney and in fact confers with her attorney as and when requested.

24. 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.

25. Having examined all information available to it, the Working Group notes at the outset that the Government and the source are in agreement about the fact that Ms. Birtukan was granted Presidential pardon on 19 or 20 July 2007. On 20 July 2007, she was released from prison to which she had been sentenced to life by the Federal High Court on 16 July 2007 on charges of treason and other offences against the constitutional order. The act of pardon was revoked and, on 29 December 2008, she was rearrested without a warrant or court order, as alleged by the source and not contested by the Government. Ms. Birtukan has since then been detained serving her term of life imprisonment based on her initial conviction.

26. The source and the Government disagree about the basis and the procedure followed leading to Ms. Birtukan's granting and revocation of pardon. The Government maintains that the rules of the Procedure of Pardon Proclamation No. 395/2004 were followed, whereas the source argued that Ms. Birtukan has never asked for pardon. According to the source, she indeed signed the document dated 18 June 2007 in which she had asked the public and the Government for forgiveness. She was, however, released on the basis of a reconciliation agreement negotiated by the elders outside the framework of Proclamation No. 395/2004. This document had been submitted by the Prime Minister to the Board of Pardon, who was not authorized to act on her behalf, and which is contrary to article 12, paragraph 1, of Proclamation No. 395/2004. Finally, the source asserts that the procedure laid down in this proclamation for revocation of a pardon was not followed.

27. The Working Group considers that Ms. Birtukan's imprisonment since 29 December 2008 is arbitrary in terms of Category I of the categories applicable to the consideration of cases submitted to it. The revocation of the pardon granted to her and hence her anew imprisonment is devoid of a legal basis.

28. The right to seek an act of pardon, historically being the sole prerogative of the ruler, granted as an act of grace largely outside of the sphere of law, has now been recognized by international human rights law as a human right in certain cases. Article 6, paragraph 4, of the International Covenant on Civil and Political Rights provides that "anyone sentenced to death shall have the right to seek pardon ... of the sentence. ... [P]ardon ... of the sentence of death may be granted in all cases". Within the framework of the right to a fair trial, article 14, paragraph 6, of the International Covenant on Civil and Political Rights also recognizes the existence of an act of pardon when it provides for a right to compensation under certain circumstances, *inter alia*, following such act.

29. In the view of the Working Group, international human rights law, in principle, does not prevent States from enacting laws which provide for a procedure governing the granting and revocation of pardon following a criminal conviction and imposing legal conditions or restrictions. This can be both upon the Government itself and on the beneficiary of a pardoning act within the framework of separation of powers between the executive, legislative and judicial branches of Government.

30. The validity of the Presidential pardon issued for Ms. Birtukan in July 2007, following which she was released from prison, as an exceptional correlate taken by the executive to a final decision taken by the judiciary in a criminal case, cannot be contested in the present case. In this context, it is irrelevant whether the President acted on the basis of powers granted to him under article 10, paragraph 1, of Proclamation No. 395/2004 to "grant or deny pardons based on the recommendations of the Board [of Pardon] or on his own appreciation of the facts", or on the basis of a prerogative power he may have retained as the Head of State, and in relation to the agreement struck by the elders. Legal certainty and the beneficial character of the pardoning act, specifically in view of the severity of the sentence to life imprisonment against Ms. Birtukan, requires that the granting of pardon remains valid. This is so even if the application procedure regulated in Proclamation No. 395/2004 may not have been followed with a view of Ms. Birtukan's assertion that she had never pleaded for pardon or authorized a representative to petition on her behalf. The Government has not disputed that the initial pardon act was valid.

31. Assuming that an act of pardon can be granted conditionally and revoked if the grantee fails to meet its terms or has violated them, the Working Group considers that such conditions and the legal basis for attaching such terms to an act of pardon must comply with applicable international human rights standards. This is not the case in respect of Ms. Birtukan.

32. According to the source, the revocation of her pardon followed a public statement made by Ms. Birtukan in Sweden where she stated that she had not petitioned for pardon, which was not contested by the Government. The Government added that she had made similar statements to her supporters and in press releases and confirmed that these statements were the reason for the Board of Pardon to recommend the revocation which was accepted and carried out by the President. However, such statements fall squarely within her right to freedom of opinion and expression as guaranteed by articles 19 of the International Covenant on Civil and Political Rights and of the Universal Declaration of Human Rights.

33. It has not been argued by the Government, and there are no grounds for the Working Group to believe, that a condition of pardon of such kind is "provided for by law" in Ethiopia and "necessary ... for the respect of the rights or reputations of others; o [f]or the

protection of national security or of public order (*ordre public*), or for public health or moral” as required by article 19, paragraph 3 (b), of the International Covenant on Civil and Political Rights for a justification of a limitation of the right to freedom of opinion and expression. Proclamation No. 395/2004, in its article 4, paragraphs 1 and 3, and article 16, paragraph 3, foresees conditional pardons, however, it fails to define any such condition. Even if such criteria for conditions were prescribed by Ethiopian laws they would not stand the test of the limitation clause of article 19, paragraph 3, of the International Covenant in the case at hand, and cannot form the legal basis for the revocation of Ms. Birtukan’s pardon.

34. Consequently, the Working Group considers that the new imprisonment of Ms. Birtukan results from her legitimate exercise of her right to freedom of opinion and expression. As the leader of a political party in a democratic society, she clearly enjoys the right to address her supporters at home or while visiting a foreign country. The deprivation of liberty of Ms. Birtukan also constitutes a violation of her right to freedom of association and assembly and the right to take part in the conduct of public affairs, guaranteed by articles 21, 22 and 25 of the International Covenant on Civil and Political Rights and by articles 20 and 21 of the Universal Declaration of Human Rights. Thus, it is arbitrary, in addition to Category I, in terms of Category II.

35. Finally, the renewed detention of Ms. Birtukan gravely violates the right to fair trial, more particularly the principle of *ne bis in idem*, or that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”, as protected by article 14, paragraph 7, of the International Covenant on Civil and Political Rights. In the view of the Working Group, acquittal “within the meaning of this provision includes acts of pardon”, which are final. If conditional pardons are recognizable under international human rights law, they must not contain conditions that are themselves in violation of international human rights laws and standards as in the case of Ms. Birtukan and thus cannot form the basis of a revocation and repeated punishment. Consequently, the current imprisonment of Ms. Birtukan is arbitrary in terms of Category III.

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

The deprivation of liberty of Ms. Birtukan Mideksa Deme is arbitrary, being in contravention of articles 9, 10, 19, 20 and 21 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights. It falls under categories II and III of the categories applicable to the consideration of cases submitted to the Working Group. Her detention since 29 December 2008 falls also under category I.

37. 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 adequate reparation to, Ms. Birtukan.

38. The Working Group would emphasize that the duty to immediately release Ms. Birtukan will not allow further detention, even if further actions taken against her should satisfy the international human rights obligations of Ethiopia. Furthermore, the duty to provide adequate compensation under articles 9, paragraph 5, and 14, paragraph 6, of the International Covenant on Civil and Political Rights is based on the arbitrary detention that has taken place and subsequent proceedings or findings in these cannot limit the State’s responsibility.

Adopted on 25 November 2009

## Avis n° 29/2009 (Liban)

### Communication adressée au Gouvernement le 29 mai 2009

**Concernant: MM. Deeq Mohamed Bere, Ghandl El-Nayer Dawelbeit et Jamil Hermez Makkhou Jakko.**

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

1 Le Groupe de travail sur la détention arbitraire a été établi par la résolution 1991/42 de l'ancienne Commission des droits de l'homme, laquelle a précisé et prolongé son mandat par sa 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 du 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 considère comme arbitraire la privation de liberté dans les cas énumérés ci-après:

a) 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);

b) 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);

c) 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).

3. Les trois cas ci-dessous ont été soumis au Groupe de travail sur la détention arbitraire.

4. Le 30 mai 2008, M. Deeq Mohamed Bere, né le 1<sup>er</sup> juillet 1975, originaire de Somalie, a été arrêté par les forces de sécurité internes libanaises au poste de police de Jounieh, pendant une visite à un ami détenu dans le même établissement. Le lendemain, M. Deeq Mohamed Bere a été transféré au Centre général de détention de sécurité à Adliya, Beyrouth, Liban, sous le contrôle du Directeur général de sécurité générale.

5. La source a rapporté que la base juridique sur laquelle la détention de M. Bere est fondée relève de l'article 32 de la loi du 10 juillet 1962 réglementant l'entrée et le séjour des étrangers au Liban ainsi que leur sortie. Selon les informations obtenues, la justification de la détention de M. Bere est constituée par le fait de sa présence illégale au Liban. Le mandat d'arrêt contre M. Bere a vraisemblablement été émis par le Procureur à Baabda, Mont-Liban.

6. Depuis qu'il a été placé en détention, M. Bere n'a toujours pas été présenté devant un tribunal. M. Bere est un réfugié statutaire somalien, reconnu par le Haut-Commissariat des Nations Unies pour les réfugiés (HCR) et en possession d'un certificat de réfugié émis le 17 novembre 2008 à Beyrouth. Il ne peut donc pas être déporté. Il a obtenu une acceptation préliminaire pour sa réinstallation au Canada et il est en attente d'un certificat médical. On craint pour l'état de santé de M. Bere, qui ne cesse de se détériorer étant donné

ses conditions actuelles de détention. Il a fait la grève de la faim plusieurs fois pour contester sa détention arbitraire prolongée. M. Bere s'est également coupé avec des lames de rasoir et a avalé des pilules.

7. Le 3 mars 2009, une organisation non gouvernementale a envoyé une pétition officielle au Procureur Public, demandant que soit réexaminée la légalité de la détention de M. Bere. La pétition se fonde sur l'article 304 du Code de procédure pénale libanais qui prévoit que le Procureur a le pouvoir de réexaminer la légalité de toute détention et d'ordonner la libération immédiate du détenu en cas de détention illégale. Aucune réponse n'a été reçue à ce jour.

8. Le même jour, cette organisation a en outre envoyé une pétition officielle au Ministère de l'intérieur, exigeant le réexamen de la légalité de la détention de M. Bere. La requête se fonde sur la compétence du Ministère en tant qu'organe supérieur chargé de la sécurité générale.

9. Le 7 avril 2009, le Ministère de l'intérieur a fait parvenir à cette organisation la réponse officielle du Directeur général de sécurité générale. Dans sa réponse, le Directeur général de sécurité générale a confirmé que M. Bere était détenu au Centre général de détention de sécurité depuis le 31 mars 2009, et accusé de présence illégale dans le pays. Le Directeur général de sécurité générale n'a pas nié le fait que le détenu n'avait pas été présenté devant un tribunal. À cet égard, le Directeur général de sécurité générale n'explique pas les motifs pour lesquels M. Bere est détenu depuis plus de 10 mois sans avoir droit à un procès.

10. De plus, dans la lettre susmentionnée, le Directeur général de sécurité générale a expliqué que M. Bere avait été détenu à quatre reprises depuis 1998, sous les accusations d'entrée illégale, de vol et de détention de drogues/substances illicites, et que chaque fois il avait été relâché compte tenu de son statut de réfugié et de la perspective de sa réinstallation dans un pays tiers. D'après les informations fournies par le Directeur général de sécurité générale, M. Bere aurait omis de contacter sa famille et le HCR après chacune de ses libérations. De plus, le Directeur général de sécurité générale a confirmé que le réfugié était autorisé à s'installer au Canada, sans expliquer les raisons pour lesquelles M. Bere n'a toujours pas été libéré à ce jour. Le Ministère de l'intérieur n'a fait aucun commentaire.

11. Le 3 décembre 2008, M. Ghandl El-Nayer Dawelbeit, né le 1<sup>er</sup> janvier 1975, apatride de facto, résidant habituellement au Soudan, concierge, a été arrêté conjointement avec sa femme à leur domicile à Koraytem, Beyrouth, Liban, par les forces de sécurité générale du Liban. Ils ont ensuite été transférés au Centre général de détention de sécurité.

12. Selon les informations fournies par M. Dawelbeit, les agents de la sécurité générale ont présenté un mandat d'arrêt contre sa femme, citoyenne du Sri Lanka, au motif qu'elle détient un passeport et un permis de travail libanais sous un nom falsifié. M. Dawelbeit a également été arrêté, bien qu'il ait présenté son certificat de demandeur d'asile (émis le 30 août 2007 par le HCR) aux agents de la sécurité.

13. La source a rapporté que la base juridique sur laquelle la détention de M. Dawelbeit est fondée relève de l'article 32 de la loi du 10 juillet 1962 réglementant l'entrée et le séjour des étrangers au Liban ainsi que leur sortie. Selon les informations recueillies, la justification de la détention de M. Dawelbeit est constituée par le fait de son entrée et de sa présence illégale au Liban.

14. Néanmoins, depuis le 3 Décembre 2008, M. Dawelbeit n'a toujours pas été déféré à la justice. Aucune procédure judiciaire n'a été engagée. Il semblerait aussi que M. Dawelbeit ait été soumis aux interrogatoires du Procureur le jour même de sa détention, avant son transfert au centre de détention.

15. La demande d'asile soumise par M. Dawelbeit au HCR a été transmise pour examen en appel. Selon les informations obtenues, M. Dawelbeit a rapporté que le Bureau de la sécurité générale libanaise avait contacté l'ambassade soudanaise au Liban pour demander des informations en rapport avec cette affaire. L'ambassade soudanaise aurait répondu qu'aucune information sur le casier judiciaire de M. Dawelbeit n'était disponible au Soudan.

16. Le 8 avril 2009, M. Jamil Hermez Makkhou Jakko, né en 1952, originaire d'Iraq, reconnu comme réfugié par le HCR (statut de réfugié obtenu le 28 janvier 2009), nettoyeur, a été arrêté par les forces de la sécurité générale, à Jdeideh, alors qu'il effectuait une demande de renouvellement de son permis de travail et de son titre de séjour. Il a été informé par les autorités susmentionnées que son arrestation relevait d'une décision judiciaire rendue *in absentia* le 5 février 2008 par le tribunal pénal de Damour (décision n°17/2008). Ladite décision se fonde sur le crime d'entrée illégale sur le territoire libanais, qui est sanctionné par l'article 32 de la loi du 10 juillet 1962 réglementant l'entrée et le séjour des étrangers au Liban ainsi que leur sortie.

17. M. Jakko avait déjà été condamné pour le même crime le 22 décembre 2005 par le tribunal pénal de Matn (décision n° 1692/2005). M. Jakko avait exécuté sa peine avant d'obtenir son permis de séjour, régularisant ainsi son statut au Liban.

18. L'avocat de M. Jakko a contesté la décision du tribunal rendue *in absentia* le 5 février 2008. Consécutivement à cette contestation, le 24 avril 2009, le tribunal pénal de Damour a annulé cette décision et écarté toutes les accusations contre M. Jakko (décision n° 44/2009, n° de registre 52/2009).

19. Entre le 8 et le 14 avril 2009, M. Jakko a été détenu successivement au Centre de sécurité générale de Jdeideh, au poste de police de Damour sous contrôle des forces de sécurité interne et au Palais de justice à Baabda. Depuis le 14 avril 2009, M. Jakko est en garde à vue au Directeurat général de sécurité générale à la prison centrale de Roumieh, Mont-Liban.

20. Les autorités de la prison à Roumieh ont refusé la lettre-missive du tribunal, arguant que la décision n° 17/2008 rendue le 5 février 2008 avait été annulée en raison d'une erreur de transcription dans le numéro de ladite décision. À la demande de l'avocat, le tribunal de Damour a adressé une nouvelle lettre-missive aux autorités de la prison le 8 mai 2009. Ces dernières ont accepté tant son enregistrement que sa mise en œuvre le 11 mai 2009; mais à ce jour M. Jakko est toujours retenu en détention.

21. Selon la source, l'administration des prisons est sous la responsabilité des Forces de sécurité intérieure (FSI), lesquelles doivent s'assurer qu'aucune personne ne se retrouve emprisonnée sans fondement légal. Le Code de procédure pénale établit clairement que les FSI sont chargées de l'exécution des décisions de justice et qu'un condamné doit être libéré le jour même où sa peine de prison se termine. Une disposition similaire se trouve dans le décret qui gouverne l'administration des prisons.

22. Les dispositions légales qui régissent le régime d'exécution des peines et l'administration des prisons n'établissent pas de distinction entre un national et un non-national. Cependant, des instructions internes réglementent la pratique concernant les étrangers. Ainsi, l'instruction du Procureur Public n° 2004/4662 du 16 décembre 2004 établit que tous les étrangers doivent être transférés au centre de détention des Services de sécurité générale (SSG), une fois reçue la décision de leur libération conditionnelle ou la constatation que leur période de prison est terminée, de manière à ce que les SSG prennent une décision appropriée sur leur statut légal. Le fait que l'étranger possède ou non les documents requis n'a pas d'incidence sur la norme que l'on vient de mentionner. En conséquence, les étrangers détenus qui ont accompli leur peine ne sont plus considérés comme relevant de la responsabilité du pouvoir judiciaire ou des FSI, mais de celle des

SSG. Le transfert d'autorité est automatique et peu importe que l'étranger ait ou non le statut de résident légal ou que la sentence judiciaire inclue ou non un ordre de déportation. Une fois qu'ils ont purgé leur peine, les étrangers en détention sont considérés comme étant sous «ida», c'est-à-dire «sous déport» dans les SSG, même s'ils sont physiquement maintenus en détention dans les prisons administrées par les FSI.

23. Ces instructions, directives et pratiques sont clairement une violation des normes légales qui prohibent de maintenir en détention une personne au-delà du terme de sa peine de détention. Ces instructions et pratiques conduisent à maintenir en détention des étrangers pendant un temps indéfini, même après que la Cour a fini par déclarer leur innocence, a désestimé les accusations portées à leur encontre ou que l'étranger a purgé complètement sa peine d'emprisonnement. Le nom de M. Jakko avait été effacé de la liste des prisonniers condamnés le 11 mai 2009 et inclus dans la liste des prisonniers à libérer. Cependant, il n'a pas été libéré mais transféré de la prison centrale de Roumieh au centre de détention des SSG le 27 mai 2009, conformément aux pratiques décrites dans le paragraphe précédent.

24. Le Gouvernement a été saisi de ces trois cas par une lettre en date du 29 mai 2009. Une note verbale de rappel lui a été envoyée le 13 novembre 2009. À ce jour, aucune réaction n'a été enregistrée de sa part.

25. Il convient d'ajouter que le Gouvernement n'a pas cru devoir utiliser les dispositions du paragraphe 16 des méthodes de travail du Groupe, qui lui offrent la possibilité de solliciter la prorogation du délai qui lui est imparti pour donner sa réponse.

26. Dans ces conditions, le Groupe de travail estime devoir passer outre et examiner les cas soumis à son attention malgré la libération de M. Deeq Mohamed Bere, à une date inconnue, et de M. Ghandl El-Nayer Dawelbeit, 14 juillet 2009, compte tenu de la gravité des allégations et du fait que la pratique décrite ci-dessus semble s'être institutionnalisée.

27. Cela dit, le Groupe de travail relève que les trois cas concernent des personnes d'origine étrangère ayant toutes les trois sollicité l'asile et obtenu un certificat du Haut-Commissariat des Nations Unies pour les réfugiés. Par ailleurs, si M. Deeq Mohamed Bere a obtenu une acceptation préliminaire pour sa réinstallation au Canada, les deux autres, MM. Ghandl El-Nayer Dawelbeit et Jamil Hermez Makkhou Jakko, ont trouvé du travail, l'un comme concierge et l'autre comme nettoyeur.

28. À ce stade, il n'est plus possible de leur reprocher l'entrée et le séjour illégal au Liban, d'autant moins que le Groupe de travail a toujours considéré que le migrant en situation irrégulière ne doit pas faire l'objet d'une détention. Toutefois, si ce principe doit souffrir une exception, la détention doit alors respecter un certain nombre de principes, en particulier celui de proportionnalité, qui exige que la détention ne s'effectue qu'en dernier recours et qu'elle soit entourée de toutes les garanties judiciaires indispensables en la matière.

29. En l'espèce, tous les individus concernés avaient obtenu un certificat du Haut-Commissariat des Nations Unies pour les réfugiés et tous avaient trouvé un emploi, sauf M. Bere qui attendait le résultat de ses examens médicaux pour se rendre au Canada. Ils ne pouvaient en conséquence être considérés comme des étrangers en situation irrégulière. Ainsi, le motif invoqué pour leur arrestation et leur détention doit être considéré comme un prétexte.

30. Il convient d'ajouter à cela que les détenus n'ont eu ni la possibilité de contester la légalité de leur détention ni la possibilité d'être jugés par un tribunal indépendant dans le cadre d'une procédure publique et équitable organisée dans des délais raisonnables, comme le prévoient les dispositions des articles 10 et 11 de la Déclaration universelle des droits de l'homme.

31. Le Groupe de travail dispose dès lors de suffisamment d'éléments pour considérer que la détention de M. Deeq Mohamed Bere, entre le 30 mai 2008 et avant le 23 juillet 2009 et la détention de M. Ghandl El-Nayer Dawelbeit, entre le 3 décembre 2008 et le 14 juillet 2009, sont arbitraires et contreviennent à la catégorie III de ses méthodes de travail. Étant donné que ces personnes ont été libérées, le Groupe de travail décide de classer l'affaire, conformément à l'alinéa *a* du paragraphe 17 de ses méthodes de travail.

32. Par ailleurs, en ce qui concerne M. Jamil Hermez Makkhou Jakko, ce dernier reste en détention malgré l'annulation de sa condamnation et malgré la décision du tribunal d'ordonner sa mise en liberté. Sa détention doit être considérée comme arbitraire selon la catégorie III des méthodes de travail du Groupe.

33. En conséquence, le Groupe de travail prie le Gouvernement de bien vouloir procéder à la libération immédiate de M. Jamil Hermez Makkhou Jakko et de veiller à assurer aux trois personnes susmentionnées un procès équitable.

Adopté le 25 novembre 2009

## **Opinion No. 1/2010 (Libyan Arab Jamahiriya)**

### **Communication addressed to the Government on 21 January 2010**

**Concerning: Mr. Jamali Al Hajji.**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. Acting in accordance with its methods of work, the Working Group forwarded a Communication addressed to the Government on 21 January 2010. The Working Group rejects that the Government has not provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion N°18/2009)

#### *Submission from the source*

4. Jamali Al Hajji, born on 6 March 1955, a citizen of the Libyan Arab Jamahiriya, usually resident on Belkheir Avenue in Tripoli, working as an accountant, has also been active in the field of human rights for many years.
5. On 9 December 2009, Mr. Al Hajji was arrested by the State Security Service without being presented with any arrest warrant or informed about the reasons for his arrest.
6. Several months before his arrest, Mr. Al Hajji submitted a complaint to Mustafa Muhammad Abdeljalil, the Secretary of the General People's Committee for Justice (Justice Minister) regarding allegations of numerous human rights violations committed by the Libyan authorities. In the complaint, Mr. Al Hajji expressed his opinions and criticism of the system of justice implemented by the Libyan authorities; the treatment of Libyan prisoners; the torture and arbitrary detention of individuals, and other allegations of violations committed by the Libyan security forces.
7. On 5 November 2009, Mr. Al Hajji was summoned by the State Security Prosecution Office in Tripoli regarding this complaint. He was reportedly questioned and then released.

8. On 9 December 2009, Mr. Al Hajji was arrested when he was for the second time summoned to the State Security Prosecution Office. He was taken to Jdeida prison in Tripoli where he has been detained since then.

9. Mr. Al Hajji's family received official confirmation of his detention on 10 December 2009, the second day of his arrest. However, his family and lawyer have been denied any contact with him. Since his arrest, Mr. Al Hajji has been detained incommunicado. He has not been charged, nor has he been brought before a judge.

10. The Working Group observes that Mr. Jamali Al Hajji was arrested in February 2007 after participating in a call for a peaceful gathering to commemorate the deaths, two years earlier, of 12 people in Benghazi during a demonstration. He was then released in March 2009. After his release he filed a writ addressed to the Secretary of the General People's Committee for Justice complaining about the judicial system; the treatment of prisoners; ill-treatment and torture by State agents, and other situations concerning human rights in the country.

#### *Deliberation*

11. The Working Group regrets that the Government has not provided it with information concerning the allegations of the source.

12. Mr. Jamali Al Hajji was arrested without any judicial warrant issued by a competent authority. No reason for his arrest was expressed at the moment of his detention. He was held incommunicado; impeded from contacting his relatives or a defence lawyer and has been deprived of his right to a fair trial before an independent and impartial tribunal.

13. The Working Group further notes that Mr. Al Hajji's detention is in relation with his activities as a human rights defender, in particular his complaint about the human rights situation in Libya to the Secretary of the General People's Committee for Justice (Minister of Justice). This would be a sanction or punishment for Mr. Al Hajji's legitimate exercise of his right to freedom of opinion and expression, as enshrined in articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

14. Mr. Al Hajji's detention is also contrary to articles 1, 6, 7 and 8 of the Declaration on Human Rights Defenders, adopted on 9 December 1998 by the General Assembly in its resolution 53/144.

15. Although the Libyan Arab Jamahiriya was one of the 26 co-signatories of a letter expressing certain reservations to some articles of the Declaration, the Declaration on Human Rights Defenders resumes principles and norms of customary international law and is in fully concordance with articles 3, 5, 8, 9, 10, 11, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 9, 10, 14, 18, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights.

#### *Conclusion*

16. Accordingly, the Working Group renders the following Opinion:

The detention of Mr. Jamali Al Hajji is arbitrary because it is devoid of any legal basis. Since his arrest, Mr. Al Hajji has not been informed about the reasons for his arrest, nor has he been accused or charged. His detention is in violation of article 9, 10 and 19 of the Universal Declaration of Human Rights and 9, 14 and 19 of the International Covenant on Civil and Political Rights. It is also contrary to article 9.3 of 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 adopted by the General Assembly on 9 December 1998.

17. The Working Group requests the Government of the Libyan Arab Jamahiriya:
- (a) To release Mr. Jamali Al Hajji;
  - (b) Alternatively, to release him on bail and to submit him to a process with all the guarantees of a fair trial;
  - (c) To consider providing him with an effective reparation for the damage caused.

Adopted on 4 May 2010

## **Opinion No. 2/2010 (Islamic Republic of Iran)**

### **Communication addressed to the Government on 1 February 2010**

**Concerning: Mr. Shane Bauer, Ms. Sarah Shourd and Mr. Joshua Fattal.**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
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. 18/2009)
4. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.
5. The following three individuals were arrested by Iranian officers on 31 July 2009 when they accidentally strayed across an unmarked border into the Islamic Republic of Iran from Iraq, while on a hiking trip:
  - (a) **Shane Bauer**, born on 13 July 1982, a citizen of the United States of America, is a photographer and freelance journalist, who usually resides in Damascus, Syrian Arab Republic;
  - (b) **Sarah Shourd**, born on 10 August 1978, a citizen of the United States of America, working as an English teacher, resides in Damascus with Shane Bauer.
  - (c) **Joshua Fattal**, born on 4 June 1982, a citizen of the United States of America, usually residing in Elkins Park, United States of America, an environmentalist, worked as a teaching fellow with the International Honours Program “Health and Community” study-abroad programme from January to June 2009. Mr. Fattal arrived in Damascus on 20 July to visit his friends Mr. Bauer and Ms. Shourd.
6. According to the source, Mr. Bauer, Ms. Shourd and Mr. Fattal entered northern Iraq with visas from Turkey on 28 July 2009 and planned to spend five days visiting the area. On the evening of 30 July 2009, they set out for Ahmed Awa with the plan to visit the Ahmed Awa waterfall and go hiking in the area with no intention of entering Iran. On 31 July 2009, they were hiking around the Ahmed Awa waterfall area.
7. It was reported that, since the borders were poorly marked in that area, they had no knowledge of their proximity to the Iranian border.
8. Mr. Bauer, Ms. Shourd and Mr. Fattal are currently detained at Evin prison in Tehran for illegal entry into the Islamic Republic of Iran. Since their detention, these three

individuals have not been able to contact with their families or allowed visits by a lawyer hired by their families.

9. According to the source, since their arrest, the Iranian authorities have only allowed two consular visits by a Swiss diplomat with these three individuals, which lasted 60 minutes in total. The first visit was granted in the late September 2009 while the last visit took place on 29 October 2009

10. It was reported that Mr. Bauer, Ms. Shourd, and Mr. Fattal were officially charged with espionage in November 2009 by Iran's Public Prosecutor. On 14 December 2009, the Iranian authorities announced that the three individuals would be put on trial. Before this, in September 2009, the President of the Republic was reported to have told the media that Mr. Bauer, Ms. Shourd and Mr. Tattal had broken the law, but that he would ask the judiciary to expedite the process, to give it its full attention and to look at the case with maximum leniency. While the judiciary had its own procedures to follow, he stated he was hopeful in this regard.

11. According to the information from the source, Mr. Bauer, Mrs Shourd and Mr. Fattal have demonstrated a great commitment to constructing a harmonious world. This commitment is evident from Mr. Bauer's work as a journalist in the Middle East, Ms. Shourd's active support for the rights of women and the underprivileged and Mr. Fattal's dedication to a sustainable environment, all of which is documented.

12. The source argues that the detention of Mr. Bauer, Ms. Shourd and Mr. Fattal is arbitrary.

13. It also argues that espionage is a totally unfounded charge. The source asserts that the three young people have absolutely no connection with any kind of action against the Iranian State or Government.

14. The source alleges that to continue to detain the three individuals without due process raises grave concerns that the Islamic Republic of Iran is holding them for political purposes and calls into question Iran's stated commitment to the rule of law.

15. The source finally alleges that the three individuals have been deprived of their right to access to a lawyer.

16. 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.

17. 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 detention of the persons mentioned above, in conformity with paragraph 15 of its methods of work.

18. From the outset, the Working Group reiterates that the right not to be deprived arbitrarily of liberty is one of the fundamental human rights provided for in article 9 of the Universal Declaration on Human Rights, and that the principles of no undue delay of a trial 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).

19. In particular, pursuant to article 9, paragraph 3, of the International Covenant on Civil and Political Rights, anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or released. It has been recognized that one of the purposes

of this provision is to protect individuals from remaining too long in a state of uncertainty about their fate. Indeed, in the conduct of criminal proceedings against persons who are detained, the authorities must display special diligence and reduce any delay to the minimum possible.

20. Moreover, under article 9, paragraph 4, of the International Covenant on Civil and Political Rights, anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful.

21. The Working Group considers that depriving the three individuals of their right to take proceedings before a court during eight months is an apparent violation of the above provision of the International Covenant.

22. Furthermore, contrary to the requirements of Principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Mr. Bauer, Ms. Shourd and Mr. Fattal have been denied access to any legal assistance for eight months. Indeed, the right of a detained person to communicate with his legal representative is part of the basic requirements of a fair trial.

23. The Working Group also recalls that Principles 15 and 19 of the Body of Principles provide for the right of the detained or imprisoned person to communication with the outside world, and in particular his or her family or counsel. Such communication shall not be denied for more than a matter of days. In the Working Group's view, the deprivation of the three persons from communication with their families or counsel for eight months represents a clear violation of these Principles.

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

The deprivation of liberty of Mr. Bauer, Ms. Shourd and Mr. Fattal since 31 July 2009 is arbitrary, being in contravention of article 9 of the Universal Declaration of Human Rights, and article 9 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.

25. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Bauer, Ms. Shourd and Mr. Fattal and 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 4 May 2010

## **Opinion No. 3/2010 (India)**

### **Communication addressed to the Government on 29 January 2010**

**Concerning: Mr. Jamali Khan**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group regrets that the Government has not replied within the 90-days deadline.

3. (Same text as paragraph 3 of Opinion No. 18/2009)

*Communication from the source*

4. According to the information received, Mr. Jamali Khan, 50 years of age, an Indian citizen, employed in the building and construction sector, usually residing in Lajpat Nagar, New Delhi, was arrested without a warrant by officials from the Jammu and Kashmir Police on 3 November 2007 in Udhampur, Jammu and Kashmir, pursuant to sections 13, 17, 18, 21, 24, and 40, of the Unlawful Activities Act (case No. FIR No. 252/2007).

5. Mr. Khan was arrested when he and his family were on their way to visit his in-laws in Srinagar. Mr. Khan was carrying money with him to purchase a small plot of land in Srinagar in the name of his wife. He was routinely checked by the police, arrested and then accused of being a money-lauderer.

6. On 19 December 2007, the District Magistrate, Udhampur, ordered Mr. Khan's detention. On 4 January 2008 the Chief Judicial Magistrate, Udhampur, granted Mr. Khan bail. However, instead of releasing Mr. Khan on bail, the State invoked the Public Safety Act and ordered his detention in a high-security jail.

7. According to the source, the High Court of Jammu has since then twice quashed his detention as being arbitrary and prejudiced and ordered his release (Writ petition in the High Court of Jammu, OWP 143/2008, 16 September 2008; Writ petition in the High Court of Jammu, HCP 38/2008, 27 July 2009). Following the first decision a release order was furnished by the jail authorities on 19 September 2008. However, instead of his release, Mr. Khan, was taken into unlawful custody by the Joint Interrogation Cell until 6 October 2008 when the District Magistrate, Udhamour, passed another detention order.

8. Following the second decision of the High Court, on 28 July 2009, a release order was served on Jail Supt., Kot Balwal. Mr. Khan was released, however, handed over to the Joint Interrogation Cell where he was illegally detained until the next day. On 29 July 2009, Mr. Khan was transferred to the Udhampur District Jail and again unlawfully detained until 31 July 2009, when the Government issued another detention order under the Public Security Act, and Mr. Khan was put into custody at Kot Balwal Jail, Jammu. On 28 September 2009, the Government of Jammu & Kashmir revoked the detention order.

9. On 3 October 2009, Mr. Khan was presented before the trial court in relation to the original crime with which he was charged. As Mr. Khan had been granted bail more than a year before the session judge ordered his release. Mr. Khan was transferred back to Kot Balwal Jail to be released from there. When he left the jail, he was again arrested and taken to the Joint Interrogation Cell. His wife was promised that he would be released on 5 October 2009; however, when she went there on that day she was told by a senior officer that her husband was fine and that "he has spent two years in Kot Balwal, let him spend two years with us, too".

10. Mr. Khan's exact place of detention in Srinagar, Jammu and Kashmir, is not known at present.

11. In addition to the various court proceedings initiated by Mr. Khan or on his behalf, petitions were also made to the Chief Minister, Jammu and Kashmir State; the President of India; the National Human Rights Commission; the State Human Rights Commission; and the National Commission for Minorities.

*Deliberation*

12. Even in the absence of any reply from the Government, the Working Group considers that it could render an Opinion on this case.

13. Mr. Khan has been deprived of his liberty without any judicial order. His arrest was carried out on 3 November 2007 without any arrest warrant. It was only 46 days later, on 19 December 2007, that his detention was ordered by a District magistrate. However, on 4 January 2008, he was granted bail.

14. Mr. Khan's fundamental right not to be arbitrarily deprived of his liberty was further denied when he was immediately rearrested by police agents, on the same day, in application of the Public Safety Act. The judicial order was clearly not respected. That was in violation of Article 9.3., *in fine*, of the International Covenant on Civil and Political Rights.

15. Mr. Khan was subjected to several rearrests. His liberty was ordered in two occasions by the High Court of Jammu (on 16 September 2008 and on 28 July 2009) and in one occasion by the Government (on 28 September 2009). However, those orders were not respected. On 3 October 2009 he was rearrested for a fifth time. But this time his detention is more serious because his place of detention is unknown.

16. Mr. Khan has not been brought to trial before an independent and impartial tribunal. The charges brought against him have been changing from money-laundering to generic unlawful activities. His right to be presumed innocent has not either been respected.

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

The privation of liberty of Mr. Jamali Khan is arbitrary, contrary to article 9 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and correspond to categories I and III applicable by the Working Group in its consideration of cases of detention.

18. The Working Group requests the Government of India:

- (a) To immediately release Mr. Jamali Khan;
- (b) Alternatively, to release him on bail respecting the judicial decisions in that sense and to submit him to a judicial process with all the guarantees of due process and fair trial;
- (c) To consider provide him with an effective reparation for the damage caused for his arbitrary detention.

Adopted on 4 May 2010

## **Opinion No. 4/2010 (Myanmar)**

### **Communication addressed to the Government on 29 May 2009**

**Concerning: Dr Tin Min Htut and Mr. U Nyi Pu**

#### **The State is a not a Party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
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. 18/2009)

*Communication from the source*

4. The case summarized below concerns Dr. Tin Min Htut and Mr. U Nyi Pu, and was reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.

5. Tin Min Htut was arrested without a warrant on 12 August 2008. Dr Htut was born on 4 May 1952, and is a citizen of Myanmar. He is a medical doctor by profession, and was elected MP for Pantanaw.

6. According to the source, he was arrested by Police Major Ye Nyunt, Special Branch; Police Captain Than Soe, Special Branch; Police Captain Aye Naing, External Affairs Department, Special Branch; Sub-Inspector Hla Min; Sub-Inspector Thuang Tan; Sub-Inspector Tin Myo; and Sub-Inspector Win Kyaw.

7. U Nyi Pu was arrested without a warrant at his home on 11 August 2008 by the same police officers. Mr Pu was born on 10 April 1955 and is a citizen of Myanmar. He was elected MP for Gwa Township, Rakhine State.

8. As elected members of Parliament, in July 2008, Dr Htut and Mr Pu organized 92 elected members of Parliament to sign a letter addressed to the United Nations Secretary-General and the Security Council, criticizing the military Government of Myanmar, and also the United Nations itself, alleging that it sides with the military Government. According to the source, after their arrest both men were held at the Aungthapyay Interrogation Camp, an army camp, until the end of September 2008, when they were transferred to the central prison. Neither of them was brought before a judge until February 2009, although section 61 of the Criminal Procedure Code requires that they should have been brought to a judge within 24 hours of arrest.

Section 61 of the Criminal Procedure Code:

No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to [the police station, and from there to the Magistrate's Court].

9. Dr Htut and Mr Pu were sentenced on 13 February 2009 to 27 years of imprisonment by the Yangon West District Court (Special Court). Judge U Tin Htut, a Deputy District Judge, presided. The charges were disturbing public tranquillity and peace pursuant to section 4 of the Anti-Subversion Law (The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Opposition) No. 5/96, section 33(a) of the Electronic Transactions Law No. 5/04 and section 505(b) of the Penal Code of Myanmar.

Sections 3 and 4 of the Anti Subversion Law 5/1996 provide:

No one and no organization shall violate either directly or indirectly any of the following prohibitions:

(a) Inciting, demonstrating, delivering speeches, making oral or written statements and disseminating in order to undermine the stability of the State, community peace and tranquillity and prevalence of law and order;

(b) Inciting, delivering speeches, making oral or written statements and disseminating in order to undermine national reconsolidation;

(c) Disturbing, destroying, obstructing, inciting, delivering speeches, making oral or written statements and disseminating in order to undermine, belittle

and make people misunderstand the functions being carried out by the National Convention for the emergence of a firm and enduring Constitution;

(d) Carrying out the functions of the National Convention or drafting and disseminating the Constitution of the State without lawful authorization;

(e) Attempting or abetting the violation of any of the prohibitions.

Whoever violates any prohibition contained in section 3 shall, on conviction be punished with imprisonment for a term of a minimum of (5) years to a maximum of (20) years and may also be liable to fine.

Section 33 of the Electronic Transactions Law 5/2004 provides:

Whoever commits any of the following acts by using electronic transactions technology shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 7 years to a maximum of 15 years and may also be liable to a fine:

committing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture.

Section 505 of the Penal Code provides:

(a) Whoever makes, publishes or circulates any statement, rumour or report, [...]

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; [...] shall be punished with imprisonment which may extend to two years, or with fine, or with both.

10. According to the source, the trial took place inside a closed court in the prison. Neither of the accused was allowed access to a lawyer, although they signed a Power of Attorney for a Supreme Court advocate, U Kyaw Hoe, to represent them. U Kyaw Hoe indeed came to the location of the trial to conduct the defence, but was not allowed inside. The source claims that such conduct is in violation of section 2 of the Judiciary Law 2000 of Myanmar, which stipulates that:

The administration of justice shall be based upon the following principles; [...]

(e) Dispensing justice in open court unless otherwise prohibited by law;

(f) Guaranteeing in all cases the right of defence and the right of appeal under the law; ...

11. The source further asserts that the evidence against Dr Htut and Mr Pu was inadequate for a conviction, had the court conducted its hearings independently and according to the legal standards that it is supposed to uphold. The police could not produce the original letter that the defendants were alleged to have prepared and sent, but only a copy taken from the Internet. The source argues that a copy of the letter is not sufficiently strong evidence by itself to be used for a conviction. Such evidence is only admissible as secondary evidence under sections 62-65 of the Evidence Act of Myanmar, but not sufficient proof of an offence in the present case upon which to secure a conviction. These sections provide:

Primary evidence. Primary evidence means the document itself produced for the inspection of the Court...

Secondary evidence. Secondary evidence means and includes-- ... (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies...

Proof of documents by primary evidence. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-- (a) when the original is shown or appears to be in the possession or power-- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it; (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest; (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

12. The defendants were accused of having distributed the letter via the Internet. According to the source, the police was not able to produce evidence at the trial to demonstrate who had actually posted the letter online. Notwithstanding, both defendants were also convicted under the Electronic Transactions Law.

13. The presiding judge did not provide any reasoning when handing down the guilty verdicts against the two accused. He merely summarized the witness statements and gave the sentences. The lack of reasons and tone of the verdicts indicate that the judge was operating from a presumption of guilt.

14. Dr Htut and Mr Pu are currently being held at Insein Central Prison, Yangon, under the authority of the Department of Corrections, Ministry of Home Affairs. Mr Pu's health has reportedly deteriorated since his detention.

#### *Deliberation*

15. The Working Group wishes to express its regrets over the Government's omission to reply within the 90-day deadline, and to note that the Government did not use the opportunity to request an extension of the time limit under section 16 of the Working Group's Methods of Work. The Working Group stated in its two communications that it would appreciate if the Government could provide information about the current situation of Dr Htut and Mr Pu and provide clarification about the legal provisions justifying their continued detention.

16. The Working Group is in a position to provide an Opinion, on the basis of all the information it has obtained, on the detention of Dr Htut and Mr Pu, as one of the measures provided for in section 17.

17. Several provisions of the international instruments that the Working Group relies upon in the examination of the cases brought to its attention, have been violated. The preamble to the Universal Declaration of Human Rights states that human rights should be protected by the rule of law. The fair trial and arbitrary arrest provisions of the Universal Declaration have been violated in the cases of Dr Htut and Mr Pu.

18. The pretrial detention of Dr Htut and Mr Pu, from August 2008 to their trial in February 2009, was in violation of their right to a court hearing. International human rights law requires that a court review the lawfulness of the detention, and that this hearing occur promptly (See article 9 of the Universal Declaration of Human Rights; the Body of

Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11; and the rule in ICCPR article 9 (3), which in opinion of the Working Group constitutes customary international law.

19. At their trial, Dr Htut and Mr Pu were denied assistance of legal counsel. (See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 17 and 18 and the rule in ICCPR article 14 (3) (d) which constitutes customary international law).

20. The evidence relied upon by the court, and the form of the judgment with the limited reasons given, constitute violations of the right to be presumed innocent until proved guilty according to law. The presumption of innocence is guaranteed by article 11 the Universal Declaration of Human Rights and established as one of the fair trial rights of customary international law as it is also provided for in Article 14 of the ICCPR. Another violation is constituted by holding the trial in private without the justification of absolute necessity (See article 10 of the Universal Declaration of Human Rights which guarantees the right 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).

21. The Working Group notes that the detention and conviction was in response to the exercise of their freedom of opinion, expression and political free speech, and in violation of article 19 of the Universal Declaration of Human Rights. This requires a particularly vigilant review of the application of fair trial guarantees, and even more so, given that the domestic system seems to fail, as in the present case.

22. This also applies to the role of Dr. Htut and Mr. Pu as human rights defenders. They have been detained and convicted for alleged acts of informing the United Nations about human rights violations.

23. Their prison conditions raise further concerns. The Working Group has received information which gives rise to concerns for Mr. Pu's health. The Working Group reminds the Government, in this case as in previous cases (inter alia, Opinion No. 44/2008) 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.

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

The detention of Dr. Tin Min Htut and Mr. U Nyi Pu is arbitrary, in violation of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights, and in contradiction of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The detention falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

25. The Working Group requests the Government to take the necessary steps to remedy the situation, which are the immediate release of, and an adequate reparation to, Dr Htut and Mr Pu.

26. The Working Group would emphasize that the duty to immediately release Dr. Htut and Mr. Pu will not allow further detention, even if the further actions taken against him should satisfy the international human rights obligations of Myanmar. Furthermore, the duty to provide adequate reparation under article 8 of the Universal Declaration of Human Rights, compare article 9 (5) of the International Covenant on Civil and Political Rights, is based on the arbitrary detention that has taken place and subsequent proceedings or findings in these cannot limit the State's responsibility.

27. The Working Group further requests the Government to seriously consider the possibility of becoming a State party to the International Covenant on Civil and Political Rights.

Adopted on 5 May 2010

## **Opinion No. 5/2010 (Israel)**

### **Communication addressed to the Government on 2 February 2010**

#### **Concerning Messrs. Hamdi Al Ta'mari and Mohamad Baran**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. According to its methods of work, the Working Group forwarded a Communication addressed to the Government on 2 February 2010. The Government has not requested any extension of the time limit. The Working Group regrets that the Government has not replied within the 90-day deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as follows:
5. Mr. **Hamdi al-Ta'mari**, born on 20 August 1992, a Palestinian citizen, student, usually residing in Bethlehem, West Bank, Occupied Palestinian Territory, was first arrested without a warrant on 25 July 2008 at his family home by Israeli soldiers invoking Israeli Military Order No. 1591. He was released without charge on 13 November 2008, but rearrested on 18 December 2008.
6. On 12 March 2008, Mr. Al-Ta'mari's father, Mr. Baran Shahadeh, along with three other men, were killed in Bethlehem by a suspected Israeli undercover unit. At around 4.00 a.m., on 25 July 2008, Mr. Al-Ta'mari heard loud banging on the front door of the family home in Bethlehem. When the door was opened Israeli soldiers said that they were looking for Mr. Al-Ta'mari. The soldiers tied his hands and legs and made him lie on the floor where he remained for around 15 minutes whilst soldiers pointed their weapons at him. He was then blindfolded and placed on the floor of a jeep. His hands were tied so tight that they became swollen. The jeep drove for about two hours during which Mr. Al-Ta'mari was physically and verbally abused by the soldiers. He was taken to Ofer Interrogation and Detention Centre, near Ramallah in the West Bank, where he was further kicked and beaten by soldiers.
7. On 28 July 2008, three days after his arrest, Mr. Al-Ta'mari was taken for interrogation in handcuffs. The interrogator spoke Arabic and accused him of being a member of "Islamic Jihad". Mr. Al-Ta'mari denied the accusations and stated that he was supporting independent members of "Fateh". The interrogator also asserted that military clothes and a weapon were found at his home, the existence of which he denied. There was no lawyer present during the interrogation which lasted for about one hour.
8. Several days later Mr. Al-Ta'mari was informed that he had been given a three month administrative detention order, which was confirmed by the Military Administrative Detention Court. He was released from administrative detention on 13 November 2008 and never charged with any offence. The source notes that membership of a banned

organization and possession of weapons are offences punishable under Israeli Military Order No. 378.

9. At around 2 a.m., on 18 December 2008, Mr. Al-Ta'mari was again arrested, blindfolded, his hands tied, and taken out of the building and put into a truck. About an hour later, Mr. Al-Ta'mari was transferred from the truck to a jeep. Half-an-hour later, the jeep arrived at Etzion Interrogation and Detention Centre in the West Bank, where he remained for 15 days before being transferred to Ofer Interrogation and Detention Centre.

10. There, Mr. Al-Ta'mari was interrogated about visitors he had seen after his release, flags on the roof of the building he lives, and about his activities. He explained that the visitors were neighbours and relatives and that he had no connection with the "Islamic Jihad" of which he was accused. The interrogation was conducted in the absence of a lawyer and lasted for about half an hour. This was only the second time Mr. Al-Ta'mari was interrogated.

11. On 28 December 2008, Mr. Al-Ta'mari was taken before the military Military Administrative Detention Court. He was not represented by a lawyer. The judge told him via an interpreter that a four months administrative detention order had been issued against him on the basis of secret information. The Court confirmed this order.

12. On 15 April 2009, Mr. Al-Ta'mari received a third administrative detention order of four months, which was confirmed by the Military Administrative Detention Court.

13. On 14 August 2009, Al-Ta'mari was issued with a fourth administrative detention order by an Israeli military commander, Colonel Ronen Cohen, Deputy Intelligence Central Command, Judea and Samaria District. This order was confirmed by a military court on 20 August 2009. Mr. Al-Ta'mari has not been charged with any offence. However, his latest administrative detention order describes the reason for his detention as follows: "His activity endangering the security of the area and the public."

14. Mr. **Mohammad Baran**, born on 17 October 1990, a Palestinian citizen, student, usually residing at Beit Ummar, Hebron, West Bank, was arrested without a warrant invoking Israeli Military Order 1591 on 1 March 2008 by Israeli soldiers from the ambulance vehicle that was taking him to hospital.

15. On 1 March 2008, Mr. Baran was at home trying to repair a gasoline heater. The heater exploded injuring Mr. Baran's right hand. Mr. Baran's parents immediately took him to the village clinic where a doctor treated him. An ambulance taking Mr. Baran to the hospital was stopped by Israeli soldiers outside the village. The ambulance driver informed the soldiers that he had an urgent case. One of the soldiers then slapped the ambulance driver in the face and struck him with the butt of his rifle. Mr. Baran was placed on a stretcher and moved to a military ambulance. His parents were not permitted to accompany him.

16. Mr. Baran believes he was taken to Hadassa Ein Karim Hospital in Jerusalem. The next morning Mr. Baran was informed by a doctor that he had undergone a long operation and had lost three fingers from his right hand. Mr. Baran spent the next three days in hospital during which time he was tied to the bed, guarded by three soldiers and not permitted to see any visitors.

17. On the third day, two interrogators came to the hospital to interview Mr. Baran. One of the interrogators accused Mr. Baran of preparing a homemade explosive device. Mr. Baran denied this accusation. The interrogator slapped him on the face and shouted at him that he would be placed in solitary confinement unless he confessed. Mr. Baran continued to deny the accusation. The interrogation lasted for approximately one hour.

18. After three days in hospital, Mr. Baran was transferred to Megiddo Prison, inside Israel, where he remained for two days before being transferred to Telmond Compound, also inside Israel. During the next few weeks Mr. Baran was taken back to hospital several times to have his bandages replaced. Mr. Baran reports having been in a lot of pain during this period against which the prison authorities gave him sedatives. Mr. Baran reports that the sedatives he was given only reduced the pain for around half an hour at a time.

19. Around 10 days after his arrest, Mr. Baran was taken to Ofer Military Court where he was informed that he had been issued with a six-month administrative detention order by the military commander. Mr. Baran was informed that there was a "secret file" regarding his activities and an accusation that he was a member of "Islamic Jihad". Mr. Baran's appeal against this decision was rejected by the Military Administrative Appeals Court.

20. Six days before its expiry Mr. Baran was informed of a new order for another six months being issued against him, which was confirmed in court and his appeal being overruled.

21. Mr. Baran was served with a third administrative order for another six months which was confirmed by the court, but on appeal reduced to three months. The courts, however, then confirmed a fourth administrative detention order of three months issued against him two days before the expiry of third order.

22. On or about 26 August 2009, Mr. Baran was informed that he had been issued with a fifth administrative detention order. He has not been charged with any offence. However, during the interrogation in hospital, Mr. Baran was accused of preparing a homemade explosive device, which he denies.

23. The source asserts that the accusations of being a member of a banned political organization and possession of a weapon in the case of Mr. Al-Ta'mari, and of preparing a homemade explosive device in the case of Mr. Mohammad Baran constitute offences under Israeli Military Order No. 378. It submits that if the authorities had evidence supporting these accusations, both could have been charged under military orders and tried in military courts.

24. However, Mr. Al-Ta'mari was interrogated for about half an hour in a manner which would suggest there was a wholly inadequate level of evidence against him. As there is evidence that Mr. Baran was physically abused and threatened during his interrogation, the source suggests that his interrogators knew they had insufficient evidence to secure a conviction in the military courts and therefore needed to obtain a confession. The source maintains that administrative detention must not be used because there is insufficient evidence to support a conviction.

25. Although the administrative detention orders issued by the Israeli military commander are the subject of review and further appeal by a military court, lawyers are not permitted to see the evidence against their clients making this right of review illusory. Further, when Mr. Al-Ta'mari's second administrative detention order was reviewed by the military court on 28 December 2008, he was not represented by counsel.

26. The Working Group transmitted the allegations of the source to the Government of Israel on the 2 February 2010 requesting information about the current situation of Mr. Hamdi Al-Ta'mari and Mr. Mohammad Baran and clarification regarding the legal provisions justifying their detention. On the 26 April 2010 a further letter was sent to the Government informing them that case in question was on the agenda of the fifty-seventh session of the Working Group and a response was required. The Working Group expresses its regrets over the Government's failure to reply within the 90-day deadline, and to note that the Government did not use the opportunity to request an extension of the time limit under section 16 of the Working Group's methods of work.

27. Despite the absence of a response from the Government and based on the information it has received, the Working Group believes itself to be in a position to provide an Opinion as one of the measures provided for in section 17 of its methods of work. It is important to take note that the Working Group has been notified of the release of the detainees but in view of the gravity of the case in hand, decides to render an Opinion.

28. The most glaring human rights violation in the instant cases are the fact that the detainees were children as defined by the United Nations Convention on Rights of the Child (CRC) which ought to have offered a further layer of protection to the detainees rather than further vulnerability.

29. It is difficult to accept that the stringent requirements of “absolute necessity” which “threatens the life of the nation” of article 42 of the Fourth Geneva Convention and article 4 of the International Covenant on Civil and Political Rights have been satisfied in Mr. Al-Ta’ mari’s and Mr. Baran’s case.

30. In addition, both have been arbitrarily denied their right to a fair trial guaranteed by article 40, paragraph 2(b) of the Convention on the Rights of the Child, including to be presumed innocent until proven guilty according to law; to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, and to examine or have examined adverse witnesses. Unlike the fair trial guarantees contained in articles 9 and 14 of the International Covenant on Civil and Political Rights, which may, under limited circumstances, be derogated from, no such derogation is permitted pursuant to the Convention on the Rights of the Child. Further, Mr. Al-Ta’ mari’s and Mr. Baran’s detention violates article 37 (b) of the Convention.

31. Although administrative detention orders issued by military commanders under Israeli Military Order No. 1591 are reviewed by the Military Administrative Detention Court and Military Appeals Court, there are no effective means to challenge such orders. Military tribunals are not independent and impartial. They consist of military personnel who are subject to military discipline and dependent on superiors for promotion. In addition, counsel are not allowed to see the “secret evidence” against their clients, collected by the Israeli Security Agency (ISA).

32. The practice of putting Palestinians under administrative detention orders for months, even years, without ever being informed about the reasons or length of their detention, and the practice of routinely informing them of the extension of their detention only within days of the former order expiring reaches a level of unwarranted cruelty in violation of article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

33. Protective provisions contained in international human rights law must be given greater weight than arguments of *lex specialis* of international humanitarian law given the circumstances in the Occupied Palestinian Territory, which has been under military occupation for 42 years.

34. According to the source, 80 per cent of the Israeli prisons where Palestinian children are detained are located inside Israel, and alleges this to be in contravention of article 76 of the Fourth Geneva Convention which provides that an occupying power must detain residents of an occupied territory inside that territory. A practical consequence of this violation is that it makes family visits more difficult, and in some cases, impossible.

35. The Working Group considers that critical ingredients of the right to a fair trial are missing in the case in hand. From the moment of detention and throughout the periods of deprivation of liberty, the two detainees, Mr. Al-Ta’ mari and Mr. Baran, were denied the fundamental rights contained in articles 7, 9, 10 and 11 of the Universal Declaration of

Human Rights and articles 9 and 14 of the International Covenant of Civil and Political Rights.

36 Not only have both detainees been denied their rights as stated above, they have been in the hands of adjudication forums (Military Courts) of the occupying Israeli forces invoking Military law (Israeli Military Order 1591). The detention orders are issued on the basis of “secret evidence” collected by the Israeli Security Agency (ISA). Neither the detainee nor their lawyers are given access to this secret evidence. Therefore there is no effective means of challenging the detention as required by international law.

37. The practice of serial administrative detention has assumed alarming proportion among states of all denominations and the Working Group has expressed its grave concern of the practice. The cases in hand are illustrative of this predicament where Mr. Al-Ta'mari has undergone four (4) periods of administrative detention (25 July to 13 November 2008); before being arrested again (18 December 2008); a third detention in April 2009 for 4 months and a fourth period of detention starting August 2009. Administrative detention is only permitted in strictly limited circumstances and only if “the security of the State ... make it absolutely necessary” and only in accordance with “regular procedure” (arts. 42 and 78 of the Fourth Geneva Convention (1949) and art. 4 of the ICCPR). Furthermore, article 37(b) of the Convention on the Rights of the Child provides that “(No) child should be deprived of his or her liberty arbitrarily and detention should only be used as a last resort for the shortest possible time”.

38. The case of Mr. Baran is equally replete with violations of a number of fundamental human rights under national and international human rights law. He too was served with four administrative detention orders and has not been formally charged with any offence except accusations that have not been thus far substantiated through evidence. It is important to make the point that where an initial period of administrative detention runs out without formal charges being brought against the detainee and a further period of detention is demanded by the detaining authorities, the threshold of proof for requiring this further detention becomes much higher. The judicial forum before which such subsequent detention is sought is thus obligated under international human rights law to employ stricter rules of determination for arriving at a decision in this regard.

39. The Working Group thus renders the following opinion: the detention of Mr. Al-Ta'mari and Mr. Baran is arbitrary and falls within categories I, II and III of the categories applied by the Working Group.

40. Consequent upon this Opinion being rendered, the Working Group urges the Government of Israel to release Mr. Al-Ta'mari and Mr. Baran forthwith.

41 It also urges the Government of Israel to remedy the situation of Mr. Al-Ta'mari and Mr. Baran, including as minors (initially) held in arbitrary detention, and including reparation for their time in detention.

Adopted on 6 May 2010.

## **Opinion No. 6/2010 (Viet Nam)**

### **Communication addressed to the Government on 29 May 2009**

#### **Concerning Father Thadeus Nguyen Van Ly**

#### **The State is a Party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)

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. 18/2009)
4. The case summarized concerns Father Thadeus Nguyen Van Ly, and was reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.
5. Father Thadeus Nguyen Van Ly, born 14 May 1946, is a citizen of Viet Nam, and a Roman Catholic priest. He was arrested at his home on 18 February 2007 by police forces of the city of Hue who came to his home for the purpose of what was communicated to him as an “administrative check”. The authorities confiscated a significant number of computers, printers, cell phones, cell phone SIM cards and documents. Father Ly was effectively placed under strict house arrest.
6. On 24 February 2007, upon a decision of the Chairman of the Thua Thien-Hue Provincial People’s Committee, he was transferred to the rural town of Ben Cui, Phong Dien District, Thua Thien-Hue Province. The Hue Police concluded that there was evidence of criminal activity and transferred Father Ly’s file and material evidence to the Office of Security and Investigation of the Thua Thien-Hue Province Police to investigate and prosecute the case. The authorities also transferred Father Ly to a small church in Ben Cui, approximately 20 km from Hue, where he was held in administrative detention until his trial on 30 March 2007.
7. On 15 March 2007, the President of the People’s Procuracy of Thua Thien-Hue Province formally charged and indicted Father Ly with disseminating propaganda against the Government, in particular “making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam”, in violation of article 88, paragraph 1 (c), of the Vietnamese Penal Code.
8. Four other pro-democracy activists who had helped Father Ly prepare and disseminate information about the “Vietnam Progression Party” and “Bloc 8406” were indicted at the same time as Father Ly. However, the conclusions of the Police Investigation referred to Father Ly as the “ringleader,” noting that “it is necessary to prosecute the ringleader (Nguyen Van Ly) strictly and clearly in the eyes of the law”. They contain only a concluding statement that Father Ly’s actions “have caused serious detrimental effects to the local political and social stability and have caused harm to national security”.
9. On March 30, 2007, five weeks after his arrest and a mere two weeks after being formally charged, Father Ly was put on trial in the Thua Thien-Hue Provincial People’s Court, which lasted four hours. After 20 minutes of deliberation, Chief Judge Bui Quoc Hiep sentenced Father Ly to prison for eight years pursuant to article 88 of the Vietnamese Penal Code for “carrying out propaganda against the Socialist Republic of Vietnam”, followed by five years of house arrest. Article 88, paragraph 1, of the Penal Code provides:

Those who commit one of the following acts against the Socialist Republic of Vietnam shall be sentenced to between three and twelve years of imprisonment:

  - a) Propagating against, distorting and/or defaming the people’s administration;
  - b) Propagating psychological warfare and spreading fabricated news in order to foment confusion among people;
  - c) Making, storing and/or circulating documents and/or cultural products with contents against the Socialist Republic of Vietnam.

10. Father Ly was convicted of the following acts:

(a) Holding interviews with overseas anticommunist radio stations and newspapers, in which he maligned the Government of Viet Nam and distorted the truth about the policies of the CPV and the Government;

(b) Purchasing equipment and tools to collect, compose, edit, and disseminate propaganda against the Government of Viet Nam;

(c) Collecting, composing, printing, storing, and disseminating materials and articles maligning the leadership and Government of Viet Nam, misrepresenting the state of religious freedom in Vietnam, and distorting the policies and laws of the Government, with the intent to undermine the Government of Vietnam;

(d) Inducing others to join “Bloc 8406,” form the “Vietnam Progression Party,” and form the “Lac Hong Coalition” in order to amass a political force opposing the Government of Vietnam;

(e) Inducing others to assist him in collecting, composing, editing, and disseminating propaganda maligning the Government of Viet Nam; and

(f) Encouraging others to boycott the 2007 National Assembly elections of the Government of Viet Nam.

11. Father Ly was refused access to counsel, both before and during his trial, and he was precluded from presenting any form of defence. He was not permitted to make any statements in his own defence or examine adverse witnesses. The police led Father Ly into the courtroom in handcuffs and kept him handcuffed throughout the trial. At one point during his trial, Father Ly shouted “Down with the Communist Party of Viet Nam!” A police officer immediately turned off Father Ly’s microphone, covered his mouth, and hustled him out of the courtroom. Father Ly was removed to a separate room where he listened to the trial over a loudspeaker. Later, he was brought back into the courtroom but he was only permitted to answer “Yes.” or “No.” to questions. When he shouted “Viet Nam practises the law of the jungle”, he was once again removed from the courtroom.

12. The authorities allowed a few diplomats and international journalists to observe the trial. However, they were permitted inside the courtroom only during the prosecutor’s opening statement and the judge’s verdict; for the rest of the trial, they were taken to a separate room to watch the trial via closed-circuit television. Moreover, neither Father Ly’s family nor any religious representatives were permitted to be present in the courtroom. When Father Ly’s sentence was handed down and announced he was not present in the courtroom.

13. According to the source, since his conviction and sentencing on 30 March 2007, Father Ly has been imprisoned in solitary confinement in a small cell at Ba Sao Prison in Phu Ly District, Ha Nam Province, which is in northern Viet Nam, approximately 400 kilometres from his home in Hue province. While he is provided with enough food to survive, he does not have a bed or separate bathroom. He does not have books, television, or radio, and he has been denied access to a Bible because prison officials fear he would convert other inmates to Christianity.

14. The Government allows, according to the source, Father Ly’s family to visit once every two months for between 30 minutes to one hour. It takes his family six days to travel from their home to his prison. During a visit on 14 November 2008, when his relatives gave Father Ly a pamphlet written by the President of the Council of Vietnamese Bishops, the prison guard overseeing the visit took the document and made a copy of it.

15. On 12 July 2009, Father Ly suffered a stroke, possibly due to inadequate medical attention, which left the right side of his body completely paralysed. On 12 May 2009,

Father Ly experienced acute abdominal pain and bleeding. Three days later, Father Ly fell and hit his head on the floor, unable to call out for help. He lay on the floor of his prison cell for a period of time before a guard noticed him and took him to the prison clinic where they gave him some medicine of an unknown kind and sent him back to solitary confinement. On 14 July 2009, Father Ly wrote a letter to his family informing them of his medical emergency, writing with his left hand. The prison officials delivered the letter to his family only on 21 August 2009. In the letter, Father Ly asked his family to send him medication to alleviate his high blood pressure. The source raises grave concerns that he might not receive the level of care his conditions requires.

16. The source, argues that the deprivation of liberty of Father Ly is in violation of international human rights protection and also violates article 69 of the Vietnamese Constitution, which guarantees the right to freedom of opinion and speech and association.

17. The source also argues that article 88 of the Vietnamese Penal Code fails to meet the limitation requirements of the aforementioned articles as being too broad and vague and not distinguishing between armed and violent acts, therefore being subject to manipulation for political reasons.

18. The manner in which his trial was conducted also violates article 132 of the Constitution of Viet Nam, which provides that “the right of the defendant to be defended is guaranteed; ...the defendant can either conduct his own defense or ask someone else to do it”.

19. The source reports that Father Ly is a peaceful advocate for democracy and religious freedom. As an adult, Father Ly committed himself to the Roman Catholic faith and became an ordained priest in 1974. In attempting to practice his religion, Father Ly discovered many legal and political barriers to free worship in Viet Nam. The Government of Viet Nam has repeatedly arrested, harassed, and jailed Father Ly for his advocacy of religious freedom. From 1977 to 1978 he was detained without charge or trial for distributing statements critical of the Government’s treatment of Catholics. He subsequently spent nine more years in prison, deportation, and forced-labour camps between May 1983 and July 1992 as punishment for his advocacy on behalf of religious groups. He was imprisoned once again from October 2001 to February 2005 for advocating religious freedom in Viet Nam.

20. On 1 February 2005, Father Ly was released from prison and his prison sentence was commuted. However, he was still required to complete his sentence of five years administrative probation at his parish in Hue. In 2006, Father Ly became a founding member and representative of a pro-democracy organization called “Bloc 8406”, named after the date (8 April 2006) on which the group released its mission statement. At its inception in April 2006, “Bloc 8406” consisted of 116 Vietnamese citizens who supported a multi-party political system, freedom of religion, freedom of association, and respect for basic human rights in Vietnam. After only one month, the group had grown to 424 citizens. “Bloc 8406” implored people both inside and outside Vietnam for support and assistance in bringing democracy to Vietnam. As an Interim Representative of “Bloc 8406”, Father Ly signed his own name to several public documents that the group released. Father Ly also founded and served as editor of two underground publications, “*Tu Do Ngon LuanI*” (“Freedom of Expression”) and “*Tu Do Dan Chu*” (“Freedom and Democracy”), whose goal was to advocate democracy and change in Vietnam. Furthermore, Father Ly was a founding member of the “Vietnam Progression Party”, an alternative, non-communist party that seeks ties with foreign democracy activists and began to operate publicly in Vietnam on 8 September 2006.

21. The Working Group wishes to express its regrets over the Government’s failure to reply within the 90-day deadline, and to note that the Government did not use the

opportunity to request an extension of the time limit under section 16 of the Working Group's Methods of Work. The Working Group stated in its two communications that it would appreciate it if the Government could provide information about the current situation of Father Ly and provide clarification about the legal provisions justifying their continued detention.

22. The Working Group is in a position to issue an Opinion, on the basis of all the information it has obtained, on the detention of Father Ly, according to paragraph 17 of its Methods of Work.

23. The Working Group recalls that Father Ly has previously been the subject of its Opinion 20/2001 (Vietnam) and of urgent appeals concerning his health and conditions in prison. 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.

24. In the present case, the Working Group holds that Father Ly was denied a fair trial by being refused access to legal counsel, both before and during his trial, and precluded from presenting any form of defence, which constitutes a clear breach of Viet Nam's international human rights obligations (see art. 14, para. 3 (d), of the International Covenant on Civil and Political Rights (ICCPR) and Principles 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In addition, he was not permitted to make any statements in his own defence or examine adverse witnesses.

25. The Working Group notes that neither Father Ly's family nor any religious representative were permitted to be present in the courtroom. When the sentence was handed down and announced, Father Ly was not present in the courtroom.

26. The Working Group wishes also point out that the detention and conviction of Father Ly was in response to the peaceful exercise of his freedom of religion and freedom of expression and political speech. According to the source, he is a peaceful advocate for democracy and religious freedom, a view which has not been denied by the Government. Given the reasons for his arrest and detention, a particularly correct observance of fair trial guarantees for him during his judicial process was necessary, and even more, attending to the compliance and concordance of the domestic legal system with international human rights law principles, standards and rules.

27. The Working Group will also point out that the requirement of proportionality on the restrictions of fundamental freedoms gives the States an obligation to provide clear and precise reasons for such restrictions, and to show that due and balanced consideration of the relevant interests took place.

28. The Working Group renders the following Opinion:

(a) The detention of Father Thadeus Nguyen Van Ly is arbitrary, in violation of articles 9, 10, 11, 18, 19 and 20 of the Universal Declaration of Human Rights, and articles 14, 18, 19 and 22 of the International Covenant of Civil and Political Rights. The detention falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group;

(b) The Working Group requests the Government of the Socialist Republic of Viet Nam to take the necessary steps to immediately remedy the situation, which are the immediate release of, and to provide adequate reparation to, Father Thadeus Nguyen Van Ly;

(c) The Working Group wishes to emphasize that the duty to immediately release Father Ly will not allow any further detention for the same reasons, even if that eventual further actions taken against him should satisfy the international human rights obligations of the Socialist Republic of Viet Nam;

(d) Furthermore, the duty to provide adequate reparation under article 8 of the Universal Declaration of Human Rights, in relation to article 9, paragraph 5, of the International Covenant on Civil and Political Rights, is based on the arbitrary detention that has taken place. Consequently, any subsequent proceedings or findings in this case and concerning this person can not limit the State's responsibility.

Adopted on 6 May 2010.

## **Opinion No. 7/2010 (Pakistan)**

### **Communication addressed to the Government on 8 June 2009**

**Concerning Mr. Mubashar Ahmed, Mr. Muhammad Irfan, Mr. Tahir Imran, Mr. Tahir Mehmood and Mr. Naseer Ahmed**

#### **The State is a Party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group notes with appreciation the information received from the Government that the above-mentioned persons are not longer in detention.
3. The response from the Government was transmitted to the source, which did not communicate any comments.
4. Having examined the available information and without prejudging the nature of the detention, the Working Group decides to file the cases of Mr. Mubashar Ahmed; Mr. Muhammad Irfan; Mr. Tahir Imran; Mr. Tahir Mehmood and Mr. Naseer Ahmed under the terms of paragraph 17 (a) of its Methods of Work.

Adopted on 6 May 2010

## **Opinion No. 8/2010 (Islamic Republic of Iran)**

### **Communication addressed to the Government on 8 January 2010**

**Concerning Mr. Isa Saharkhiz**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group regrets that the Government has not replied to the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The Working Group would have welcomed the cooperation of the Government. It has not responded to the allegations transmitted to it in spite of the fact of having been requested to do it in two occasions, on 8 January and 26 April 2010. The Government has also not requested an extension of the delay to reply, as established in paragraph 16 of the

Working Group's Methods of Work. In the absence of any information from the Government, the Working Group believes that it is in position to render an Opinion on the facts and circumstances of the case, since they have not been challenged by the Government.

5. According to the source, Mr. Isa Saharkhiz, an Iranian citizen, born in Abadan, Bushehr Province; 56 years old, is a political figure, a well-known journalist and a former editor for two prestigious news publications, the monthly magazine *Aftab*, and newspaper *Akhbar-e-Eghtesad*. His usual place of residence is Tehran.

6. Mr. Saharkhiz studied economics at the University of Tehran before moving to the United States of America, where he worked as the Chief Manager of the Islamic Republic News Agency (IRNA). In 1997, he was appointed Head of the Media Department at the Ministry of Culture and Islamic Guidance. According to the source, his term at the Ministry was dubbed "the spring of journalism". Mr. Saharkhiz eliminated the informal system of prepublication screening of certain periodicals, instead holding all publishers accountable for unlawful publications, or defamation, after their circulation. He also contributed to changing the law so that violations would be subjected to a public trial before a special press jury, rather than unofficial sanctions by State security services. These reforms were designed to prevent arbitrary State encroachment and to enhance press freedoms.

7. In 2006, Mr. Saharkhiz was previously detained for having given a speech praising the 1999 Iranian student movement of anti-government demonstrations which followed to the closure of *Salam* newspaper. Later Mr. Saharkhiz co-founded the Iran Association for the Defense of Press Freedom, a non-profit organization dedicated to the protection and promotion of a free press in the country. On 28 August 2008, he was elected to the executive committee for Iran's National Peace Council, an organization of leading civil society activists, lawyers, human rights defenders and artists. During the tenth presidential elections, he campaigned on behalf of candidate Karroubi, a former Speaker of the Majlis, acting as his foreign media campaign manager.

8. It was reported that Mr. Saharkhiz was arrested on 4 July 2009 in northern Iran by plainclothes members of the police and/or the Sepah-e-Pasdaran, the Revolutionary Guard Corps. Involvement may have also included the Basij militia. During the arrest, one of the agents struck Mr. Saharkhiz's chest with his knee, breaking two of his ribs. Mr. Saharkhiz was taken to an unknown destination and placed in an undisclosed detention centre. Mr. Saharkhiz was not informed of the charges against him and the legal basis of his detention.

9. Mr. Saharkhiz's arrest came two days after he printed articles criticizing the Iranian Government. He has on multiple occasions given speeches on the importance of the freedom of the press and of human rights, often criticizing the Government. According to the source, he was arrested on account of participating in Karroubi's political campaign for the recent presidential elections and for speaking out against the Government.

10. On 20 June 2009, his Tehran house was raided by four plainclothes agents. After the officers threatened to break the door, Mr. Saharkhiz's daughter, Mahtab, agreed to allow them in. The agents searched the house and seized Mr. Saharkhiz's computer and election campaign materials. At the time, Mr. Saharkhiz was travelling in northern Iran.

11. Mr. Saharkhiz was placed in solitary confinement for 62 days. During that time, he was prevented from obtaining access to an attorney and allowed only one communication with his family, on 23 July 2009. At that conversation, he informed his family that the agents refused to tell him what his offences were. He was interrogated numerous times without the assistance of counsel. Mr. Saharkhiz lost over 20 kilos and was reportedly subjected to police brutality. Later, he was transferred to Section 209 of Evin prison in Tehran under the surveillance of the Revolutionary Guard. Section 209 is a part of Evin prison which is run by the Ministry of Intelligence and not by the Ministry of Justice.

12. Two months after his arrest, Mr. Saharkhiz was authorized to consult with an attorney. However, all communications with his attorney are monitored by the Revolutionary Guard and access is frequently denied.

13. According to the source, Mr. Saharkhiz's detention is contrary to the Iranian law, particularly article 32 of the Constitution of the Islamic Republic of Iran, which prohibits arbitrary arrest; article 35 of the Constitution, which establishes the right to legal counsel; article 128 of the Penal Procedure Code; and article 3 of the 2004 Act on Protection of Citizen's Rights and Respect to Legitimate Freedom.

*Working Group's deliberation*

14. It has not been refuted that Mr. Saharkhiz is a widely known political figure and a journalist. He has occupied very important administrative and managerial positions which allowed him to make his contribution to the consolidation of a free press in Iran.

15. It has not been discussed that Mr. Saharkhiz has suffered in the past several arrests and detentions in virtue of articles written for him; for his positions concerning the freedom of opinion and expression and the freedom of the press in the country, as well as in reason of the expression of his political views.

16. Following his last arrest in July 2009, he was held in detention in a secret section of Evin Prison. He was not informed about the charges brought against him nor about the legal basis justifying his arrest and detention.

17. The Working Group notes that Mr. Saharkhiz's arrest took place two days after the publication of an article written for him which was reportedly considered to be critic of the Government of Iran.

18. According to the source, Mr. Saharkhiz was held in incommunicado detention for 62 days following his arrest. During that period, he had no access to a defence lawyer and was authorized to see only once his family, on 23 July 2009. In that occasion, he advised his relatives that he had not been informed about the reasons for his arrest nor about the charges brought against him. These allegations have not been denied.

19. The analysis of the information submitted by the source also indicates that Mr. Saharkhiz has not been brought before a judge or a judicial authority and has not been able to contest the lawfulness of his detention. His right to a fair trial has been violated by the authorities by refusing to bring any charges against him and do not allow that he could be tried in a court of law.

20. On the basis of the allegations, not challenged by the Government, the Working Group considers that Mr. Saharkhiz's detention is characterized by the following elements:

(a) Since July 2009, Mr. Saharkhiz is being persecuted without any precise and concrete reason, cause or motive, duly notified to him. He is consequently incapable of defending himself;

(b) Given the absence of notification of any reason for his arrest, it is possible to consider that Mr. Saharkhiz is being persecuted in virtue of his professional, political or religious ideas, particularly taken into account that his last apprehension took place after publishing an article contrary to the Government's views;

(c) Mr. Saharkhiz has not been notified of any charges or accusations brought against him. He has not been formally charged with any offence;

(d) He has not been brought before a judge or a judicial authority. This fact has impeded him to challenge the lawfulness of his detention before a judicial authority;

(e) Mr. Saharkhiz has not had recourse to the assistance of a defence lawyer. He has been unable to prepare his defence in adequate conditions.

21. The Working Group notes that the authorities have not informed the detainee of the charges brought against him, have denied him access to a defence lawyer and have failed to bring him before a judge.

22. In the absence of a legal notification of the reasons for Mr. Saharkhiz's arrest and of the charges brought against him, and considering his past professional and political activities, it is possible to consider that Mr. Saharkhiz's arrest and detention are motivated in his exercise of the rights to free opinion and expression and to take part in the conduct of public affairs of his country.

23. The authorities exacerbated these violations by failing to provide him with a prompt hearing; with access to legal counsel; information about the charges brought against him; release pending trial and a fair trial. In addition, the authorities have failed to afford Mr. Saharkhiz the right of habeas corpus. His detention without trial also violates his right to be presumed innocent.

24. The Working Group considers that Mr. Saharkhiz's arrest and detention violates rights and fundamental freedoms established in articles 9, 10, 11, 18, 19 and 21 of the Universal Declaration of Human Rights and, *inter alia*, articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, of which the Islamic Republic of Iran is a State Party.

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

The deprivation of liberty of Mr. Isa Saharkhiz is arbitrary and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

26. Having found the detention of Mr. Isa Saharkhiz to be arbitrary, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Saharkhiz, and in particular:

- (a) To order his immediate an unconditional release;
- (b) To guarantee him a fair trial according to international standards;
- (c) To consider the eventual reparation to be granted to Mr. Saharkhiz for the no respect of the legal norms in his arrest and detention.

Adopted on 6 May 2010

## **Opinion No. 9/2010 (Israel)**

### **Communication addressed to the Government on 1 February 2010**

#### **Concerning Mr. Wa'ad al-Hidmy**

#### **The State is a Party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. According to its Methods of Work, the Working Group forwarded a communication to the Government on 29 May 2009. A reminder was also sent. The Government has not requested any extension of the time limit. The Working Group regrets that the Government has not replied within the 90-days deadline.

3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case was reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.
5. Mr Wa'ad al-Hidmy, born on 24 May 1991, is a pupil and a Palestinian resident at Surif Village, Hebron, West Bank, Occupied Palestinian Territory. He was arrested on 28 April 2008 by Israeli soldiers. The arrest took place at his family home in the village of Surif, near Hebron, West Bank.
6. According to the source, Israeli soldiers came to Mr. Al-Hidmy's home during the night and took him without informing him of the reasons for his arrest. Mr. Al-Hidmy was blindfolded, placed in a military vehicle, and told to "shut up."
7. Mr. Al-Hidmy was taken to the Israeli settlement of Karmi Zur in the West Bank, and later held at the Etzion Interrogation Centre, near Bethlehem in the West Bank, with other detainees in a room. Mr. Al-Hidmy was later interrogated for five minutes at Ofer Prison and accused of participation in demonstrations organized by "Islamic Jihad", an organization banned by the Israeli authorities, which he denied.
8. On 6 May 2008, still at Ofer Prison, Mr. Al-Hidmy received a document in Hebrew and was informed by the prison officer that it was an administrative detention order for a duration of six months. The source underlines that Mr. Al-Hidmy was taken back since he was expecting to be released as he had not confessed to any wrongdoing and was innocent. Two days later the Military Administrative Detention Court reduced the order from six months to four. The Military Administrative Detention Appeals Court rejected Mr. Al-Hidmy's appeal.
9. After this, Mr. Al-Hidmy has been served with a series of administrative orders extending his detention.
10. On 27 August 2008, three days before the expiry of the first order, Mr. Al-Hidmy received another order of four months, which upon review was reduced by the Military Administrative Detention Court to three months and upheld on appeal by the Military Administrative Detention Appeals Court.
11. On 26 November 2008, Mr. Al-Hidmy was issued with a third administrative detention order issued by the military commander for a duration of further four months, which was not reduced by the courts.
12. On 26 March 2009, after 11 months, Mr. Al-Hidmy received a fourth order which was reduced by the Military Administrative Detention Court to three months.
13. On 21 June 2009, Mr. Al-Hidmy was served with a fifth administrative detention order of three months.
14. On 24 September 2009, Mr. Al-Hidmy was issued with his sixth administrative detention order by an Israeli military commander in the West Bank. The order was reviewed and confirmed by an Israeli military court on the same day.
15. Finally, according to the source, Mr. Al-Hidmy was allowed to see his parents for the first time on 14 June 2009. Until this time only his younger siblings had been allowed to visit him. He has never been clearly informed about any accusations against him.
16. The Working Group wishes to express its regrets over the Government's failure to reply within the 90-day deadline, and to note that the Government did not use the opportunity to request an extension of the time limit under section 16 of the Working Group's Methods of Work. The Working Group stated in its two communications that it would appreciate the Government providing information about the current situation of Mr. Al-Hidmy and clarification about the legal provisions justifying his continued detention.

17. The Working Group is in a position to provide an Opinion, on the basis of all the information it has obtained on the detention of Mr Al-Hidmy.

18. The Working Group notes that Israel has ratified the International Covenant on Civil and Political Rights (ICCPR), and that it has derogated from its obligations under article 9. The Working Group wishes to stress that the right to a fair trial is a fundamental right and that at its core is non-derogable. Any derogation must be subjected to the limitations that follow from the requirements of the principle of proportionality.

19. The first issue to consider is whether the right to a court hearing apply in this case. International human rights law requires the revision by a judicial court of the legality and the lawfulness of the detention, and that this hearing must occur promptly (see art. 9 of the Universal Declaration of Human Rights; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11; and article 9 (3) of the ICCPR, which should be considered as customary international law and with a core which is non-derogable).

20. The Working Group recalls the statements and observations of the Human Rights Committee, including its General Comment No. 29 and its concluding observations on reports submitted by Israel (see CCPR/C/79/Add.93 of 1998 and CCPR/CO/78/ISR of 2003).

21. In the latter concluding observations, the Human Rights Committee establishes in sub-section D titled "Principal subjects of concern and recommendations", that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including its article 4 which covers situations of public emergency that threaten the life of the nation.

22. The Human Rights Committee states: "Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law".

23. In paragraph 12, the Human Rights Committee welcomes the State party's decision to review the need to maintain the declared state of emergency and to prolong it on a yearly rather than an indefinite basis. However, the Committee "remains concerned about the sweeping nature of measures during the state of emergency, that appear to derogate from Covenant provisions other than article 9, derogation from which was notified by the State party upon ratification. In the Committee's opinion, these derogations extend beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights (e.g. articles 12, paragraph 3; 19, paragraph 3 and; 21, paragraph 3). As to measures derogating from article 9 itself, the Committee is concerned about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclose of full reasons of the detention. These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively than what in the Committee's view is permissible pursuant to article 4.

24. In the present case, the detention is a result of the exercise of the freedom to opinion and expression; of political free speech, and a prima facie violation of article 19 of the Universal Declaration of Human Rights and article 19 of the ICCPR. This requires a

particularly vigilant review of the fair trial guarantees, and even more so, given the domestic system compliance with international human rights standards.

25. The Working Group will point out that the detention of a teenager for two years based simply on accusations of having participated in demonstrations by an organization banned by the Israeli authorities, seems to be disproportionate in relation to any public emergency.

26. International humanitarian law cannot be used to produce legal black holes where individuals are denied the protection of both international human rights law and international humanitarian law.

27. The Working Group has also reviewed the relevant obligations of Israel under the Convention of the Rights of the Child. Mr Wa'ad al-Hidmy was under 18 when he was detained.

28. The Committee on the Rights of the Child in its concluding observations on Israel (See CRC/C/15/Add.195, paras. 62 and 63 of 2002 and in the report CRC/C/OPAC/ISR/CO/1 on consideration of reports submitted by Israel under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, of 2010) states the following:

## II. General measures of implementation

### Non-discrimination

The Committee is concerned that Israeli legislation continues to discriminate in the definition of the child between Israeli children (18 years) and Palestinian children in the occupied Palestinian territory (16 years) according to Military Order No. 132.

The Committee reiterates its recommendation that the State party rescind the provision of Military Order No. 132 concerning the definition of the child and ensure that its legislation.

The Committee expresses concern that provisions in Military Orders (specifically no. 378 and 1591) continue to be in violation of international standards on the administration of juvenile justice and the right to a fair trial. The Committee furthermore notes with concern information regarding attempts to incorporate juvenile justice standards within military courts.

The Committee is gravely concerned over reports that more than 2 000 children, some as young as twelve, have been charged with security offenses between 2005 and 2009, held without charge for up to 8 days and prosecuted by military courts. The Committee is particularly concerned that children charged with security offences are subjected to prolonged period of solitary confinement and abuse in inhumane and degrading conditions, that legal representation and interpretation assistance is inadequate and that family visits are not possible as relatives are denied entry to Israel. The Committee is disturbed over information indicating that children have been subjected to administrative detention orders for renewable periods of up to six months. Finally, the Committee regrets the insufficient information provided by the State party on the above concerns.

Para 11 The Committee urges the State party to:

(a) Take prompt measures to comply with the fundamental principles of proportionality and distinction enshrined in humanitarian law, including the Fourth Geneva Convention of 1949, which set out the minimum standards for the protection of civilians in armed conflict.

29. Accordingly, the Working Group renders the following Opinion:

The detention of Mr Wa'ad al-Hidmy is arbitrary, being in violation of articles 9, 10, 11, and 19 of the Universal Declaration of Human Rights, and articles 14 and 19 of the International Covenant of Civil and Political Rights. His detention falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

30. The Working Group requests the Government to take the necessary steps to remedy the situation, which are the immediate release of, and adequate reparation to, Mr Wa'ad al-Hidmy.

Adopted on 7 May 2010

## **Opinion No. 10/2010 (Singapore)**

### **Communication addressed to the Government on 11 January 2010**

#### **Concerning: Dr. Chee Siok Chin**

#### **The State has not ratified the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. According to its Methods of Work, the Working Group forwarded a communication to the Government on 11 January 2010. The Working Group conveys its appreciation to the Government for having replied within the 90-days deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case was reported by the source to the Working Group on Arbitrary Detention as follows:
  5. Dr. Chee Siok Chin, born on 5 February 1966, citizen of Singapore; a human rights defender, pro-democracy activist and a leader of Singapore Democratic Party (SDP); usually residing at 2A Jalan Gelenggang, Singapore 578187; was arrested on 10 September 2006 in the vicinity of Suntec City in downtown Singapore, at or near the entrance of the City Hall MRT Station outside Raffles City Shopping Centre, North Bridge Road, and near the venue for the World Bank-International Monetary Fund (WB-IMF) meeting, which was held between 14 and 20 September 2006. She was arrested together with five other flyer distributors, namely Mr. Gandhi Ambalam, Dr. Chee Soon Juan, Mr. Jeffrey George, Ms. Hakirat Kaur and Mr. Charles Tan.
6. The flyers announced the "Empower Singaporeans March and Rally" that was to be held the following week on 16 September 2006. The forces carrying out the arrest were officers of the Singapore Police Force. They did not show Dr. Chee Siok Chin and the five other flyer distributors the arrest warrant or decision to arrest that had been issued by unknown authorities at the Command Post of the Singapore Police Force.
7. At trial, arresting officers denied knowledge of what offence Dr. Chee Siok Chin and the other flyer distributors were committing at the time of their arrest. Dr. Chee Siok Chin was detained on 4 January 2010 under the orders of Singapore District Judge Ch'ng Lye Beng. She was detained at the Changi Women's Prison, 10 Tanah Merah Besar Road, Singapore 498834.
8. It is stated by the source that the District Judge found Dr. Chee Siok Chin, together with Mr. Gandhi Ambalam and Dr. Chee Soon Juan, guilty of distributing pamphlets criticizing the Government of Singapore led by the People's Action Party (PAP) without a permit and fined the three Singapore Democratic Party (SDP) leaders the maximum amount

of S\$ 1,000 each or one week's jail in default. The other three people arrested, Mr. George, Ms. Kaur and Mr. Tan, had earlier pleaded guilty and paid S\$ 1,000 fines.

9. The case of Dr. Chee Siok Chin was heard in the District of Court of Singapore, starting on 7 January 2009 and concluding on 18 December 2009. The verdict has been appealed, but Dr. Chee Siok Chin is serving her sentence because she cannot afford to pay the S\$ 1,000 fine, due to the fact that she is bankrupt, and also can point to no precedent established by the Singapore Courts that has ever overturned a verdict against a political dissident for exercising his or her right to challenge policies of the Government. Her appeal was filed simply with the intention to render the Judge to publicly state his reasons for the verdict, as he had declined to advance them after finding the defendants guilty as charged. He did, however, note that most of the evidence presented in the case was irrelevant.

10. At trial, Deputy Public Prosecutor Anandan Bala claimed that the defendants had demonstrated "opposition to the actions of the Government" and were therefore in violation of the law. Prosecutors in Dr. Chee Siok Chin's case took exception with the political wording of the flyer inviting citizens of Singapore to the rally. It read, in pertinent part:

"Tired of being a voiceless 2nd class citizen in your own country without any rights?  
Sick of the Ministers paying themselves millions of dollars while they tell you to keep making sacrifices for Singapore?"

11. The Prosecution, according to the source, also claimed that defendant Dr. Chee Siok Chin did not possess a permit to engage in such activity and that they "ought reasonably to have known" that a permit was required. According to Dr. Chee Siok Chin and the other defendants, "[t]he police state that permits are not required for distribution of flyers by 5 or more persons only if the assembly is for 'commercial causes'".

12. The Charging Document, signed by Mark Chua, Senior Investigation Officer, Central Police Division, on 29 December 2008, inter alia, stated:

"You are charged that you, on the 10th day of September 2006 at about 12:15 pm, in the vicinity of Raffles City Shopping Centre, North Bridge Road, Singapore, which is a public place, together with 5 persons did participate in an assembly intended to demonstrate opposition to the actions of the Government, which assembly you ought reasonably to have known was held without a permit under the Miscellaneous Offences (Public Order & Nuisance) (Assemblies & Processions) Rules, and you have thereby committed an offence punishable under Rule 5 of the said Rules."

13. In the Charging Document reference was made to the Singapore Miscellaneous Offences (Public Order and Nuisance) Act (Chapter 184, section 5 (1)) and the Miscellaneous Offences (Public Order & Nuisance) (Assemblies & Processions) Rules. Rule 5 of the Miscellaneous Offences Rules provides:

"Any person who participates in any assembly or processions in any public road, public place or place of public resort shall, if he knows or ought reasonably to have known that the assembly or processions is held without a permit, or in contravention of any term or condition of a permit, be guilty of an offence and shall be liable on conviction to a fine not exceeding S\$ 1,000."

14. Under the subsidiary legislation of the Miscellaneous Offences Rules a group of five or more persons intending to demonstrate support or opposition to the views of the Government would require a permit:

"2. - (1) Subject to paragraph (2), these Rules shall apply to any assembly or procession of 5 or more persons in any public road, public place or place of public resort intended -

- (a) to demonstrate support for or opposition to the views or actions of any person;
- (b) to publicise a cause or campaign; or
- (c) to mark or commemorate any event.”

15. Dr. Chee Siok Chin was distributing flyers in public to inform citizens of Singapore of a rally to be held by members of the Singapore Democratic Party (SDP) in Hong Lim Park during the forthcoming World Bank-International Monetary Fund meeting.

16. At trial, several arresting officers admitted being uncertain what laws, if any, the flyer distributors had violated at the time of their arrest. During his cross-examination, one of the arresting officers testified that when police confronted the activists and warned them that they were committing an offence, the officers did not know what that offence was. His trial testimony was: “But after checking my law book, I realised that there could be an offence under the Miscellaneous Offences Act .... But I'm not sure”. When asked whether the contents of the flyer he had seized constituted an offence, Sgt. Oh again testified that he was “unsure”. When asked if by using the word “unsure” he meant that he did not know what the offence was, Sgt. Oh said, “Yes”. And when asked whether he was still uncertain, even at trial, about what offence had been committed on the day of the arrest, he answered, “Yes”.

17. Under cross-examination by Dr. Chee Siok Chin, one of Sgt. Oh's fellow officers at the scene of the arrest failed to identify what offence was being committed by any of the flyer distributors when he confronted Ms. Hakirat Kaur. When asked by Dr. Chee Siok Chin under cross-examination why Ms. Kaur was being accused of committing an offence, he answered, “I was under instructions”.

18. Even a commissioned officer assigned to be on guard for signs of “public disorder incidents”, testified that he was unaware what law he was being called to enforce on 10 September 2006. In fact, he told the court that the accused had not committed any offence. During cross-examination, Prosecutor Anandan Bala asked him, “From your observation of the defendants distributing flyers, they have not breached the peace?” He responded, “Correct”. The prosecutor then asked, “As far as you're concerned, they have not committed a crime?” - “Based on my personal opinion, they are not committing an offence,” he answered.

19. Dr. Chee Siok Chin maintains that she cannot reasonably be expected to know that a permit for distributing flyers was required by law when the arresting officers testified in court that they did not even know what offence she and others had committed, even while performing the arrests. The officers also testified to the fact that the distribution of flyers of various kinds and varieties was completely normal and considered lawful in Singapore. The police witnesses repeatedly testified at trial that when Dr. Chee Siok Chin and others were distributing flyers, they were orderly and did not pose any threat of any kind to public order. The source finally reports that, in 2003, the Singapore Minister for Home Affairs publicly stated, “The Government does not authorize protests and demonstrations of any nature”.

20. The source argues that the arrest of Dr. Chee Siok Chin, Mr. Gandhi Ambalam, Dr. Chee Soon Juan, Mr. Jeffrey George, Ms. Hakirat Kaur and Mr. Charles Tan, was arbitrary, and that the detention of Dr. Chee Siok Chin, Mr. Gandhi Ambalam, and Dr. Chee Soon Juan, is arbitrary. It is in contravention of the right to equality before the law and equal protection of the law without any discrimination, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association as guaranteed by articles 7, 19 and 20 of the Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and article

14 of the Singapore Constitution, which states in relevant part that “a) every citizen of Singapore has the right to freedom of speech and expression; b) all citizens of Singapore have the right to assemble peaceably and without arms”.

21. The only limitation placed on the rights of freedom of speech and expression under article 14 (a) of the Constitution grants Parliament the authority to impose by law “such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof .... [and] public order or morality”. The lone restriction placed on the rights to assemble peaceably and without arms under article 14 (b) of the Constitution grants Parliament the authority to curtail freedom of assembly “as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order”. Neither requirement has been met in the present case. The source further submits that a declination of these rights is inconsistent with article 4 of the Singapore Constitution according to which no law may be enforced, including an administrative act, which is “inconsistent with this Constitution” and “shall, to the extent of the inconsistency, be void.” Consequently, the powers exercised by the Singapore Police Force were ultra vires of the Miscellaneous Offences Act, and therefore unconstitutional.

22. The source further argues that the Miscellaneous Offences Rules do not expressly forbid or restrict criticism of the Government of Singapore or its policies; neither does it draw a distinction between “commercial” and “political” causes, an issue raised during the trial: under cross-examination, Officer SI Yeo conceded that nowhere in Rule 2 did it expressly draw a distinction between “commercial” activities and a “march” or “rally”. “The rule does not say,” he finally admitted during the trial. Moreover, according to the source, the case at hand illustrates a practice of discrimination against political dissidents by both the Singapore police and courts, giving the appearance that their actions are unmoored from the Singapore Constitution.

23. The source finally submits that Dr. Chee Siok Chin has also been denied the right to leave Singapore in violation of article 13, paragraph 2, of the Universal Declaration of Human Rights, which asserts that “[e]veryone has the right to leave any country, including his own, and to return to his country.” She has been declared a bankrupt by the Court as a result of her conviction on libel charges brought against her and her brother, Dr. Chee Soon Juan, by Lee Kwan Yew, based on an article “implying corruption in Singapore’s Government that was published in a newsletter in 2006.” The fine was S\$ 416,000. The Government has since refused her permission to leave Singapore, even for academic purposes.

#### *The Government’s response*

24. The Government provided the Working Group with a timely detailed response with attachment of the excerpts from the relevant Singapore law and trial transcripts. It maintains that neither Ms. Chee Siok Chin nor any of the other two persons in her group were arrested or detained on 10 September 2006. They were charged for illegally assembly according to Rule 5 of the Miscellaneous Offences (Public Order and Nuisance; Assemblies and Processions) Rules (MOR). They were not charged for criticizing the Government or for the act of distributing flyers, both of which are not offences in Singapore. They were convicted by the Subordinate Court for illegal assembly and fined with S\$ 1,000 (approximately US \$ 715). Rather to pay the fine, the defendants chose instead on their own accord to serve a one-week term of imprisonment. Subsequently, they voluntarily surrendered themselves to the Court.

25. The Government states that, according to Article 14 of the Constitution, the right to freedom of speech and expression; the right to assemble peacefully and without arms, and the right to form associations, are guaranteed to all citizens, subject to restrictions imposed by Parliament in interest of the security or of public order. This is consistent with article 29

(2) of the Universal Declaration of Human Rights and with resolution 1997/50 of the former Commission on Human Rights.

26. Domestic law provides for certain situations where a person will not be allowed to travel, even if she or he has a valid passport. One of these situations is when the person is an undischarged bankrupt. Under the Bankruptcy Act, Ms. Chee made 13 applications to travel overseas, of which six were approved.

*The source's comments on the Government's response.*

27. The source does not challenge the fact that these persons were convicted in accordance with domestic law. Rather, it contests the constitutionality of the Miscellaneous Offences Rules (MOR). According to the source, the Parliament cannot by law impose restrictions on the rights of freedom of speech and expression, and the right of freedom of assembly. Consequently, the source rejects the Deliberation of the Singapore High Court in that sense.

28. The source confirmed that these persons were living at liberty.

*Disposition*

29. The Working Group recalls that paragraph 15 of resolution 1997/50 of the former Commission on Human Rights requires conformity of a domestic judicial decision with the relevant international standards. The mere conformity with domestic law itself cannot be used to justify a detention of an individual.

30. Taking in consideration that these persons are living at liberty and in conformity with paragraph 17 (a) of its Methods of Work, the Working Group decides to file the case.

Adopted on 7 May 2010

## **Opinion No. 11/2010 (Iraq)**

### **Communication addressed to the Government on 30 September 2009**

**Concerning: Jalil Gholamzadeh Golmarzi Hossein; Azizollah Gholamizadeh; Homaun Dayhim; Mohammad Ali Tatai; Mohammad Reza Ghasemzadeh; Iraq Ahmadi Jihonabadi; Jamshid Kargarfar; Ebrahim Komarizadeh; Javad Gougerdi; Mehrban Balae; Hamid Ashtari; Mehdi Zare; Mehdi Abdorrahimi; Hossein Sarveazad; Hossein Farsy; Ali Tolammy Moghaddam; Seyyed Hossein Ahmadi Djehon Abadi; Karim Mohammadi; Mir Rahim Ghorayshy Danaloo; Asad Shahbazi; Moshfegh Kongi; Ahmad Tajgardan; Jalil Forghany; . Ebrahim Malaipol; Gholam-Reza Khorrami; Mohsen Shojaee; Omid Ghadermazi; Manouchehr Majidi; Hassan Besharati; Ezat Latifi; Mostafa Sanaie; Habib Ghorab; Rahman Haydari; Mohammad Reza Hoshmand; Abbas Mohammadi; Gholamreza Mohammadzadeh; and Abbas Hussein Fili.**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. According to its Methods of Work, the Working Group forwarded a communication to the Government on 30 September 2009. A reminder was also sent. The Government has not requested any extension of the time limit. The Working Group regrets that the Government has not replied within the 90-day deadline.

3. (Same text as paragraph 1 of Opinion No. 18/2009)
4. The case summarized below was reported to the Working Group on Arbitrary Detention as set out in the paragraphs below.
5. The names of the 37 concerned persons were given as follows:
  1. **Jalil Gholamzadeh Golmarzi Hossein**, born on 10 July 1964;
  2. **Azizollah Gholamizadeh**; born on 18 November 1955;
  3. **Homaun Dayhim**, born on 5 May 1956;
  4. **Mohammad Ali Tatai**, born on 2 February 1954;
  5. **Mohammad Reza Ghasemzadeh**, born on 12 December 1956;
  6. **Iraj Ahmadi Jihonabadi**, born on 18 February 1954;
  7. **Jamshid Kargarfar**, born on 2 February 1956;
  8. **Ebrahim Komarizadeh**, born on 18 December 1959;
  9. **Javad Gougerdi**, born on 5 March 1950;
  10. **Mehrban Balae**, born on 10 April 1963;
  11. **Hamid Ashtari**, born on 21 March 1962;
  12. **Mehdi Zare**, born on 25 March 1967;
  13. **Mehdi Abdorrahimi**, born on 10 June 1963;
  14. **Hossein Sarveazad**, born on 22 July 1960;
  15. **Hossein Farsy**, born on 20 June 1964;
  16. **Ali Tolammy Moghaddam**, born on 28 December 1960;
  17. **Seyyed Hossein Ahmadi Djehon Abadi**, born on 15 November 1956;
  18. **Karim Mohammadi**, born on 1 April 1961;
  19. **Mir Rahim Ghorayshy Danaloo**, born on 14 April 1964;
  20. **Asad Shahbazi**, born on 9 September 1958;
  21. **Moshfegh Kongi**, born on 21 March 1963;
  22. **Ahmad Tajgardan**, born on 25 January 1963;
  23. **Jalil Forghany**, born on 13 September 1964;
  24. **Ebrahim Malaipol**, born on 21 March 1967;
  25. **Gholam-Reza Khorrami**, born on 25 November 1955;
  26. **Mohsen Shojaee**, born on 15 April 1963;
  27. **Omid Ghadermazi**, born on 5 March 1968;
  28. **Manouchehr Majidi**, born on 19 February 1977;
  29. **Hassan Besharati**, born on 26 May 1962;
  30. **Ezat Latifi**, born on 1 September 1981;
  31. **Mostafa Sanaie**, born on 27 March 1955;
  32. **Habib Ghorab**, born on 24 March 1952;

33. **Rahman Haydari**, born on 1 December 1962;
34. **Mohammad Reza Hoshmand**, born on 7 December 1957;
35. **Abbas Mohammadi**, born on 20 June 1960;
36. **Gholamreza Mohammadzadeh**, born on 27 December 1953; and
37. **Abbas Hussein Fili**, aged 39.

6. According to the information received, on 28 July 2009, 37 residents of Ashraf camp were arrested by the police when they protested against the establishment of a police station in the camp. At least 32 of them were then transferred to the police station of Al-Khalis, in Diyala Province, north of Baghdad, where they were allegedly beaten by the police with wooden truncheons and metal cables on their chests, heads and hands, which resulted in seven persons being seriously injured (broken arms, hands and fingers; fractures of back and head bones).

7. These persons were later taken to the Iraqi army battalion compound just outside Ashraf, where they were put in a cell of 12 square metres.

8. It was reported that, during a transfer, one of the men, Mr. Ebrahim Malaipol, attempted to enter the back of a pickup truck, but was allegedly hit on his head by an officer of the Scorpion Special Force. As a result, he sustained a head injury and was in urgent need of medical treatment. Overall, at least seven persons were found by medical doctors to be in need of hospitalization, but they remain without adequate medical treatment.

9. It was said that Camp Ashraf has hosted some 3,400 members or supporters of the People's Mojahedeen Organization of Iran (PMOI), an Iranian opposition organization whose members have been resident in Iraq for many years. They were formerly under the protection of the Multi-National Forces-Iraq, enjoying the status of "Protected Persons" under the Fourth Geneva Convention. They rejected participation in, or support for terrorism; delivered all military equipment and weapons under their control or responsibility and assumed the engagement of rejecting violence and obeying the laws of Iraq and relevant United Nations dispositions while residing in Iraqi territory. This status was discontinued following the Status of Forces Agreement (SOFA) between the Governments of Iraq and the United States of America.

10. On 28 July 2009, the police entered the camp allegedly making an excessive use of the force. 11 residents were dead and more than 450 were injured during the violent clashes between the police forces and the residents.

11. On 30 September 2009, the above-mentioned 37 persons continued to be held at a police station in the town of Al-Khalis, in spite of a release order issued by the investigative judge of the Criminal Court of Diyala Province. On 24 August 2009, the investigative judge ordered the release of these persons on the grounds that they had no charges to answer.

12. On 16 September 2009, the investigative judge confirmed his previous ruling of 24 August 2009, ordering the release of these 37 people. The public prosecutor, who had appealed the investigative judge's first ruling, stated to have had no objection to their release without charge. However, the local police authorities in the town of Al-Khalis refused to release the detainees.

13. The Working Group notes that Police authorities have not provided any reason or legal justification for the continued detention of these 37 persons.

14. In addition, fears have been expressed concerning the possibility of a possible forcible return of these Iranian nationals to their country in circumstances where they would be at risk of serious human rights violations, including execution.

15. The Working Group also notes that most of these persons are in a poor state of health and have been denied adequate medical treatment. It expresses its concern for their physical and mental integrity.

16. The Working Group considers that the arrest and detention of the above-mentioned 37 persons is arbitrary according to category III of the categories applicable to the consideration of cases, and contrary to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. These people have been arrested for unknown reasons and continue to be kept in detention despite two express judicial decisions ordering their release.

Adopted on 7 May 2010

## Opinion No. 12/2010 (Myanmar)

### Communication addressed to the Government on 1 February 2010

#### 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. 18/2009)
2. The Working Group regrets that the Government has not replied within the 90-days deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The Working Group on Arbitrary Detention has already adopted five Opinions on **Ms. Aung San Suu Kyi** in 1992 (Opinion No. 8/1992, E/CN.4/1993/24, page 43), 2002 (Opinion No. 2/2002, E/CN.4/2003/8/Add.1, page 50), 2004 (Opinion No. 9/2004, E/CN.4/2005/6/Add.1, page 47), 2007 (Opinion No. 2/2007, A/HRC/7/4/Add.1, page 56), and 2008 (Opinion No. 46/2008, A/HRC/13/30/Add.1), declaring her detention to be arbitrary in contravention of Articles 9, 10, and 19 of the Universal Declaration of Human Rights.
5. Additional information on her case summarized hereinafter were reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.
6. On 14 May 2009, Ms. **Aung San Suu Kyi**, while serving a one-year extension of her term of house arrest at her home at Yangon, arrested by police officers, taken to Insein prison in Yangon, and charged with a new offense under Article 22 of the 1975 State Protection Law (*Pyithu Hluttaw* Law No. 3, 1975). Article 1 describes the State Protection Law as the “Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts”. Article 22 states, that “any person against whom action is taken, who opposes, resists, or disobeys any order passed under this Law shall be liable to imprisonment for a period of three years to five years, or a fine of up to 5,000 kyats, or both”. Ms. Suu Kyi’s house arrest order was originally issued pursuant to articles 7 and 10 of the 1975 State Protection Law, which allow the Government to order, without charge or trial, the detention or restricted residence of anyone it believes is performing or might perform “any act endangering the sovereignty and security of the state or public peace and tranquillity”.
7. The State Protection Law was adopted in accordance with article 167 of Myanmar’s 1974 Constitution, article 167 states: “(a) Laws may be enacted imposing necessary restriction on the rights and freedoms of citizens to prevent in infringements of the

sovereignty and security of the State . . . (b) Such a preventive law shall provide that the restrictive order shall only be made collectively by a body and that the order shall be regularly reviewed and modified as necessary”. The Constitution itself was annulled when the military Government took power in 1988, and further invalidated by the alleged adoption of the new Constitution in the May 2008 referendum.

8. The source recalls that Ms. Suu Kyi was previously arrested in May 2003 and placed under a five-year term of house arrest that was declared to amount to arbitrary detention by the Working Group in its Opinions No. 9/2004 and 2/2007. This term of house arrest was renewed for one year on 28 May 2008, which was declared arbitrary by the Working Group in Opinion No. 46/2008, and expired on 27 May 2009, while Ms. Suu Kyi was under detention at Insein prison. While Ms. Suu Kyi was held there, she was allowed only one brief visit with individuals other than her lawyers, namely three foreign diplomats. Further, when Secretary-General Ban Ki-moon visited Myanmar on 3 and 4 July, he twice asked General Than Shwe to visit Ms. Suu Kyi, and was twice denied.

9. The source reports the factual events that lead to Ms. Suu Kyi’s current regime of detention as follows: On the evening of 3 May 2009, an American citizen, Mr. John Yettaw, covertly entered the grounds of Ms. Suu Kyi’s home. There were conflicting reports about how Mr. Yettaw gained access to the property. Early reports stated that Mr. Yettaw, a 53-year-old unemployed former military serviceman, swam across Inya Lake, which backs up to Ms. Suu Kyi’s house. He reportedly accomplished this swim using homemade flippers and flotation devices. Other reports indicate that Mr. Yettaw told authorities that he “walked through” the lake, possibly along the lakeshore. According to the police complaint, Mr. Yettaw had made a similar swim on 30 November 2008, and left behind a copy of the Book of Mormon after Ms. Suu Kyi refused to see him. Mr. Yettaw later testified that after his November swim, police caught, questioned, and released him.

10. In relation to this occasion, Mr. Yettaw stated that “four or five” policeman saw him crossing the lake en route to Ms. Suu Kyi’s house, and took no action against him other than throwing rocks. At the time, security around Inya Lake and the front of Ms. Suu Kyi’s home was very tight. At approximately 5 a.m. on 4 May, Mr. Yettaw was discovered at the back of Ms. Suu Kyi’s house by Ms. Suu Kyi’s two friends and companions, Ms. Khin Khin Win and Ms. Win Ma Ma, a mother and daughter who are members of her party, the National League for Democracy. Mr. Yettaw, who is reportedly diabetic and suffers from asthma, told Ms. Suu Kyi’s companions that he was exhausted and hungry, and they gave him food and reported his presence to Ms. Suu Kyi.

11. Ms. Suu Kyi then asked Mr. Yettaw to leave, but he refused, stating that he had leg cramps and was exhausted. Ms. Suu Kyi gave Mr. Yettaw “temporary shelter” in a groundfloor room, while she returned to her bedroom upstairs. She later testified that she did not report Mr. Yettaw to the authorities because she did not want to cause either Mr. Yettaw or the guards around her house getting in trouble. Instead, she planned to report Mr. Yettaw’s visit to her doctor, Dr. Tin Myo Win, on his next allowed visit on 7 May. Ms. Suu Kyi had reported Mr. Yettaw’s previous attempted visit in 2008 through Dr. Myo Win, and had faced no questions from the Government authorities at that time.

12. Prior to 4 May, Ms. Suu Kyi had had no contact with Mr. Yettaw, who testified that he had broken into Ms. Suu Kyi’s home because he “had a dream” that Ms. Suu Kyi would be assassinated, and “came to warn her”. On a video shot by Mr. Yettaw inside Ms. Suu Kyi’s home upon his arrival and later shown at trial, Mr. Yettaw said that he had asked Ms. Suu Kyi for permission to take her picture, and she had refused. He stated in the video, “She looks frightened, and I am sorry about this”. Mr. Yettaw remained at Ms. Suu Kyi’s home on 4 May. He initially told Ms. Suu Kyi he would leave that evening under the cover of night, but then pleaded to stay another day due to continuing health problems.

13. At approximately 11:45 p.m. on 5 May, Mr. Yettaw left Ms. Suu Kyi's home. At dawn on 6 May, Mr. Yettaw was pulled from Inya Lake by security forces and arrested. Mr. Yettaw left behind a number of items at Ms. Suu Kyi's house, including two black chadors, two black scarves, colored pencils, and sunglasses. When later asked whether she had accepted these items as gifts, Ms. Suu Kyi stated that she did not know if Mr. Yettaw had forgotten to take the items or left them.

14. After Mr. Yettaw was arrested, police visited Ms. Suu Kyi's home, and appeared to accept her explanation of events. However, on 7 May, security officials denied Dr. Myo Win entry to her house when he arrived for a scheduled visit, and he was later taken from his home and arrested on unspecified charges.

15. On the next day, medical assistant Mr. Pyone Moe Ei was allowed to visit Ms. Suu Kyi at her home, and found that she had been unable to eat for three or four days, and was suffering from dehydration and low blood sugar. She was placed on an intravenous drip. Mr. Pyone Moe Ei was denied permission to visit Ms. Suu Kyi on 9 May, and was not allowed entry to her home for a follow-up visit until 11 May.

16. On the morning of 14 May, Ms. Suu Kyi and her two companions were taken from her home by armed convoy to Yangon's Insein Prison. There, all three were charged with breaching the terms of Ms. Suu Kyi's house arrest in violation of article 22 of the 1975 State Protection Law. Ms. Suu Kyi's companions were also charged under Section 109 of the Penal Code for aiding and abetting another in committing a crime.

17. On 11 August 2009, Ms. Suu Kyi was given a three-year term of imprisonment at hard labor, which was subsequently commuted to 18 months of house arrest. Before the trial Ms. Suu Kyi requested that her lead counsel, U Kyi Win, ask another prominent lawyer in Myanmar, Aung Thein, to join her legal team. On 14 May, Mr. Thein, who had previously served as counsel to a number of political activists, applied to the court to represent Ms. Suu Kyi. The following day, Mr. Thein's law license was revoked by the authorities.

18. Ms. Suu Kyi was permitted a defense team of three lawyers, but was allowed to consult with her counsel only sporadically. Ms. Suu Kyi was charged on 14 May, and was allowed only one hour to visit with her lead attorney on 16 May before the trial began two days later. It does not appear that Ms. Suu Kyi was allowed to meet with counsel between 18 and 25 May. On 25 May, the prosecution abruptly cancelled its remaining witnesses, forcing Ms. Suu Kyi to testify on 26 May without prior discussion with her counsel. The court then denied a defense request to consult with Ms. Suu Kyi privately. Ms. Suu Kyi was not granted another private meeting with counsel until 30 May, after the prosecution's witnesses had concluded testimony and the defense had called its one allowed witness.

19. During the month of June 2009, when Ms. Suu Kyi's legal team appealed the trial court's decision to reject three of the four defense witnesses, Ms. Suu Kyi appears to have been allowed to consult with counsel only three times. On 19 June, Ms. Suu Kyi's birthday, authorities specifically refused to allow counsel to meet with Ms. Suu Kyi. Similarly, when Ms. Suu Kyi's trial resumed in July 2009, she appeared to have been allowed to consult with counsel only twice. Counsel described the necessity of "negotiating" with the Government in order to obtain permission to meet with Ms. Suu Kyi, and permission to meet was again specifically refused at least once.

20. During her trial the judges rejected an application by Ms. Suu Kyi's lawyers for a public trial. The public was denied access to the courtroom, which was under heavy security by armed soldiers. The Government repeatedly barred access to diplomats and journalists seeking to attend the trial. The trial was open on only four occasions for a limited number of hours, and each time, only allowed entry to a small, hand-selected group of diplomats and/or domestic journalists.

21. When the Government briefly opened Ms. Suu Kyi's trial to selected spectators on 20 May, it was Ms. Suu Kyi's first public appearance in over a year. In addition to conducting largely secret proceedings, the Government closely censored media reports of the trial. Domestic journalists were told not to deviate from official reports of the trial proceedings, and on one occasion, officials from the National League for Democracy received a "formal warning" from authorities of Myanmar for criticism of the trial that was leaked to a blogger in Myanmar.
22. Of the five defense witnesses offered by Ms. Suu Kyi's legal team, the trial court permitted only two witnesses to testify. The court justified the rejection of the remaining three witnesses on the grounds that their testimony was aimed at "vexation or delay or for defeating the ends of justice". In contrast, the trial court approved 23 prosecution witnesses, and 14 took the stand. As such conduct was not in accord with the laws of Myanmar, Ms. Suu Kyi's legal team appealed the witness ban following which the wife of one of her lawyers, a government employee, was abruptly laid off without explanation in an apparent attempt to intimidate Ms. Suu Kyi's lawyers.
23. On appeal, the Divisional Court ruled to allow the testimony of a second defense witness, legal expert Khin Moe Moe, but maintained the disqualification of prominent journalist and former political prisoner Win Tin and the Vice Chairman of the National League for Democracy, Mr. Tin Oo, who is under house arrest. The highest court of Myanmar upheld the lower courts' rejection of the remaining two witnesses. At the close of the trial, the lower court denied another defense request to present witness testimony from a fifth witness, a foreign ministry official, judging this testimony as "not important".
24. The source argues that Ms. Suu Kyi's current term of house arrest amounts to arbitrary deprivation of liberty.
25. The Working Group regrets that the Government has not replied to its communication in spite of the opportunity to do so.
26. The Working Group notes that Ms. Aung San Suu Kyi was sentenced for violating the terms of her previous term of house arrest which the Working Group has repeatedly found lacking legal basis (Opinions Nos. 9/2004, 2/2007 and 46/2008). Consequently, no charges can flow from the violation of the terms of this previous house arrest order. Further, even if this were not the case, no controlling body, acting in good faith, could find that her actions violated the terms of her house arrest.
27. However, there is no evidence to show that Ms. Suu Kyi or her companions knew Mr. Yettaw or welcomed his visit. To the contrary, all evidence clearly demonstrates that Mr. Yettaw was an uninvited trespasser on Ms. Suu Kyi's property. Ms. Suu Kyi did not invite Mr. Yettaw to her home, and indeed, did not know Mr. Yettaw at all.
28. Ms. Suu Kyi and her companions had no communications with Mr. Yettaw, let alone by phone or letter, until he breached security at the property and was no longer an "outside party". Ms. Suu Kyi and her companions took all reasonable steps to minimize their contact with him. As Ms. Suu Kyi and her companions were presumably incapable of physically forcing Mr. Yettaw to leave the grounds, their only "choice" to avoid communicating further with Mr. Yettaw would have been to alert the guards around Ms. Suu Kyi's house. Ms. Suu Kyi elected not to do so, fearing that both Mr. Yettaw and the guards would face punishment. Rather, Ms. Suu Kyi had planned to alert the Government to the security breach through her doctor's regular visit, as she did when Mr. Yettaw attempted to visit in November 2008.
29. Because Ms. Suu Kyi faced no inquiry or arrest based on this previous attempted visit, she had reason to believe that this method of reporting was acceptable to the Government.

30. Furthermore, Ms. Suu Kyi and her companions had no way of preventing Mr. Yettaw from breaching security at her home as this is under exclusive control of the Government. Indeed, among other charges, Mr. Yettaw was charged with “illegally entering a restricted zone”. Reinforcing the exclusive control the Government had around Ms. Suu Kyi’s home, National Police Chief, Mr. Khin Yee, announced that 20 security officials had been given either three-month prison sentences or demoted and transferred from their positions after Mr. Yettaw’s unannounced visit.

31. The Working Group further notes that Ms. Suu Kyi’s trial was conducted in violation of a number of international norms relating to the right to a fair trial as contained in article 10 of the Universal Declaration of Human Rights, Principles 15, 17(2), 18 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and article 37 of the Standard Minimum Rules for the Treatment of Prisoners. She was not judged by “an independent and impartial tribunal” as enshrined in article 10 of the Universal Declaration of Human Rights.

32. The former Special Rapporteur on the situation of human rights in Myanmar stated: “The administration of justice is greatly marked by constraints which are inconsistent with judicial independence and characteristic of a military dictatorship . . . In reality . . . the judiciary is far from independent” (E/CN.4/2000/38, para. 22). The current Special Rapporteur on Myanmar writes that “under the current functioning, the judiciary is not independent and is under the direct control of the Government and the military” (A/63/341, para. 103).

33. Since Ms. Suu Kyi was refused the right to present witnesses in her defence in a largely closed trial and to communicate with her legal counsel, she has been denied a fair and public hearing. She has been denied access to medical care in contravention of principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and articles 24 and 25 of the Standard Minimum Rules for the Treatment of Prisoners. The Government has permitted Ms. Suu Kyi only sporadic visits from medical professionals during the past six years, despite Ms. Suu Kyi’s need to address a number of serious health ailments.

34. The Working Group deems it necessary to recall that the Universal Declaration of Human Rights guarantees the right not to be arbitrarily detained, as well as the rights to due process and a fair trial, and to freedom of opinion, expression and assembly. None of these have been complied with.

35. In addition, the Working Group notes that a lawyer of the defence team for Ms. Aung San Suu Kyi and her co-accused had his licence revoked by the authorities. She was allowed to consult with her defence lawyers only sporadically. Most of the trial was conducted behind closed doors. The media was prevented from speaking to the defence lawyers. Only two of the five witnesses called by the defence were permitted to testify.

36. Ms. Aung San Suu Kyi was not informed of the reasons for her arrest; had no effective remedy to challenge her detention; no records were given to her; she was never informed of her rights; she has been denied communication with the outside world; and is being detained because of her political views.

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

The continuation of the deprivation of liberty of Ms. Aung San Suu Kyi is arbitrary, being in contravention of articles 9, 10, 19 and 20 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.

38. The Working Group again requests the Government of the Union of Myanmar to implement its previous recommendations and to remedy the situation of Ms. Aung San Suu

Kyi in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights and to consider ratifying the International Covenant on Civil and Political Rights.

Adopted on 7 May 2010

## **Opinion No. 13/2010 (Palestinian Authority)**

### **Communication addressed to the Palestinian Authority on 3 February 2010**

#### **Concerning: Mr. Mohammad Abu-Shalbak**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group regrets that the Palestinian Authority has not replied within the 90-days deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. According to the source, Mr. Mohammad Abu-Shalbak, aged 46 years, a Palestinian usually residing at Othman bin Affan Street, Al-Berih city, West Bank, Occupied Palestinian Territory, was arrested on 19 July 2009 at around 2 p.m. at his parents' home of the same address by forces of the Palestinian General Intelligence Service. His arrest had been ordered by the Head of the Military Judiciary Committee on the same day. The order was presented to a court, but neither Mr. Abu-Shalbak nor his family was informed about its contents or the reasons for his arrest.
5. His mother is the only witness of the arrest carried out. She was sitting outside and saw an officer of the General Intelligence Service in plain clothes waiting in a white car in front of the house. When Mr. Abu-Shalbak arrived he was approached by the officer and requested to show his ID. Thereafter, Mr. Abu-Shalbak was orally informed that he was wanted by the General Intelligence Service and was not permitted to enter the house to inform his relatives. He could only shout to his mother on the street that he was being arrested. When his family arrived on the scene he had already been taken away.
6. Since his arrest, Mr. Abu-Shalbak has been detained by the General Intelligence Service at its building in Al-Ersal Street, Ramallah, West Bank. No reasons for his detention have been communicated to Mr. Abu-Shalbak or his family as the case file is classified and kept secret. Furthermore, his family was unaware about his place of detention for 15 days. Mr. Abu-Shalbak's family learned about his place of custody only through an unofficial source and was not allowed to visit him for 80 days. He has to date not been allowed access to his lawyer and no reasons for his arrest and detention for more than six months have been communicated by Palestinian authorities or are otherwise recognizable.
7. The first visit of Mr. Abu-Shalbak's relatives took place on 21 September 2009 and was supervised by an investigating officer. He permitted a visit of 10 minutes only, and ordered the family not to discuss anything related to the reasons for Mr. Abu-Shalbak's arrest or the conditions of his detention.
8. When Mr. Abu-Shalbak entered the office of the investigating officer, he was in bad condition, wearing dirty clothes, and having had lost about half his weight. He had a pale face, appeared to be afraid and had difficulties to stay focused. During the visit the investigating officer repeatedly interrupted the conversation so that his family could in fact only talk for two out of 10 minutes.

9. On 4 October 2009, the Palestinian High Court of Justice issued a judicial decision stating that “after review of the documents of this case, we noticed that the detainee is a civilian person and has been detained based on an order by the Head of the Military Judiciary Committee on 19 July 2009, and has not been produced before the civilian prosecution within 24 hours of arrest. As this case is not under the mandate of military prosecution as identified in the Basic Law, article 101(2), therefore the court found that the decision of the Head of Military Judiciary Committee is considered as an abuse of his authority and violated the right to liberty of the detainee. Therefore, the arrest of this civil civilian was unlawful and the court decided to release him immediately”.

10. Following this order, Mr. Abu-Shalbak was released on 7 October 2009, but rearrested eight hours later under a new arrest order issued by the Head of the Military Judiciary Committee. It is not known on what grounds Mr. Abu-Shalbak was rearrested, however, it is reported that in comparable cases different charges are put forward. Mr. Abu-Shalbak was returned to the detention centre at the General Intelligence Service in Al-Ersal Street, Ramallah.

11. During the few hours of his release, Mr. Abu-Shalbak informed his family about the conditions of detention he had been subjected to. He spent 43 days standing on his feet with his eyes blindfolded and his legs tied in a small and unhealthy cell, with one hour of rest daily. He was allowed to use the bathroom only once a day and was wearing the same clothes for two months without having been allowed to take a shower. His cell is hot in summer and cold in winter. Mr. Abu-Shalbak has suffered from abdominal cramps, anal fissures and toothaches as his front teeth were broken. The abdominal cramps became so severe that Mr. Abu-Shalbak was taken to the military medical services. Although the doctor ordered an abdominal ultrasound examination, the family was informed at a later visit that it had not been carried out.

12. Following his rearrest, his family contacted the Office of President Mahmoud Abbas; however, it has not received a response.

13. Since his rearrest, his family has tried to visit Mr. Abu-Shalbak every weekend. Most of the times they were denied access by the detaining authorities.

14. The Working Group notes that Mr. Mohammad Abu-Shalbak was arrested on 19 July 2009 at his father’s home located in Al-Berih. No arrest warrant was shown to him by the captors pertaining to the Palestinian General Intelligence Service. Only he was told that his detention had been ordered by the Head of the Military Judiciary Committee. Neither he nor his relatives were informed on the reasons for his detention.

15. The Working Group further notes that Mr. Mohammad Abu-Shalbak is a civilian. On 4 October of the same year, the Palestinian High Court of Justice attended to his condition as a civilian and ordered his immediate release. Abu-Shalbak was released but eight hours later he was rearrested again under orders of the Head of the Military Judiciary Committee.

16. In several Opinions, the Working Group has considered that the deprivation of liberty of a civilian person ordered by a military tribunal is a violation of the right of a civilian to be tried by an impartial and independent tribunal. In the present case the High Court considered that it “noticed that the detainee is a civilian person and has been detained based on an order by the Head of the Military Judiciary Committee on 19 July 2009, and has not been produced before the civilian prosecution within 24 hours of arrest”.

17. According to the Working Group, the nature and composition of the tribunal is a fundamental element to consider in the guarantees of impartiality and independence established by article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights. The universal experience is that

military judges are, in reality and before all, military people acting as judges. The essential element which a court or judge must show is independence. In a military person, the main value is his or her obedience to and his or her dependence on his or her superiors in the command chain. Consequently, a military tribunal cannot guarantee the conditions of a fair trial or the guarantees or due process.

18. A similar opinion was expressed by the Human Rights Committee at its General Comment No. 32 of 2007 on article 14 of the International Covenant on Civil and Political Rights on the right to equality before courts and tribunals and to a fair trial (see CCPR/C/GC/32 (2007)). According to the Committee, “While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of military or special character of the court concerned”.

19. The Committee also notes that “the trial of civilians in military or special courts may raise serious problems as far the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show than resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.

20. The Working Group notes that the Head of the Military Judiciary Committee did not order to respect the right of Mr. Abu-Shalbak to not be arbitrarily deprived of his liberty and to enjoy the guarantees established in article 14 of the International Covenant on Civil and Political Rights. An arrest warrant was not issued; he was not brought without undue delay before a judicial authority; he was not promptly subjected to interrogation nor charged; he was not allowed to consult a defence lawyer; his family was not informed about his arrest; he was held in incommunicado detention; he was not given the possibility to prepare his defence. And when a Court found that these fundamental guarantees had been violated and, consequently, ordered his release, this judicial order was ignored and Mr. Abu-Shalbak was rearrested.

21. The conditions on which Mr. Abu-Shalbak is maintained in detention during more of nine months are also very serious: He is being held in incommunicado detention; he has not the right to receive visits; he has not the most elemental means to assure his subsistence while in detention.

22. Consequently, the Working Group considers that the arrest and detention of Mr. Mohammad Abu-Shalbak is arbitrary. He has been deprived of his right to a fair trial. Authorities have failed to produce Mr. Abu-Shalbak before the – competent – civilian prosecution within 24 hours of arrest.

23. The unlawfulness of Mr. Abu-Shalbak’s detention was confirmed by the High Court of Justice. Despite the order for his release he was rearrested and remains in detention.

24. The Working Group issues the following Opinion:

The privation of liberty of Mr. Mohammad Abu-Shalbak is arbitrary, because it is contrary to articles 9 and 10 of the Universal Declaration of Human Rights and correspond to categories I and III of the categories applicable by the Working Group in its consideration of individual cases.

25. Consequently with this Opinion, the Working Group requests the Palestinian Authority to remedy the situation of Mr. Mohammad Abu-Shalbak according to the

principles enshrined in the Universal Declaration of Human Rights. In the circumstances of the case and taking into account the time he has been arbitrarily deprived of his liberty and the very bad conditions of his detention, the adequate remedies could be:

- (a) The immediate unconditional release of Mr. Mohammad Abu-Shalbak;
- (b) Alternatively, his immediate release on bail and trial before and independent and impartial tribunal with all the guarantees of due process, human rights and the norms of international law;
- (c) To give him an adequate and effective reparation for the damage occasioned by his arbitrary detention.

26. The Working Group requests the Human Rights Council to consider adopting the Draft Principles governing the administration of justice through military tribunals elaborated by the expert of the former Sub-Commission on Human Rights, Emmanuel Decaux.

Adopted on 7 May 2010

## **Opinion No. 14/2010 (United Arab Emirates)**

### **Communication addressed to the Government on 17 December 2009**

**Concerning: Mr. Nikola Milat**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
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. 18/2009)
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:
5. Mr. **Nikola Milat**, born on 27 December 1974, a Serbian national, company owner, usually residing at Danat Al Rolla 114A, Bur Dubai, was arrested without a warrant on 22 April 2007 at his office in Dubai, Ayal Nasir Building, Flat No-M-05, Deira, by officers of the Dubai police. Since then he has remained in detention under the orders of the Public Prosecution of Dubai and the courts of Dubai. Mr. Nikola Milat was accused of being an accomplice in a robbery of 15 April 2007. He was alleged to have known the perpetrators, who are Serbian citizens and still at large. Mr. Nikola Milat denies any involvement in the robbery.
6. Following his arrest he was taken to the main police station in Dubai. There, he was interrogated for 10 days before being transferred to the Al Raifa police station. He had to sign three statements, each of which were issued in Arabic only, which he did not understand. Two statements were taken by police officers, the third one was made before the prosecutor five to seven days after his arrest. His respective interrogators required Mr. Nikola Milat to state that he knows who the perpetrators of the robbery are and that he knew about their plan but did not report the plan to the authorities. He was interrogated in English; some parts of the interrogation he understood, other parts he did not. The interrogations before the police took longer than permitted under the laws of the United Arab Emirates.

7. Following the interrogation session with the prosecutor, upon his return to the police station, Mr. Nikola Milat's telephone was seized. He was not allowed to make phone calls or any other contact with the outside world. He was not able to arrange for a lawyer. Mr. Nikola Milat was granted access to a lawyer only after the police and public prosecutor interrogations.

8. Mr. Nikola Milat went on trial and was convicted by the Dubai Court of First Instance to a prison term of 10 years, judgement dated 8 June 2008 (Case No 7089 - Penal for the year 2009). The source has submitted an English translation of this judgement to the case file, which is made integral part thereof. The conviction was upheld by the Appeal Court of Dubai, judgement dated 23 November 2008, and by the Dubai Court of Cassation, judgement dated 2 February 2009. During the trial Mr. Milat asked the judge to give him the opportunity to speak, which was denied. The whole trial was conducted in Arabic, with no Serbian interpreters.

9. At the trial, Mr. Nikola Milat's lawyer applied for annulment of the statement he had given to the police since the police did not have valid permission of the prosecution to interrogate Mr. Nikola Milat. The lawyer also asked for annulment of the testimonies of police officers since during his interrogation, while he was still a suspect, no interpretation was available to understand the questions put to him by the police. Mr. Nikola Milat did not understand these questions, and he did not understand the statements made during his trial because of a lack of interpretation.

10. The sequestration officer asked Mr. Nikola Milat questions which were written down in a report submitted to the prosecution thereafter. The officer freely translated Mr. Nikola Milat's replies and added to his statements in order to render it possible to press charges against him.

11. Mr. Nikola Milat noted that he never provided visas to persons who committed the robbery in which he was the alleged accomplice. He also stated that he did not know the reason of their arrival to Dubai. The written statements did not contain what he had stated, rather the contrary of everything he had said. The police took his statements in the absence of his lawyer or an interpreter. When he asked for interpretation he was told that there is no time for arranging for an interpreter. Mr. Nikola Milat answered as much as he could and he was constantly repeating that he was not an accomplice in the robbery and that he does not know who organized and committed the robbery. Mr. Nikola Milat was never provided a copy of the statements assigned to him.

12. Mr. Nikola Milat's lawyer used the lack of information in a language Mr. Nikola Milat understands about the nature and cause of charges against him in his defence at all court hearings, and also in all statements for the Dubai media. No testimonies were ever registered in an official report. The source further reports that despite fingerprints being taken from Mr. Nikola Milat's apartment, office, car, computer, mobile phones, 18 witnesses being interrogated, not a single piece of evidence was found to link him with the persons who committed the robbery.

13. Serbian authorities were involved in the trial through its embassy in Egypt. The Serbian Consul was present at five court hearings and had the opportunity to speak with the judge and with representatives of the Ministry of Foreign Affairs in Dubai. Serbian authorities also provided a certificate that Mr. Nikola Milat had never been convicted before; this certificate, however, appears to be missing from his case file in the United Arab Emirates. Further, the Serbian Minister of Foreign Affairs addressed a letter to his counterpart in the United Arab Emirates.

14. On 30 December 2009, Mr. Nikola Milat was taken to court, where the judge requested his interpreter to explain to him that he had been sentenced for another ten years for the same crime for which he had previously been sentenced to 10 years. It is not clear

whether this was the result of an increase of sentencing on appeal, or the result of a new trial, possibly on a separate charge. Mr. Nikola Milat was not represented by a lawyer and he was not brought to any court hearings prior to being informed of this new sentence.

15. Mr. Nikola Milat requested the judge through his interpreter to show him the charges, and to be represented by a lawyer. He was told that he would be brought before the court again on 11 January 2010.

16. Mr. Nikola Milat was able to contact his lawyer after returning from the court, who told him that the crime he was sentenced for carries a maximum penalty of three years of imprisonment, whereas his total tariff is now 20 years.

17. The source further informs that the nearest embassy of the Republic of Serbia in Cairo, Egypt, was never officially informed by authorities of the United Arab Emirates about the arrest, detention, trial and conviction of Mr. Nikola Milat, who is a Serbian citizen.

18. In its response on 16 February 2010, the Government informed the Working Group the following: the trial was carried out in public, in the presence of Mr. Milat's lawyer and a Serbian translator, and with a right to a fair trial. The Court condemned Mr. Nikola Milat to a sentence of 10 years of imprisonment followed by an expulsion from the country. Mr. Nikola Milat appealed his sentence to the Court of appeals, which received the complaint and dismissed it completely. Mr. Nikola Milat appealed to the Court of Cassation which rejected the appeal.

19. In its comments to the Government's response, the source observed what follows in the paragraphs below.

20. Mr. Nikola Milat was arrested on 22 April 2007 and for the next 10 days, he did not meet the Prosecutor. Mr. Milat was interrogated by police officers day and night and he was denied any possibility to contact his family or his lawyer. Mr. Milat was obligated to sign the verbal statement in Arabic, a language which he does not speak, and that no interpreter was ever presented to him by the police.

21. After 10 days, Mr. Nikola Milat was taken to the Prosecutor who interrogated him also without an interpreter. For the next 30 days Mr. Nikola Milat was detained in another police station, without any possibility whatsoever to contact his family or his lawyer.

22. All of the interrogations that followed were conducted without an assistance of an interpreter, at the end of which Mr. Nikola Milat was obligated to sign another verbal statement written in Arabic in front of the Prosecutor. The entire procedure was conducted with consideration for these signed statements. Mr. Nikola Milat remains to this day, unaware of their contents.

23. Mr. Nikola Milat was subjected to 14 hearings which were conducted in Arabic, without a presence of an interpreter. During these hearings, Mr. Milat attempted to address the Court, but his attempts were in vane.

24. Mr. Nikola Milat was able to address the court only when the ambassador of his country was in the courtroom. Only in that occasion, the judge had initially dismissed Mr. Nikola Milat's case as there was no interpreter present. The ambassador provided the interpreter and conveyed his message to the Court, which only then accepted to hear for the first time the position of Mr. Nikola Milat.

25. It should be noted that paragraph 15 of the Methods of Work of the Working Group on Arbitrary Detention provides that "it shall request the Government to reply within 90 days after having carried out such inquiries as may be appropriate so as to furnish the Group with the fullest possible information". This provision is based on the fact that the Government is chiefly responsible for the matters pertaining the respect of human rights, as

it is the Government which undertakes the obligations in good faith in front of the international community.

26. In the light of the foregoing, the Working Group observes that the response submitted by the Government is questionable, given that its character is brief, generalized and incomplete. The Government, in fact, declares that the trial was public, in the presence of Mr. Nikola Milat's lawyer, and in the presence of a Serbian-language interpreter; but the Government fails to provide the information regarding the severe allegations regarding the fact that Mr. Milat was in the police custody for 10 days; that he was interrogated incessantly day and night; that Mr. Milat was not provided with a lawyer; that Mr. Milat was obligated to sign a verbal statement in a language he did not understand and in the absence of an interpreter; that he was interrogated again in front of the judicial Prosecutor, again in the complete absence of an interpreter and a legal representative, and for the period of 30 days.

27. All of the aforementioned deficiencies had repercussions on the judicial process conducted by the Court in regard of the case. The Government does provide information that an interpreter and a lawyer were present during the trial, but without elaborating on the respect of Mr. Milat's individual rights during this process.

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

The deprivation of liberty of Mr. Nikola Milat is arbitrary being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and of 9 and 14 of the International Covenant on Civil and Political Rights and falls under the category III of the categories applicable to the consideration of cases submitted to the Working Group.

29. Consequent upon the Opinion rendered, the Working Group requests the Government to take necessary steps to remedy the situation, which, under the specific circumstances of this case, would be the immediate release of Mr. Nikola Milat; to provide for his right to compensation, and to secure a fair and public hearing by an independent and impartial tribunal if necessary.

30. The Working Group invites the Government to consider signing and ratifying the International Covenant on Civil and Political Rights, as soon as is practicable.

Adopted 31 August 2010

## **Opinion No. 15/2010 (Turkmenistan)**

### **Communication addressed to the Government on 19 March 2010**

#### **Concerning: Messrs. Annakurban Amanklychev and Sapardurdy Khadzheid**

#### **The State is a Party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group regrets that the Government has not replied within the 90-days deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.

5. Mr. Annakurban Atabalovich Amanklychev, born on 7 February 1971, a citizen of Turkmenistan, usually resident in Ashgabat, is an independent journalist, who has participated in human rights trainings focused on prison reform in Poland and Ukraine.
6. Mr. Sapardurdy Karlievich Khadzhiev, born on 15 August 1959, a citizen of Turkmenistan, usually resident in Ashgabat, is an independent journalist and a human rights defender, who has advocated for prison reform in Turkmenistan. Mr. Khadzhiev has denounced the alleged practice of arbitrary detention of opposition leaders and political dissidents. He has conducted interviews of former Turkmen political prisoners who were granted amnesty by the Turkmen Government, and investigated the whereabouts of political prisoners who have allegedly disappeared. Mr. Khadzhiev has also interviewed former prison employees about the conditions on which political prisoners are detained.
7. Both persons are members of the Turkmenistan Helsinki Foundation (THF), a Bulgaria-based human rights non-governmental organization which was established in 2003 to watch and protect human rights of the people of Turkmenistan and to sharp the attention to the human rights situation in the country.
8. Before their arrests, both persons worked with foreign journalists. At the time of their arrest, Mr. Amanklychev and Mr. Khadzhiev were working with French producers from Galaxie Presse on a documentary which criticized the Turkmen health-care and education systems, and the then-President Niyazov's personality cult, which was broadcast on France 2 on 28 September 2006. Previously, Mr. Amanklychev had also assisted the British Broadcasting Corporation (BBC) with recording a radio programme on Turkmen health care and human rights which was broadcast by the radio station on 17 November 2005.
9. According to the source, Mr. Amanklychev was arrested on 16 June 2006 at his home in Ashgabat by officials of the Ministry of National Security without being presented with an arrest warrant or informed about the reason of his arrest. Mr. Khadzhiev was arrested on 18 June 2006 at his home in Ashgabat by officials of the Ministry of National Security without being presented with an arrest warrant or informed on the reason of the arrest.
10. The source adds that a third individual, Ms. Ogulsapar Muradova, (Mr. Khadzhiev's sister), a reporter for Radio Free Europe/Radio Liberty and a former THF member, was also arrested on 18 June 2006. Ms. Muradova was allegedly tortured and died in Government custody. On 14 September 2006, Turkmen authorities informed Ms. Muradova's family that she had died of natural causes. However, her body shown signs of having been badly beaten, with a head wound, bruises from strangulation, puncture marks from injections, and a broken leg.
11. Mr. Khadzhiev and Mr. Amanklychev were held in incommunicado detention for over two months at the pretrial detention centre of the Ministry of National Security. They were allegedly subjected to torture and other physical abuse while in Government custody. The two individuals were held in solitary confinement and deprived of food, water, medical treatment, and often prohibited from using the lavatory. They were administered psychotropic drugs, and threatened with harm to their families if they did not cooperate. Soon after their arrests, an official from the Interior Ministry told Mr. Amanklychev's family that "you wouldn't recognize him. After three days of uninterrupted questioning, he is simply unrecognizable".
12. Mr. Amanklychev's private attorney, Mr. Kakazhan Kadyrov, and Mr. Khadzhiev's private attorney, Mr. Ata Mukhamedov, were deprived of basic information related to their clients. Both attorneys learned of the espionage charges brought against their clients on 18 June 2006, from a televised broadcast by the Minister of National Security. They only learned of the munitions-related charges against their clients a few days before the trial. In

addition, Mr. Kadyrov and Mr. Mukhamedov were not informed of the trial date of these persons until just before it occurred.

13. On 12 July 2006, the two individuals were formally charged with possession of illegal munitions. According to the source, the attorneys appointed to Mr. Amanklychev and Mr. Khadzhiiev by the Turkmen Government did not act in their interests. They avoided meeting with their clients and tried to convince them to confess to the reportedly false charges.

14. On 25 August 2006, the two individuals were tried in Court. It was a brief *in camera* trial which reportedly lasted only a few minutes. The Court denied Mr. Amanklychev and Mr. Khadzhiiev's requests to call witnesses on their behalf. Soldiers and police officers controlled the Court, preventing the defendants' relatives and other members of the public from accessing. Mr. Amanklychev and Mr. Khadzhiiev were summarily convicted and sentenced to six to seven years of imprisonment.

15. Mr. Khadzhiiev and Mr. Amanklychev were both accused by the then-President Saparmyrat Niyazov and the then Minister of National Security Geldimukhammet Asyrmukhammedov of "conspiring with foreigners to destabilize the State".

16. Mr. Amanklychev was accused by the then-Minister of National Security Mr. Asyrmukhammedov in a television broadcast of "trying to collect defamatory information about Turkmenistan and to cause discontent among people on instructions of traitors of the Motherland and foreign-based centers of destabilization". He was further accused by Mr. Asyrmukhammedov of being trained in Ukraine for "intelligence gathering and sabotage in Turkmenistan, as well as on the methods used in the 'Orange Revolution' in Ukraine". In a Government-sponsored news article, Mr. Amanklychev was accused of involvement in 'subversive acts and collection of defamatory information in Turkmenistan in order to create public dissatisfaction".

17. In a speech on television, President Niyazov announced: "We don't know why (Mr. Khadzhiiev and Mr. Amanklychev) are engaged in such dirty business in Turkmenistan, a peaceful country where justice is ruling and where nobody is disgraced ... Let people condemn the traitors. The entire population is proud of their Motherland, whereas they are trying to harm it. Go ahead with your fight against such people".

18. The two above-mentioned persons were denied the ability to receive visitors until 2009. Currently, Mr. Amanklychev is allowed to be visited by his wife just twice per year. Mr. Khadzhiiev is only allowed to be visited by his sister once a year. Mr. Amanklychev and Mr. Khadzhiiev are currently detained in the Caspian Sea desert area in Turkmenistan, known for its extreme climate.

19. The source asserts that the detention of Mr. Khadzhiiev is related to his family relations. Mr. Khadzhiiev's brother, Mr. Annadurdy Khadzhiiev, is an opposition leader, and his sister-in-law, Ms. Tajigul Begmedova, is the head of the THF. Both of them currently are living in exile in Bulgaria. The source asserts that the arrests of the two individuals were ordered and directed by high officials in the Government of Turkmenistan, including the then-President of Turkmenistan, Saparmyrat Niyazov, and the then-Minister of National Security, Geldimukhammet Asyrmukhammedov.

20. Moreover, the source alleges that the individuals are detained based on false accusations and fabricated evidence. Even the Government accused them of espionage and treason in public, they were never charged with such crimes. The public statements by Government officials mentioned above confirm that the arrest and detention of the individuals result from their journalism-related and human rights activities. The statements further suggest that the munitions-related charges were fabricated. It was reported that Mr.

Amanklychev's family members observed security officers tossing a parcel into Mr. Amanklychev's car on the day of his arrest.

21. The source concerns about the health conditions of Mr. Amanklychev and Mr. Khadzhiev. It was reported that both persons are suffering from ailments affecting the stomach, kidneys, legs and joints. Mr. Amanklychev has also a blood pressure problem.

22. The above-summarized allegations were transmitted to the Government by letter dated 19 March 2010. The Government has not responded to these allegations within the 90-day period established in the Working Group's methods of work. The Government has neither requested an extension of that period, a possibility available to all Governments established in paragraph 16 of the methods of work. Consequently, the Working Group esteems it is in a position to issue an Opinion on the basis of all the elements brought to its attention.

23. The Working Group notes that both Mr. Amanklychev as Mr. Khadzhiev are independent journalists and human rights defenders. Both are militants in a non-governmental organization (NGO) which tries to improve the human rights situation in the country. Before their arrests, they were working with foreign journalists in the elaboration of press articles, documentary films and radio programs on some aspects related to their activities.

24. At the moment of their arrests, they were not presented with legal arrest warrants nor informed about the reasons for their detention. They were held in incommunicado detention in inhuman conditions. Their defence lawyers were not allowed to have access to the judicial files and learned the charges brought against their clients from a television broadcast by the Minister of National Security. They were not informed of the trial date until just before it occurred. According to the source, the public defenders, assigned by the authorities in substitution of the lawyers, avoided meeting with their clients and tried to convince them to confess to the false charges. In addition, the public defenders were not allowed to call witnesses on behalf of their clients.

25. Messrs. Amanklychev and Khadzhiev were finally charged with possession of illegal munitions and later with espionage and conspiracy with foreign Powers to destabilize the country. Their trial was held *in camera*, in a small court room, without hearing witnesses in favour of the defendants. They were summarily sentenced to six to seven years of imprisonment. At the same time, a vast television campaign was launched by the authorities against them, in order to affect their image and their human rights work before the general public.

26. The Government took knowledge of these particular serious and detailed allegations but has not provided the Working Group with information on this case. In these conditions, the Working Group esteems that the detention of Mr. Amanklychev and Mr. Khadzhiev is arbitrary because it results from the individuals' exercise of their fundamental rights to freedom of expression, freedom of association and of their right to work in favor of the protection and promotion of human rights.

27. Mr. Amanklychev and Mr. Khadzhiev have also been denied of their rights to a fair trial which is in violation of articles 9 and 14 of the International Covenant on Civil and Political Rights and articles 10 and 11 of the Universal Declaration of Human Rights.

28. Consequently, the Working Group considers that the detention of Messrs. Amanklychev and Khadzhiev is arbitrary, being in violation of articles 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and articles 9, 14, 19 and 22 of the International Covenant on Civil and Political Rights, falling within categories II and III of the categories applied by the Working Group.

29. The Working Group ask the Government to cooperate with the Working Group as established in its resolution 6/4 of 28 September 2007, and in particular:

- (a) To proceed to the immediate release of the above-mentioned two persons;
- (b) To proceed with the reparation of damages, through financial compensation.

Adopted on 31 August 2010

## **Avis n° 16/2010 (Liban)**

### **Communication adressée au Gouvernement le 24 mars 2010**

**Concernant: MM. Abdulkarim Idane Ibrahim Al Samara'i et Shehabeldin Othman Yehya Othman.**

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

1. Voir le texte du paragraphe 1 de l'avis n° 29/2009.
2. Par lettre en date du 24 Mars 2010, le Gouvernement a été régulièrement saisi et avait 90 jours pour répondre. Aucune réaction n'a été enregistrée de sa part, et il n'a pas non plus demandé de délai supplémentaire pour répondre comme le lui permet le paragraphe 16 de nos méthodes de travail. Dans ces conditions, le Groupe de travail s'estime en mesure de rendre un avis.
3. Voir le texte du paragraphe 3 de l'avis n° 29/2009.
4. Au regard de ce qui précède, les deux intéressés, M. Abdulkarim Idane Ibrahim Al Samara'i et Shehabeldin Othman Yehya Othman, sont tous deux demandeurs d'asile et régulièrement enregistrés auprès du Haut-Commissariat pour les réfugiés(HCR). Ils sont poursuivis pour entrée illégale sur le territoire et usage de faux documents. Si le premier a été jugé et condamné (et finit de purger sa peine), le second n'a jamais été inculqué ni présenté devant un tribunal.
5. Le Groupe de travail a toujours considéré que dès lors qu'un migrant en situation irrégulière est arrêté, le principe de proportionnalité exige que la mesure d'arrestation soit prise en dernier recours, que, dans cette hypothèse, la détention ne soit pas un moyen de dissuasion et que sa durée maximale soit fixée par la loi. Surtout, il convient que cette détention soit ordonnée ou approuvée par un juge et qu'elle fasse l'objet d'un examen régulier quant à sa légalité et à son caractère raisonnable, conformément aux dispositions des articles 9 et 10 de la Déclaration universelle des droits de l'homme. En conséquence, tout détenu doit être informé des raisons de sa détention et de ses droits, y compris le droit de contester la légalité de sa détention, dans une langue qu'il comprend, et avoir le droit d'accès à un avocat. Cependant, les personnes reconnues comme réfugiées ne doivent en aucune manière faire l'objet d'une détention.
6. En l'espèce, les deux intéressés qui sont enregistrés auprès du HCR n'ont pas bénéficié des garanties procédurales susmentionnées et continuent à être détenus de manière anormalement longue. Le premier reste en détention alors qu'il a fini de purger sa peine et le second n'est toujours pas passé en jugement.
7. Le Groupe de travail estime, sur la base de ces éléments, que la détention des personnes susmentionnées est arbitraire et contrevient aux catégories I et III de ses méthodes de travail.
8. En conséquence, il prie le Gouvernement :

- a) De coopérer avec le Groupe de travail comme l'y invite la résolution;
- b) De procéder à la libération immédiate des intéressés;
- c) De prendre en considération leur statut de demandeurs d'asile;
- d) D'envisager la réparation de leur préjudice éventuel.

Adopté à Genève le 31 août 2010

## **Opinion No. 17/2010 (Yemen)**

### **Communication addressed to the Government on 17 March 2010**

#### **The State is a Party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group regrets that the Government has not replied within the 90-days deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as follows:
5. Mr. Azzam Hassan Ali, born on 22 October 1972, a citizen of Yemen, holding a Yemeni national ID card with the number 03010007596 issued on 26 April 2005 by the Personal Affairs Department of Aden Governorate, lives in Block 22, No. 124, Al Mansoorah Department, Aden Governorate, Yemen.
6. Mr. Hassan Ali was arrested on 20 October 2007, after presenting himself at the Political Security headquarters of Al Mansoorah to check in with them, as he did once a month after his previous arrests. Mr. Hassan Ali was then held during four months in incommunicado detention, tied up in chains, at the Political Security headquarters.
7. In January 2008, Mr Hassan Ali was transferred to the Central Prison of Al Mansoorah, where he was detained with convicted individuals, although he remained without charge or any other legal proceedings, nor did he have access to a lawyer.
8. Mr. Hassan Ali has been detained for two years and four months without charge. Seeing no changes in his situation in the near future, Mr. Hassan Ali allegedly decided to undertake a hunger strike.
9. On 25 January 2010, Mr. Hassan Ali was transferred to Fatah Prison in the Al Tawahi Directorate, a high-security prison run by Political Security where the media could not have access to information concerning his case.
10. Mr. Hassan Ali was previously arrested twice by the Yemeni security services, in 2005 and 2006, respectively, for reasons unknown to the family. He was released without charge both times after the arrests.
11. The source concerns about the health condition of Mr. Hassan Ali as he will allegedly continue his hunger strike until he is released.
12. The source alleges that the prolonged detention of Mr. Hassan Ali is arbitrary because that it is devoid of any legal basis. Mr. Hassan Ali has not been charged with any crime. The source further argues that Mr. Hassan Ali should be either released immediately or his case should be started with relevant legal proceedings.

13. Given that the Government has not replied to the allegations submitted by the Working Group and has not requested an extension of the delay to reply, as contemplated in paragraph 16 of the Working Group's methods of work, the Working Group esteems that it is in condition to render an Opinion.

14. The Working Group considers that Mr. Azzam Hassan Ali presented himself to the Political Security headquarters of the Police for reasons of judicial control. He was arrested and held in incommunicado detention during four months. He has been detained for two years and four months without charges; without having been brought before a judge; without possibilities to prepare his defence and to have a fair trial before an independent and impartial tribunal; and without having the services of a defence lawyer.

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

The detention of Mr. Azzam Hassan Ali is arbitrary and contrary to articles 9, 10 and 11 of the Universal Declaration of Human Rights and 9 and 14 of the International Covenant on Civil and Political Rights and falls under categories I and III of the categories applied by the Working Group.

16. The Working Group asks the Government to cooperate with the Working Group as established in the Human Rights Council resolution 6/4 of 28 September 2007, and in particular:

- (a) To proceed to the immediate release of the above-mentioned person;
- (b) To proceed to the reparation of the occasioned damages, through the correspondent compensation.

Adopted on 31 August 2010

## **Avis n° 18/20010 (Mauritanie)**

### **Communication adressée au Gouvernement le 14 avril 2010**

**Concernant: M. Hanevy Ould Dahah**

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

1. Voir le texte du paragraphe 1 de l'avis n° 18/2009.
2. Le Groupe de travail déplore que le Gouvernement ne lui ait pas fourni l'information demandée.
3. Voir le texte du paragraphe 3 de l'avis n° 18/2009.
4. M. Hanevy Ould Dahah, âgé de 33 ans, journaliste, marié, citoyen mauritanien, résidant à Nouakchott, père de deux enfants, a été arrêté à Nouakchott le 18 juin 2009 par des hommes en tenue civile sans qu'un mandat de justice ne lui soit présenté et sans être informé des motifs de son arrestation.
5. M. Hanevy Ould Dahah a été menotté et conduit à la brigade de gendarmerie puis dans un commissariat de police à Nouakchott. Placé en garde à vue, M. Hanevy Ould Dahah n'a pas été en mesure de recevoir la visite de ses proches ni celle de son avocat, alors que ce droit est garanti par les dispositions du droit interne et en particulier par l'article 58 du Code pénal mauritanien.
6. Selon les informations reçues, son arrestation est intervenue après qu'une plainte pénale a été déposée par le candidat à l'élection présidentielle, M. Ibrahima Moctar Sarr,

Président du parti Alliance pour la justice et la démocratie/Mouvement pour la rénovation (AJD/MR), faisant suite à un article qui était paru sur le site d'information *Taqadoumy* sur l'origine de sa fortune. Déféré devant le parquet de Nouakchott le 24 mai 2009, M. Hanevy Ould Dahah a été inculpé «d'atteinte aux bonnes mœurs» et placé en détention provisoire.

7. Le 19 août 2009, M. Hanevy Ould Dahah a été condamné sur ce chef d'accusation par la Chambre correctionnelle du tribunal à six mois de prison ferme et maintenu en détention à la prison de Dar Naim à Nouakchott.

8. Il aurait dû, en conséquence, être libéré le 24 décembre 2009 à la fin de sa période légale d'emprisonnement. Cependant, il est toujours maintenu en détention alors qu'il a déjà purgé la totalité de sa peine de prison. Les autorités judiciaires ont refusé de se prononcer sur la raison pour laquelle cette personne est maintenue en détention. M. Hanevy a entamé une grève de la faim qu'il n'a interrompue que le 13 janvier 2010 pour protester contre son maintien en détention sans base légale.

9. Le 14 janvier 2010, la Cour Suprême de Mauritanie, saisie d'un pourvoi en cassation introduit par le parquet contre le jugement du 19 août 2009, a cassé cette décision et prononcé le renvoi de l'accusé devant la même juridiction, dont la composition a été modifiée, pour être jugé de nouveau.

10. Selon la source, la Cour Suprême, la plus haute juridiction de contrôle du pays, aurait cependant dû relever d'office le caractère arbitraire du maintien en détention de M. Hanevy et ordonner sa libération immédiate, ce qu'elle s'est abstenue de faire.

11. Le Gouvernement n'a pas estimé devoir répondre, malgré le délai de 90 jours qui lui a été imparti, et n'a pas non plus sollicité de délai supplémentaire comme le lui permet le paragraphe 16 des méthodes de travail du Groupe, qui, dans ces conditions, est en mesure de rendre un avis.

12. L'article 14 du Pacte international relatif aux droits civils et politiques, dans son dernier alinéa, dispose que: «Nul ne peut être poursuivi ou puni en raison d'une infraction pour laquelle il a déjà été acquitté ou condamné par un jugement définitif conformément à la loi et à la procédure pénale de chaque pays» .

13. La Mauritanie, qui est partie au Pacte, est tenue par cette disposition.

14. Placé sous mandat de dépôt le 24 Mai 2009 et condamné à six mois de prison, M. Hanevy Ould Dahah aurait dû être libéré le 24 décembre 2009 si aucune autre poursuite n'est exercée contre lui.

15. L'arrêt de la Cour Suprême qui a cassé le jugement ne peut avoir pour conséquence que l'ouverture d'une nouvelle procédure de jugement ; mais en attendant l'issue de cette procédure, M. Dahah, qui a fini de purger sa peine, doit être libéré conformément aux dispositions précitées.

16. Le maintien en détention de cette personne, sans aucune base légale en droit interne, est arbitraire et contrevient aux dispositions des articles 9 et 10 de la Déclaration universelle des droits de l'homme ainsi qu'aux articles 9 et 14 du Pacte international relatif aux droits civils et politiques auquel la République islamique de Mauritanie est partie.

17. Elle pourrait également constituer une violation de la liberté d'opinion et d'expression de l'intéressé, consacrée par les articles 19 de la Déclaration universelle des droits de l'homme et du Pacte international relatif aux droits civils et politiques.

18. La détention actuelle de M. Dahah sans aucun fondement légal est considérée par le Groupe de travail comme une détention arbitraire qui contrevient à la catégorie I de ses méthodes de travail.

19. En conséquence, le Groupe de travail prie le Gouvernement:

- a) De coopérer avec le Groupe de travail comme l'y invite la résolution;
- b) De bien vouloir procéder à la libération immédiate de l'intéressé;
- c) D'envisager éventuellement la réparation du préjudice qu'il aurait subi du fait de cette situation.

Adopté le 31 août 2010

## **Opinión N.º 19/2010 (Perú)**

### **Comunicación dirigida al Gobierno el 22 de febrero de 2010**

**Relativa a: 1) Pedro Condori Laurente; 2) Claudio Boza Huanhuayo; y 3) Eloy Martín Poma Canchán.**

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

1. (Texto del párrafo 1 de la opinión N° 19/2009)
2. El Grupo de Trabajo lamenta que el Gobierno no le proporcionase la información solicitada, a pesar de las haberla requerido por carta de 22 de febrero de 2010.
3. (Texto del párrafo 3 de la opinión N° 19/2009)
4. Según la fuente, el Sr. Pedro Condori Laurente, de nacionalidad peruana, nacido el 5 de agosto de 1966, Secretario General del Sindicato Unitario de Trabajadores Mineros de la Compañía Minera Casapalca, fue detenido el 9 de septiembre de 2009 cuando salía del local del Ministerio de Trabajo sito en Avenida Salaverry 655, Jesús María, Lima, luego de participar en una negociación laboral en su condición de dirigente sindical.
5. El Sr. Claudio Boza Huanhuayo, de nacionalidad peruana, Secretario de Seguridad e Higiene del Sindicato de Trabajadores Mineros de Casapalca, fue detenido el 23 de septiembre de 2009.
6. El Sr. Eloy Martín Poma Canchan, dirigente del Sindicato de Trabajadores Mineros de Casapalca, fue detenido el 23 de septiembre de 2009.
7. Se informa de que estas tres personas fueron detenidas en virtud de un mandato de detención emitido por el Juzgado Mixto de Matucana. Pese a que les correspondería estar recluidas en una prisión de Lima, se encuentran detenidas en el Penal de Aucallama en el Distrito de Huaral, penal que presentaría malas condiciones físicas para el alojamiento de prisioneros. Además de estar afectando a su salud, su ubicación en dicho penal afecta también al derecho de los detenidos a contactar con sus abogados defensores, a preparar su defensa en juicio, a recibir visitas de sus parientes y a atender a sus obligaciones sindicales y familiares.
8. Según la fuente, estas personas han sido acusadas de ser responsables de la muerte del capitán de la Policía Nacional del Perú (PNP) Giuliano Villarreal Lobatón, quien falleció por impacto de una piedra durante una manifestación de los trabajadores mineros de Casapalca ocurrida a las 6.30 horas del 24 de noviembre de 2008 en el kilómetro 114,850 de la Carretera Central. La acusación judicial se fundamenta en el artículo 111 del Código Penal, que tipifica la figura de homicidio culposo.
9. La fuente afirma que el 17 de mayo de 2008, el Sindicato de Trabajadores Mineros de Casapalca firmó un acta con la Compañía Minera Casapalca. La empresa habría incumplido los términos de los acuerdos contenidos en dicha acta y se habría negado a dialogar con el Sindicato. Ante esta situación, en noviembre de 2008, el Sindicato decretó

una paralización de labores. Durante una de las manifestaciones que tuvieron lugar el 24 de noviembre, un grupo de exaltados lanzó piedras desde lo alto de una montaña con el objeto de bloquear el tránsito en una carretera. Una de éstas impactó en el capitán Villarreal Lobatón, ocasionándole la muerte. Se ignora quién fue el responsable de esta acción.

10. Pese a tratarse de dirigentes sindicales, que participan frecuentemente en negociaciones laborales en el Ministerio de Trabajo, muchas veces ante la presencia de la ministra del ramo y que tienen domicilio y trabajo conocido, la medida de detención habría sido ordenada por el juez en aplicación del artículo 135 del Código Procesal Penal alegando un riesgo posible de fuga.

11. Según la fuente, la decisión judicial de privación de libertad de estas personas es arbitraria, puesto que no tiene fundamento en los principios de proporcionalidad y razonabilidad. La detención preventiva debe decretarse como último recurso. El Juez tenía la posibilidad de decretar otras medidas cautelares para salvaguardar el debido proceso, teniendo en cuenta las personas acusadas, su riesgo de fuga y los indicios. Estas medidas incluyen la comparecencia simple; la comparecencia restringida y la detención domiciliaria. Por estas razones, la defensa ha interpuesto un recurso de apelación contra el mandato de detención ante la Segunda Sala Penal de Reos en Cárcel con el objeto de obtener su sustitución por una medida de comparecencia. Sin embargo, la Sala Penal todavía no ha resuelto este recurso.

12. Según la fuente, del auto de procesamiento no se desprende ninguna acción u omisión por parte de estas personas en los incidentes que dieron origen a la muerte del capitán Villarreal. No existe ningún medio probatorio ni ningún testigo que vincule a estos trabajadores con la muerte del policía. Ni siquiera ha podido acreditarse que se encontrasen en el lugar de los hechos. Al contrario, está demostrado que el Sr. Pedro Condori se encontraba en Lima cuando se produjo la muerte del capitán Villarreal. La esposa del Sr. Poma Canchán precisa que éste se encontraba en su vivienda cuando se produjo la muerte del capitán Villarreal.

13. La fuente precisa que la realización de un reclamo laboral no implica que se avalen o respalden hechos de violencia. No es posible plantear autoría mediata o coautoría en delitos que no son dolosos. En este caso, no existía intención de causar daño.

14. La detención de estas personas no está orientada a esclarecer y sancionar la muerte del Capitán Villarreal Lobatón, ni a encontrar a los verdaderos responsables de su muerte, sino que se trata, más bien, de un caso de “criminalización de la protesta social”. Toda protesta social es una práctica inherente a una sana vida democrática y no se la puede reprimir con los mecanismos legalmente establecidos para castigar delitos y crímenes. Los ciudadanos ven en la protesta social la única alternativa para hacer valer sus derechos ante el inadecuado funcionamiento de los canales institucionales.

15. Según la fuente, tras años de negociaciones en el Ministerio de Trabajo, prácticamente todos los mineros que operan en la Compañía Minera Casapalca se encuentran subcontratados; reciben una pésima alimentación y salarios muy reducidos, pese a trabajar durante 12 horas consecutivas, y no cuentan con adecuada cobertura frente a accidentes laborales ni enfermedades ocupacionales. La Compañía Minera Casapalca ha sido ya sancionada en el pasado en la vía administrativa por las prácticas de despedir a trabajadores sindicalizados.

16. La privación arbitraria de libertad de estas tres personas constituye también un medio para atentar contra sus derechos a la libertad de opinión y de expresión, a la libertad de asociación, a ejercer sus derechos como dirigentes sindicales y a participar en la vida política del país.

17. El auto de procesamiento emitido contra estas tres personas ha incurrido en una vulneración del principio acusatorio al ampliar el sustento fáctico contenido en la denuncia fiscal. Ésta se limita a argumentar en torno al papel como dirigentes de los procesados en el Sindicato y a su supuesto rol en la organización de la protesta llevada a cabo el 24 de noviembre de 2008. Sin embargo, el auto de procesamiento emitido por el juez amplía el sustento fáctico establecido en la denuncia fiscal, entrando a hacer consideraciones sobre la supuesta presencia de los procesados en el lugar de los hechos. La fuente recuerda que el principio acusatorio determina la sujeción del juez al sustento fáctico establecido por el Ministerio Público. Según la Ejecutoria Suprema de 13 de abril de 2007, Queja N.º 1678-2006 Lima, el objeto del proceso lo fija el Ministerio Público. La decisión judicial debe ser absolutamente respetuosa de la acusación fiscal en orden a sus límites fácticos.

18. Los hechos deben estar fijados en la acusación fiscal, lo que constituye un límite infranqueable para el juez (Acuerdo Plenario N.º 11-2005/ESV-22, Pleno Jurisdiccional de los Vocales de lo Penal de la Corte Suprema, 2005; Ejecutoria Suprema de 21 de abril de 2005, R.N. N.º 224-2005, Sullana). Esta vulneración del principio acusatorio es de tal gravedad que debe determinar la nulidad total del auto de procesamiento.

19. El auto de procesamiento y la denuncia fiscal vulneran también el principio de imputación necesaria, que es la llave que posibilita una defensa adecuada. No se señala si a los procesados se les inculpa como autores directos del delito; como cómplices; o como instigadores del mismo, o bajo cualquier otra modalidad de participación.

20. El auto de procesamiento ha vulnerado también el principio de motivación de las resoluciones judiciales, violando el derecho de defensa de los procesados. El derecho a que las resoluciones judiciales sean razonadas garantiza que la decisión adoptada no sea fruto de la arbitrariedad, del voluntarismo judicial o acaso consecuencia de un proceso deductivo irracional, absurdo o manifiestamente irrazonable (Sentencia del Tribunal Constitucional de 25 de septiembre de 2001; EXP. N.º 458-2001-HC/TC Lima, Fundamentos 1 y 2).

21. La fuente agrega que no resulta conforme a derecho adjudicar responsabilidad penal a los procesados por su simple participación en la organización de una protesta social.

22. Dado que el Gobierno no proporcionó información alguna al Grupo de Trabajo, éste deberá emitir la presente Opinión sobre la base de la información proporcionada por la fuente.

23. No obstante, el Grupo de Trabajo, antes de emitir su Opinión, procedió a realizar averiguaciones sobre el estado actual de las personas cuya detención se denunció, imponiéndose que las tres personas fueron liberadas por los jueces que las juzgaban. En efecto, en el proceso por la muerte del oficial de policía (por homicidio culposo) les fue concedida la excarcelación bajo caución, y finalmente el juez dictó sobreseimiento del proceso, y aunque la parte civil —la viuda del policía— apeló, no han vuelto a ser detenidos.

24. En el segundo proceso seguido en contra de Pedro Condori Laurente y otra persona por la que no se ha recibido comunicación al Grupo de Trabajo, en el que la acusación consistió en entorpecimiento del funcionamiento de los servicios públicos debido a un bloqueo de carreteras, y por el que el Sr. Condori estuvo tres meses preso, se le concedió la libertad bajo fianza de la que aún goza.

25. En estas circunstancias, y atendiendo a que ni el Gobierno ni la fuente han demostrado un real interés en colaborar con el Grupo de Trabajo proporcionando las informaciones relevantes sobre la libertad de las personas incluidas en la comunicación — que han sido obtenidas por el Grupo de Trabajo por sus propias investigaciones—, el Grupo de Trabajo decide que, encontrándose los detenidos liberados, procede archivar el caso

conforme a lo establecido en el inciso *a* del párrafo 17 de sus Métodos de Trabajo. Se da así por cerrado este asunto, por encontrarse los involucrados en libertad.

Aprobada el 1.º de septiembre de 2010

## **Opinión N.º 20/2010 (República Bolivariana de Venezuela)**

### **Comunicación dirigida al Gobierno de la República Bolivariana de Venezuela el 17 de marzo de 2010**

**Relativa a: María Lourdes Afiuni Mora**

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

1. (Texto del párrafo 1 de la opinión N° 19/2009)
2. El Grupo de Trabajo agradece al Gobierno por haberle proporcionado oportuna información.
3. (Texto del párrafo 3 de la opinión N° 19/2009)
4. Según la fuente, la Sra. María Lourdes Afiuni Mora, de 46 años de edad, de nacionalidad venezolana, Jueza Titular del Juzgado de Primera Instancia Penal Ordinario, designada jueza del Tribunal 31.º de Control del Área Metropolitana de Caracas, decretó el 10 de diciembre de 2009 una medida cautelar menos gravosa en favor del Sr. Eligio Cedeño. Concretamente, la Sra. Afiuni decretó la libertad bajo caución del Sr. Cedeño, quien se encontraba en prisión provisional sin ser sometido a juicio durante más de dos años y medio.
5. La Audiencia pertinente en el proceso seguido en contra del Sr. Cedeño, convocada para el 8 de diciembre de 2009, fue diferida a solicitud del Ministerio Público, quien planteó la imposibilidad de asistir al acto. La Sra. Afiuni acordó convocar nuevamente la audiencia para el 10 de diciembre de 2009. Sin embargo, los representantes del Ministerio Público tampoco se presentaron. De conformidad con la ley, la Sra. Afiuni convocó a los presentes en el tribunal (defensores, representantes de la Procuraduría General de la República e imputado) a trasladarse a la Sala de Juicio en el Palacio de Justicia. La continua inasistencia del Ministerio Público demostraba, según la fuente, su falta de interés en la situación de una persona en detención preventiva durante casi tres años y en aplicar la debida celeridad al proceso, a lo que, como Ministerio Público, estaba obligado.
6. La Sra. Afiuni decretó la liberación bajo caución del Sr. Cedeño en pleno ejercicio de sus funciones jurisdiccionales, disponiendo una medida cautelar menos gravosa, que incluía la prohibición del Sr. Cedeño de salir del territorio nacional, la retención de su pasaporte y la de presentarse al juzgado cada 15 días. La medida se impuso regularmente en el expediente número 31C-15.197-09, en cumplimiento del Código Orgánico Procesal Penal y teniendo a la vista la Opinión N.º 10/2009 (República Bolivariana de Venezuela) emitida por el Grupo de Trabajo sobre la Detención Arbitraria el 1.º de septiembre de 2009. En dicha Opinión, el Grupo de Trabajo consideró que la prolongada detención provisional del Sr. Cedeño durante más de dos años y medio era arbitraria. La jueza consideró que el Sr. Cedeño era víctima de una situación evidente de retardo procesal.
7. Minutos después de emitir su resolución, la Sra. Afiuni fue arrestada en la propia sede del tribunal por elementos de la Policía de Seguridad Pública adscritos a la Dirección de los Servicios de Inteligencia y Prevención (DISIP, actualmente Servicio Bolivariano de Inteligencia [SEBIN]), quienes no mencionaron ni el motivo de la detención ni qué autoridad la había ordenado. Los agentes policiales no mostraron orden judicial alguna. Se

afirma que el SEBIN tiene como función la persecución de los delitos políticos y está adscrito al Ministerio del Poder Popular para Relaciones Interiores y Justicia.

8. La Sra. Afiuni fue arrestada junto con los alguaciles judiciales Rafael Rondón y Carlos Lotuffo, en las instalaciones del Palacio de Justicia del Área Metropolitana de Caracas, específicamente en la sede de su tribunal, y fue conducida a la sede del SEBIN, ubicada en la Avenida Victoria, Sector Roca Tarpeya, Caracas.

9. La orden de arresto le fue comunicada al día siguiente de su detención, el 11 de diciembre de 2009. Fue suscrita por el Tribunal 50.º de Control del Circuito Judicial Penal del Área Metropolitana, a cargo de la Sra. Leyvis Azuaje Toledo, mencionándose la comisión de irregularidades que permitieron la liberación del Sr. Cedeño.

10. Según la fuente, la decisión emitida por la Sra. Afiuni es una decisión interlocutoria susceptible de ser recurrida por el Ministerio Público de acuerdo al principio de impugnabilidad objetiva consagrado en el artículo 433 del Código Orgánico Procesal Penal, concordante con el párrafo 4 del artículo 447 del mencionado cuerpo legal. Es claro que el Ministerio Público tenía a su alcance medios legalmente establecidos para hacer oposición a la decisión de liberación bajo caución. No obstante, no recurrió a ninguno de los recursos legales que tenía a su alcance.

11. La jueza designada para sustituir a la jueza Afiuni Mora revocó la medida cautelar de libertad bajo fianza en favor del Sr. Cedeño, y libró orden de captura en su contra.

12. Durante la Audiencia de Presentación que tuvo lugar el 12 de diciembre de 2009, la Fiscal 56.ª Nacional, Sra. Alicia Monroy, imputó a la Sra. Afiuni la comisión de los delitos de corrupción propia; abuso de autoridad; asociación para delinquir y favorecimiento de evasión, delitos tipificados en el Código Penal, la Ley Orgánica contra la Delincuencia Organizada y la Ley contra la Corrupción. El 50.º Tribunal de Control del Área Metropolitana de Caracas acogió las imputaciones.

13. Según la fuente, altas autoridades del Poder Ejecutivo se refirieron a la detención de la Sra. Afiuni solicitando que “se la condenase a la pena máxima, a 30 años de prisión”, aun cuando fuese necesaria una nueva legislación para alcanzar ese fin. El objetivo era “evitar acciones similares por parte de otros jueces”. Estas declaraciones fueron transmitidas por televisión y radio. Según la fuente, estas declaraciones constituyen una indebida intromisión del Poder Ejecutivo en asuntos del Poder Judicial y perjudican gravemente los principios de Separación de Poderes, Independencia del Poder Judicial, Independencia e Imparcialidad de los jueces y la presunción de inocencia, de la que debe gozar todo ciudadano y la jueza Afiuni Mora.

14. Según la fuente, tampoco se cumple en este caso el requisito establecido por el artículo 256 del Código Orgánico Procesal Penal para privar a una persona de su libertad. No existe ningún elemento de peligrosidad. Tampoco parece vislumbrarse que pueda acreditarse ninguna presunta responsabilidad penal.

15. El 18 de diciembre de 2009, la Sra. Afiuni fue trasladada a las instalaciones de la prisión de mujeres del Estado Miranda, conocida como Instituto Nacional de Orientación Femenina (INOF), ubicada en la localidad de Los Teques, donde se encuentran internadas varias detenidas de particular peligrosidad, algunas condenadas a prisión por la propia Sra. Afiuni. Durante los meses que la Sra. Afiuni lleva privada de libertad, ha sido objeto de varios atentados contra su vida por las reclusas del INOF.

16. Su particular condición de funcionario público ubica a la Sra. Afiuni en una situación de peligro inminente con respecto a las internas que se encuentran recluidas en dicho centro penitenciario. Durante su permanencia en dicha prisión ha sido objeto de varios intentos de agresión e incluso de una tentativa de varias internas de prenderle fuego y quemarla viva. Ante las medidas cautelares relativas a la protección de su vida e integridad personal

acordadas por la Comisión Interamericana de Derechos Humanos el 11 de enero de 2010, la Sra. Afiuni fue trasladada a un lugar de la prisión que presenta una mayor seguridad relativa, aunque sigue siendo un ambiente hostil y evidentemente peligroso.

17. Según la fuente, ello constituye una violación del artículo 46 de la Constitución Política de la República Bolivariana de Venezuela, que proclama que toda persona tiene derecho a que se respete su integridad física, psíquica, y moral, pero también su derecho a permanecer recluida en un lugar que garantice su seguridad, dada su condición de funcionaria judicial que durante varios años ha dictado medidas privativas de libertad y ha dictado condenas a reclusas que se encuentran en el mencionado centro penal.

18. La fuente considera que el arresto y la detención provisional de la Jueza María Lourdes Afiuni Mora son arbitrarios y contrarios a lo dispuesto por la Constitución Política de la República Bolivariana de Venezuela que garantiza los principios de separación de poderes, independencia del poder judicial, e independencia e imparcialidad de los jueces en el ejercicio de sus funciones. El artículo 334 de la Constitución Política reconoce el deber de los jueces de respetar los derechos humanos para hacer respetar la Constitución.

19. La Sra. Afiuni se limitó a aplicar criterios similares a los contenidos en la Opinión 10/2009 (Venezuela) emitida por el Grupo de Trabajo sobre la Detención Arbitraria. Ordenó la libertad bajo fianza de una persona que había estado más de dos años y medio en detención preventiva, en situación de evidente exceso de carcelería, retardo procesal y violación del principio de presunción de inocencia, según el cual toda persona tiene derecho a ser presumida inocente mientras no haya sido declarada culpable mediante sentencia judicial firme y ejecutoriada. El Ministerio Público, que no estuvo presente en la audiencia en la cual la jueza Afiuni Mora decretó la liberación bajo fianza, pudo haber impugnado dicha resolución, en lugar de recurrir a la presentación de cargos penales contra la jueza. Según la fuente, dichos cargos no debieron nunca ser presentados.

20. La Sra. Afiuni no solamente ha sido injustamente privada de su libertad por haber emitido una resolución judicial concordante con la opinión de un órgano de las Naciones Unidas, sino que su vida y su integridad física y psíquica han sido puestas en serio peligro.

21. Se agrega que la detención de la Sra. Afiuni ha tenido un efecto seriamente negativo en la moral de los magistrados, jueces y funcionarios del Ministerio Público.

22. La fuente reitera que toda persona tiene derecho a ser juzgada por un juez independiente e imparcial y que en el ejercicio de sus funciones los jueces deben ser autónomos e independientes de los órganos del Estado. Sólo deben obediencia a la ley y al derecho.

23. La fuente informa también que la sede del Juzgado fue allanada sin la presencia de la Sra. Afiuni por elementos de la Policía de Seguridad Pública, lo que constituye una seria violación de la ley que afectaría de nulidad el proceso en curso.

24. Diversos recursos presentados para lograr el respeto al derecho a la libertad de la Sra. Afiuni o para obtener su traslado a un lugar de reclusión más seguro no han dado resultado. Recursos de revocación interpuestos en la Audiencia de Presentación fueron desestimados en la misma Audiencia. Dos recursos de amparo sobre el derecho a la vida y a la integridad física de la Jueza fueron declarados sin lugar. Una denuncia contra la jueza actuante Leyvis Azuaje por abuso de autoridad fue desestimada.

25. En su completo y documentado informe de respuesta —que el Grupo de Trabajo agradece y valora— el Gobierno sostiene que:

a) La jueza Afiuni Mora está acusada por el hecho de haber concedido, en la audiencia del 10 de diciembre de 2009, una medida de restricción de la libertad del procesado Eligio Cedeño menos gravosa que la prisión preventiva en que se encontraba

desde hacía dos años y medio (fue detenido el 8 de febrero de 2007), lo que constituiría la presunta comisión de los delitos de corrupción propia; abuso de autoridad; favorecimiento de la evasión y asociación para delinquir, delitos todos contemplados en la Ley contra la Corrupción, en el Código Penal y en Ley contra la Delincuencia Organizada;

b) La Jueza realizó la audiencia del 10 de diciembre de 2010 —en la que se concedió la medida menos gravosa que la privación de libertad, consistente en la libertad provisional bajo caución, con prohibición de salir del país y con retención de su pasaporte y la obligación de ir a firmar cada 15 días— sin la presencia del Ministerio Público, cuya presencia era obligatoria;

c) La resolución de medidas restrictivas de libertad menos gravosas importa un desconocimiento de una resolución de la Corte Constitucional de 20 de octubre de 2009 recaída en una acción de amparo deducida por el Ministerio Público que impedía a la jueza adoptar medidas procesales mientras dicho recurso no fuese resuelto. E importa también un desconocimiento de la sentencia condenatoria firme dictada en el mismo proceso contra Eligio Cedeño, en la que se condenaba a un cómplice de éste, Gustavo Arraiz, a la pena de seis años de privación de libertad;

d) No es efectivo que la detención y juzgamiento de la jueza Afiuni hayan sido consecuencia de haber ésta dispuesto una medida menos gravosa que la privación de libertad del procesado Eligio Cedeño basándose en la Opinión 10/2009 (República Bolivariana de Venezuela) del Grupo de Trabajo, de 1.º de septiembre de 2009;

e) Tampoco es efectivo que “minutos después de emitir su resolución” la jueza fuera arrestada en la propia sede del tribunal por elementos de elementos de la seguridad pública, sin orden judicial, ni que la orden le haya sido comunicada al día siguiente, es decir el 11 de diciembre de 2009;

f) Ninguno de los hechos alegados como atentados contra la vida de la jueza ni los varios intentos de agresión por otras reclusas en su centro de detención han ocurrido;

g) El Grupo de Trabajo adoptó la Opinión N.º 10/2009 teniendo en consideración sólo los argumentos de la fuente, los que fueron total y categóricamente desvirtuados por el Estado venezolano en su nota verbal de 14 de diciembre de 2009 (esto es, después de emitida la Opinión);

h) No controvierte el Gobierno el hecho que el Sr. Cedeño llevase ya cumplidos más de dos años y medio de privación de libertad sin haber sido sometido a juicio, sino que sostiene que ello se debió a la dificultad de la investigación de su caso. En realidad, Eligio Cedeño estuvo en prisión preventiva durante dos años, 10 meses y tres días.

26. El estudio de los antecedentes presentados por la fuente y por el Gobierno, y prescindiendo de los hechos nuevos aportados por la fuente en su escrito de observaciones a la respuesta gubernamental fechado el 25 de agosto de 2010, por no haber sido considerados en la comunicación que el Grupo de Trabajo envió al Gobierno, permite al Grupo de Trabajo concluir que los hechos que llevaron a la detención y procesamiento de la jueza María Lourdes Afiuni Mora se desarrollaron de la siguiente manera:

a) La jueza convocó a las partes del juicio penal seguido en contra del Sr. Eligio Cedeño (defensa y Ministerio Público) para una audiencia el día 8 de diciembre de 2009 para resolver sobre la concesión al reo de medidas menos gravosas que la privación de libertad, situación en la que se encontraba ya por dos años, 10 meses y tres días;

b) La audiencia no se realizó, pues la jueza accedió a la petición del Ministerio Público de postergarla, quedando todas las partes notificadas que la audiencia se realizaría el 10 de diciembre;

c) El día fijado se realizó la audiencia (denominada de diferimiento), luego de retardarla por más de una hora por ausencia del Ministerio Público, a las 11.20 horas, concurriendo la parte del reo, pero el Ministerio Público;

d) En estas circunstancias la audiencia se realizó con la sola presencia del reo y su defensa;

e) La jueza, atendido el tiempo que el reo llevaba privado de libertad, sustituyó la medida de privación de ella por la menos gravosa de libertad provisional, con la obligación de comparecer al tribunal cada 15 días, siéndole prohibido abandonar el país, para lo cual se dio orden de retención de su pasaporte;

f) “Minutos después de emitir su resolución” (según la fuente), entre las 12.00 y las 13.00 horas (según la Jueza) o en un momento que no precisa la respuesta del Gobierno, funcionarios adscritos al Servicio Bolivariano de Inteligencia Nacional (SEBIN, antiguamente DISIP) detuvieron a la jueza en su despacho (según la fuente) o en un lugar que no se indica en la respuesta del Gobierno;

g) No se exhibió a la jueza la orden de detención (según la fuente), la que según el Gobierno fue entregada al Tribunal, atendido lo avanzado de la hora, después de las 18.00 horas de ese día.

27. De la narración de hechos, que se desprende fundamentalmente de la respuesta del Gobierno y de los documentos que transcribe, así como por los antecedentes de la fuente transmitidos al Gobierno en la comunicación de 17 de marzo de 2010, aparece claro que la detención de la magistrada, alrededor de las 13.00 horas del día 10 de diciembre de 2010 fue una consecuencia de haber concedido la libertad bajo fianza y con prohibición de abandonar el país a una persona procesada; hecho que, desde el punto de vista del Gobierno, constituye los delitos de corrupción propia; abuso de autoridad; favorecimiento para la evasión y asociación para delinquir, delitos todos contemplados en la Ley contra la Corrupción, en el Código Penal y en Ley contra la Delincuencia Organizada.

28. A este respecto, el Grupo de Trabajo debe recordar que, conforme a lo dispuesto en el artículo 9 del Pacto Internacional de Derechos Civiles y Políticos, toda persona goza del derecho humano a la libertad personal; a ser informada, “en el momento de su detención, de las razones de la misma” y a ser notificada “sin demora de la acusación formulada” en su contra; así como a ser juzgada dentro de un plazo razonable o a ser puesta en libertad. Y se agrega que “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”.

29. Del expediente se destaca que cuando la jueza Afiuni Mora asumió el caso, éste había sido llevado por otros jueces que poco habían avanzado en la investigación, lo que se tradujo en una inusualmente larga privación de libertad.

30. A este respecto debe considerarse que los Principios Básicos relativos a la Independencia de la Judicatura, adoptados por el Séptimo Congreso de las Naciones Unidas sobre Prevención del Delito y Tratamiento del Delincuente, celebrado en Milán (Italia) del 26 de agosto al 6 de septiembre de 1985, y confirmados por la Asamblea General en sus resoluciones 40/32 de 29 de noviembre de 1985 y 40/146 de 13 de diciembre de 1985, consideran que “los jueces son los encargados de adoptar la decisión definitiva con respecto a la vida, la libertad, los derechos, los deberes y los bienes de los ciudadanos” (párrafo 6 del preámbulo). Siendo esta misión la más importante de su mandato, es obvio para el Grupo de Trabajo que la jueza no tenía ninguna otra alternativa legal que acoger la petición de sustitución de la prisión preventiva de quien llevaba poco menos de tres años en esa condición, por una medida más benigna. Por lo demás, la privación preventiva de la libertad

es esencialmente revocable, y el hecho que una sentencia dictada con anterioridad, en otro momento procesal y con otros antecedentes, haya dispuesto la mantención del arresto, en nada impide que, en un momento posterior y con otros antecedentes, el juez pueda —en rigor, deba— disponer su revocación. Y, desde luego, lo obrado respecto de un inculpado ya condenado en caso alguno puede significar que otro, solamente procesado, deba continuar en prisión preventiva. Las responsabilidades penales son individuales y las condiciones de procesado y condenado son enteramente diferentes.

31. Por lo demás, así lo ordena imperativamente el artículo 256 del Código Orgánico Procesal Penal de la República Bolivariana de Venezuela, al sostener que “siempre que los supuestos que motivan la privación judicial preventiva de libertad puedan ser razonablemente satisfechos con la aplicación de otra medida menos gravosa para el imputado, el tribunal competente, de oficio o a solicitud del Ministerio Público o del imputado, deberá imponer en su lugar, mediante resolución motivada, alguna de las siguientes medidas: ...” (y cita esas medidas, entre las cuales estaban las aplicadas por la jueza Afiuni Mora en el proceso contra Cedeño).

32. El cargo que se le formula de haber realizado la audiencia sin la presencia del Ministerio Público es del todo inconsistente: la audiencia debió haberse realizado el día que se había designado —el 8 de diciembre de 2009—, pero se suspendió a petición del Ministerio Público que quedó notificado de comparecer para a nueva audiencia, que se fijó a su propia demanda. Al no hacerlo, y luego de una hora de espera, la jueza estuvo obligada a resolver.

33. A juicio del Grupo de Trabajo, la sustitución de la prisión preventiva por la de libertad bajo caución y con arraigo en el país, fue una determinación prudente que, junto con reconocer el derecho humano a ser juzgado en libertad, garantiza “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”. Resolver un asunto judicial dando cumplimiento al derecho internacional de los derechos humanos no puede considerarse de modo alguno favorecimiento de la evasión, ni corrupción, ni abuso de autoridad y menos asociación para delinquir. Si el liberado logró fugarse no es responsabilidad del juez que lo liberó, y deberá buscarse las responsabilidades en quienes estaban obligados a impedir el abandono del país, como lo ordenó la sentencia.

34. El Grupo de Trabajo adoptó su Opinión 10/2009 y la mantiene, pues la prolongada privación de libertad esperando juicio por dos años y seis meses (en aquel momento) constituye la situación contemplada en sus Métodos de Trabajo como una detención arbitraria de categoría III. No obstante, es claro que al resolver como lo hizo, la jueza, en su función de integrante de un Poder del Estado de la República Bolivariana de Venezuela, dio cumplimiento al derecho internacional, lo que le ha significado que hoy sea, por ello, privada de libertad, paradójicamente, por otro integrante del mismo Poder del Estado.

35. Conviene agregar que la fuente señala que la jueza Afiuni “fue arrestada en la sede del tribunal por elementos de la Policía de Seguridad Pública adscritos a la Dirección de los Servicios de Inteligencia y Prevención [...] quienes no mencionaron ni el motivo de la detención ni qué autoridad la había ordenado. Los agentes policiales no mostraron orden judicial alguna”. El Gobierno en su respuesta califica estas afirmaciones como una “intención descarada de la fuente de inducir a error sobre la exacta apreciación de los hechos que llevaron a que se dictara orden de aprehensión”. Sin embargo, el Grupo de Trabajo nota que es el propio Gobierno quien confirma la versión de la fuente, al sostener que la orden de detención en contra de la Sra. Afiuni fue depositada por la Policía en la Unidad de Recepción y Distribución de Documentos Penales del Palacio de Justicia a las 20.00 horas de ese día, 10 de diciembre y que le fue presentada recién el día 12 de diciembre en la Audiencia de Presentación del Aprehendido. La explicación que da el Gobierno es que el día 10 la Jueza no fue aprehendida, sino que ella y dos alguaciles

“fueron trasladados a la sede de la Dirección de los Servicios de Inteligencia (DISIP) sólo con la finalidad de indagar en torno a la investigación por la posible comisión de un hecho punible y no es sino cuando ese Tribunal emitió las órdenes de aprehensión... pasadas las seis horas de la tarde y recibidas en la sede del órgano judicial siendo las 8 horas de la noche...”. Confirma también el Gobierno lo sostenido por la fuente en cuanto el despacho judicial de la jueza fue allanado, hecho que dice haber ocurrido por orden de la fiscal Monroy en la búsqueda de evidencias de un hecho ilícito. A juicio del Grupo, la jueza estaba detenida desde el mediodía del día 10 de diciembre, pues el traslado a la sede de la DISIP se hizo en condición de persona privada de libertad, sin que se le hubiese presentado orden de aprehensión y sin haber sido informada de los motivos ni la autoridad que así lo dispuso. Esta ausencia de orden previa de arresto permite al Grupo de Trabajo considerar que se ha producido la causal de arbitrariedad de la detención contemplada en la Categoría I de sus Métodos de Trabajo. Tal situación importa una privación de libertad que tiene el carácter de arbitraria.

36. Sostiene el Gobierno que no son efectivos los supuestos atentados contra la vida y la integridad física o psíquica contra la Sra. Afiuni en su recinto de detención, de parte del resto de la población penal, en la que se incluyen personas que fueron encarceladas por órdenes de la Sra. Afiuni, y que motivaron no sólo la preocupación del Grupo de Trabajo, sino también de gran parte de la comunidad internacional. De hecho:

a) El Presidente del Grupo de Trabajo, conjuntamente con la Relatora Especial sobre la independencia de los magistrados y abogados y la Relatora Especial sobre la situación de los defensores de los derechos humanos, todos mecanismos del Consejo de Derechos Humanos, dirigieron al Gobierno de la República Bolivariana de Venezuela un llamamiento urgente el 16 de diciembre de 2009 a este respecto;

b) El Relator Especial sobre las ejecuciones extrajudiciales, sumarias o arbitrarias, la Relatora Especial sobre la independencia de los magistrados y abogados y la Relatora Especial sobre la situación de los defensores de los derechos humanos enviaron el 1.º de abril de 2010 un segundo llamamiento urgente al Gobierno para el debido resguardo de los derechos de la Sra. Afiuni, sin que se haya recibido respuesta a la fecha de adopción de esta Opinión;

c) El Relator Especial sobre el derecho de toda persona al disfrute del más alto nivel posible de salud física y mental y el Relator Especial sobre la Tortura y otros tratos o penas crueles, inhumanos o degradantes hicieron lo propio el 26 de julio de 2010. Esta tercera comunicación tampoco ha tenido respuesta del Gobierno al momento de la adopción de la presente Opinión.

37. La Alta Comisionada de las Naciones Unidas para los Derechos Humanos, Navi Pillay, participando en Seúl en la Décima Conferencia Bienal de la Asociación Internacional de Mujeres Jueces (IAWJ), luego de manifestar que las juezas y los jueces “también pueden utilizar el análisis experto y el contenido de los informes de los relatores temáticos especiales del Consejo de Derechos Humanos”, expresó su “solidaridad con las colegas judiciales que han sido atacados o encarcelados por sus gobiernos, no necesariamente porque ellas son mujeres, sino por su integridad y convicción. Estoy preocupada en particular, manifestó, por Birtukan Mideksa en Etiopía y por María Lourdes Afiuni en Venezuela”.

38. Durante la misma reunión en Seúl y en ocasión del 14.º período de sesiones del Consejo de Derechos Humanos en junio de 2010 en Ginebra, la Relatora Especial sobre la independencia de los magistrados y abogados, Gabriela Knaul, llamó también la atención sobre la condición de riesgo a su integridad física en que se encontraba la jueza Afiuni Mora.

39. Del mismo modo, la Comisión Interamericana de Derechos Humanos concedió medidas cautelares a la Sra. Afiuni Mora, considerando que su integridad física e, incluso, su vida, estaban en riesgo en el lugar de su actual reclusión. Estas medidas (MC 380/09) de 11 de enero de 2010 fueron concedidas con el fin que el Gobierno garantizase la vida y la integridad física de la Sra. Afiuni, debiendo trasladarla a un lugar seguro, solicitando que el Gobierno informase a la Comisión sobre las acciones adoptadas a fin de esclarecer judicialmente los hechos que justifican la adopción de dichas medidas cautelares.

40. El Gobierno en su respuesta niega los hechos que motivaron tanta preocupación internacional, e informa al Grupo de Trabajo de que ha adoptado todas las medidas necesarias para la protección física de la Sra. Afiuni. El Grupo de Trabajo agradece al Gobierno la información proporcionada y la adopción de las medidas de protección requeridas. La mayor información sobre estos hechos que entrega la fuente en su escrito de comentarios y observaciones a la respuesta gubernamental de 25 de agosto de 2010 no ha sido considerada en esta Opinión, por no haber estado esos hechos incluidos en la comunicación inicial ni en la consiguiente comunicación del Grupo de Trabajo al Gobierno.

41. El Grupo de Trabajo considera que la función de juzgar es una de las manifestaciones más nobles del derecho humano a la libertad de expresión y opinión a que se refieren los artículos 19 de la Declaración Universal de Derechos Humanos y del Pacto Internacional de Derechos Civiles y Políticos. Ejerciendo esta libertad es como satisface su mandato en nombre del pueblo, por lo que para un juez es aún más apremiante la prohibición de ser molestado por sus decisiones. Esto hace que las medidas adoptadas en su contra por órganos del Estado constituyan una vulneración del ejercicio de este derecho. De este modo, también la detención de la jueza Afiuni Mora constituye una manifestación de arbitrariedad de la privación de la libertad conforme a la Categoría II de las categorías aplicadas por el Grupo.

42. Ninguno de los recursos interpuestos por la Sra. Afiuni en resguardo de sus derechos en el plano interno ha sido satisfecho conforme a las exigencias de los artículos 8 y 10 de la Declaración Universal y el párrafo 3 del artículo 2 y el artículo 9 del Pacto, de modo que los derechos al recurso efectivo para el restablecimiento del derecho a la libertad personal y la legalidad de la prisión han sido también conculcados.

43. El derecho humano a ser juzgado en libertad, consagrado en el párrafo 3 del artículo 9 del Pacto Internacional de Derechos Civiles y Políticos, ha sido también violado, encontrándose la Sra. Afiuni ya en prisión preventiva por 10 meses.

44. La resolución sobre la libertad del Sr. Eligio Cedeño dio origen a que las más altas autoridades de la República Bolivariana de Venezuela demandaran que “se condenase a la Jueza a la pena máxima de 30 años de prisión”; a que se le calificara de “bandida”, y a que se dijera que “habrá que hacer una ley porque es mucho, mucho más grave un juez que libera a un bandido que el bandido mismo”. Este hecho público y notorio fue explicado en la respuesta del Gobierno como “presuntas menciones injuriosas por parte del Jefe del Ejecutivo venezolano, pero en todo caso, las consideraciones y reacciones del mandatario nacional son muestra de su claro compromiso por la erradicación de la corrupción en todos los niveles y ámbitos del poder público”. Estas declaraciones “fueron posteriores a la detención decretada, y obedecieron sin duda a la bochornosa actuación de esta ciudadana en el caso del banquero Eligio Cedeño”.

45. El Grupo de Trabajo entiende que estas declaraciones importan una fuerte presión e injerencia del Poder Ejecutivo sobre el Judicial, que afectan muy seriamente la independencia de este último. Los jueces que están y estarán encargados de juzgar a la Jueza Afiuni Mora han de sentir esta presión, de modo tal que el juicio no será conducido por jueces independientes ni imparciales, lo que constituye una causal de arbitrariedad de la detención, según la Categoría III de los Métodos de Trabajo ya citados.

46. Por lo dicho con anterioridad, al ser la Sra. Afiuni arrestada alrededor del mediodía del 10 de diciembre de 2009 en las dependencias del Juzgado en el que ejercía, se ha vulnerado su derecho a ser informada de las razones de su arresto y de notificación de la orden pertinente (artículos 11 de la Declaración Universal, y 9.1 y 9.2 y 14.3 *a* del Pacto), lo que importa la consideración de arbitrariedad, según la Categoría I de las consideradas por los Métodos de Trabajo del Grupo de Trabajo

47. El Grupo de Trabajo desea, finalmente, fijar su posición respecto a la afirmación del Gobierno en cuanto que para adoptar su Opinión N° 10/2009 “solo tuvo en consideración los argumentos expresados por los defensores del citado banquero”, versión que “ha sido total y categóricamente desvirtuada por el Estado venezolano en nota de 14 de diciembre de 2009, “si bien es cierto que la respuesta del Gobierno venezolano se produjo después” de la adopción de la Opinión (después de septiembre de 2009). El Gobierno sostiene que a partir del 14 de diciembre de 2009, el Grupo de Trabajo “tuvo a su disposición los objetivos y contundentes argumentos jurídicos expresados en nota de esa fecha, a pesar de lo cual el Presidente [del Grupo de Trabajo] optó por incluir una mención expresa a la referida Opinión 10/2009 en la presentación del Informe el 9 de marzo 2010 durante el 13.º período de sesiones del Consejo de Derechos Humanos”.

48. De la misma respuesta gubernamental se transparenta que el Grupo de Trabajo nunca tuvo a la vista una respuesta del Gobierno. Pero otra cosa es que su Presidente-Relator, cumpliendo su obligación de presentar el informe anual del Grupo de Trabajo al Consejo de Derechos Humanos el 9 de marzo de 2010, se refiriera al caso de la jueza Afiuni Mora. A esa época, la Opinión ya tenía tres meses de haber sido adoptada, y el Presidente-Relator del Grupo de Trabajo no tiene poder alguno de modificar una Opinión del mismo. Al mismo tiempo, la intensa preocupación que el caso ha planteado en la comunidad internacional forzaba que en su intervención ante el Consejo, el Presidente-Relator hiciera una mención específica del caso, del mismo modo como la Alta Comisionada y la Relatora Especial sobre la independencia de los magistrados y abogados lo hicieron durante la Décima Conferencia Bienal de de la IAWJ. El Grupo de Trabajo respalda absoluta y unánimemente a su Presidente-Relator por su intervención ante el Consejo.

49. Habida cuenta de lo que antecede, el Grupo de Trabajo emite la siguiente Opinión:

La privación de libertad de la jueza María Lourdes Afiuni Mora es arbitraria, ya que contraviene lo dispuesto en los artículos 3, 9, 10, 11, 12 y 23 de la Declaración Universal de Derechos Humanos y los artículos 9, 10 y 14 del Pacto Internacional de Derechos Civiles y Políticos, del cual la República Bolivariana de Venezuela es Parte, y corresponde a las Categorías I, II y III aplicables al examen de los casos presentados al Grupo de Trabajo.

50. Consecuente con la Opinión emitida, el Grupo de Trabajo pide al Gobierno de la República Bolivariana de Venezuela que ponga remedio a la situación de la Sra. María Lourdes Afiuni Mora de conformidad con las disposiciones de la Declaración Universal de Derechos Humanos. El Grupo de Trabajo cree que, en las circunstancias del caso y teniendo en cuenta el prolongado período de tiempo que ha estado privada de libertad, los remedios adecuados deben ser:

a) La liberación inmediata de la Sra. Afiuni, disponiéndose al mismo tiempo que reasuma el cargo de magistrada que se encontraba ejerciendo al momento de su arresto y el despacho judicial, con todos sus derechos;

b) Alternativamente, someter a la Sra. Afiuni a un proceso seguido según las reglas del debido proceso de derecho, y gozando la detenida de su derecho humano a la libertad provisional;

c) Brindar alguna forma de reparación efectiva a la Sra. Afiuni por los daños causados por su detención arbitraria.

Adoptada el 1.º de septiembre de 2010

## **Opinion No. 21/2010 (Egypt)**

### **Communication addressed to the Government on 2 February 2010**

**Concerning: Abdul Mohamed Gamal Heshmat, Hosni Omar Ali Omaar, and 10 other individuals.**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group conveys its appreciation to the Government for having provided it with information in its reply concerning the allegations of the source. The Working Group regrets that the Government has not replied within the 90-day deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.
5. According to the source, this case concerns a recent increase of mass arrests and detention, which it considers to be arbitrary, occurring in the Arab Republic of Egypt and targeting the leadership and activists of the “Muslim Brotherhood”, a banned political party in Egypt.
6. In particular, the source reported of the arrests the following two individuals alongside with 10 other members of the “Muslim Brotherhood”:
  - Mr. Mohamed Gamal Heshmat, 54 years old, a renowned doctor in Egypt and an important member of the Arab Doctors Syndicate, who was arrested on 26 September 2009;
  - Mr. Hosni Omar Ali Omaar; 49 years old; a civil engineer with the Directorate of Irrigation of AI Bahira. He was a candidate in the last parliamentary elections. Was arrested on 26 September 2009.
7. In its original submission, the source also referred to arbitrary detention of Mr. Ashraf Abdel Ghaffar and Mr. Abdul Moneim Aboul Fatouh, who were also accused of belonging to the “Muslim Brotherhood”. The Working Group, however, could not form an opinion as to the arbitrariness of their detention for the following reasons:
  - (a) In its subsequent comments, the source consented with the Government’s information, that Mr. Ghaffar was also accused of and detained in July 2009 for allegedly laundering money raised abroad. He was released in November 2009. The source in his comments provided additional information related to Mr. Ghaffar case (such as the reference to the report of the financial committee), which the Working Group has not had an opportunity to include in its original request for information from the Government;
  - (b) As to Mr. Abdul Moneim Aboul Fatouh, although he was listed in the original submission among those detained members of the “Muslim Brotherhood”, there was no further reference to the circumstances of his case neither in the Government’s response nor in the subsequent source’s comments on the response. The Working Group

has not had sufficient information as to circumstances of his detention to form an opinion on its arbitrariness or otherwise.

8. Mr. Mohamed Gamal Heshmat and Mr. Hosni Omar Ali Omaar were accused of belonging to the “Muslim Brotherhood”, and being “dangerous to public security and order”. The Egyptian authorities invoke article 3 (1) of Law 162 of 1958, which is the Emergency Law. It not only permits the arrest and detention of criminal suspects, but also of “persons who are ‘dangerous to public security and order’”.

9. However, in this regard the source points out that the Special Rapporteur on Countering Terrorism stated in his report of 14 October 2009 on his country mission to Egypt that “the lack of a clear indication in the law as to what exactly constitutes a threat to public security and order is at variance with the principle of legality”.

10. The source considers that the arrest and detention of a large number of political opponents is an excess caused by the Emergency Law. The state of emergency is allegedly in place to combat terrorism in Egypt, yet the arrests carried out often target members of the “Muslim Brotherhood”, who have no link to any terrorist activities.

11. According to the source, since July 2009, successive waves of arrests have been occurring in Egypt, systematically aimed at the “Muslim Brotherhood” leadership and their sympathizers. The majority of those arrested are between the age of 40 and 55 and hold high-profile positions in the companies and institutions in which they work. Many of them work in charity or other forms of associations and all are members of the “Muslim Brotherhood”. They all hold positions of considerable influence and this puts many of them in a promising position for being successfully elected to Parliament.

12. The source submits that the arrest and detention of these two individuals is arbitrary, being devoid of a recognizable legal basis.

13. In addition, the source argues that the arrest and detention of these individuals results from the exercise of their rights to hold opinions, of the right to freedom of thought, opinion, expression, belief and assembly, and the right to take part in the conduct of public affairs, as guaranteed by articles 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 18, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights.

14. In November 2010, parliamentary elections are scheduled to be held in Egypt, and the source is concerned that the current trend of arrests and detention is motivated, in particular, by a desire to silence or at least disrupt the plans by the leaders of the “Muslim Brotherhood”, Egypt’s largest opposition movement, to submit their candidacies for these elections and run successful election campaigns.

15. The source states that in the runup to the 2008 municipal elections, Egypt’s security forces conducted mass arrests on a similar scale to those occurring at present, targeting mainly “Muslim Brotherhood” members who had submitted their candidacies as independents. The source reports that, in total, 831 leading members or sympathizers of the movement were arrested around the country, establishing a pattern.

16. The Government in its response described the legal procedures through which the two above-mentioned individuals were detained. According to the response, the two individuals were released.

17. According to the response, Mr. Mohamed Gamal Heshmat and Mr. Hosni Omar Ali Omaar, together with 10 other Muslim Brotherhood members, had been arrested on 26 September 2009 and charged with the membership of an illegal organization and possession of written material and publications designed to promote and raise awareness of this

organization's beliefs. These individuals were released on 5 October 2009 further to a court order.

18. The source confirms that the two individuals were indeed released due to a lack of evidence against them.

19. The source maintains that the Egyptian authorities continued persecution of these individuals as a result of the exercise of their right to the freedom of thought, opinion and expression, as guaranteed by article 19 of the International Covenant.

20. The source emphasized that these individuals were rearrested following the Government's response to the Working Group stating that they had been released.

21. In particular, Mr. Ali Omaar was released in January 2010, following five months of detention which the authorities justify in their response to the Working Group as required for "investigations", which found no evidence to justify his deprivation of liberty. However, Mr. Ali Omaar was again arrested by the SSI on 18 March 2010. On 22 March, the criminal court of Damanhour, having considered his case, ordered his immediate release for lack of any evidence justifying his continued detention. Despite this release order, the SSI kept him in detention, and the Ministry of the Interior issued an administrative detention order. The source concludes that Mr. Hosni Omar Ali Omaar's detention between September 2009 and January 2010 as well as his current detention are arbitrary as they lack any legal basis and because they are a direct result of his exercising of his right to the freedom of opinion and expression.

22. Mr. Mohamed Gamal Heshmat, originally arrested on 26 September 2009, was released on 26 November 2009, following the prosecution's findings that there was no evidence against him, and thus his deprivation of liberty had no legal basis. However, according to the source, he was rearrested by SSI forces on 3 May 2010, after the Government sent its response to the Working Group, under the same accusations of belonging to a prohibited organization, the Muslim Brotherhood. He is currently detained in Bourj al Arab prison, in particularly difficult conditions. He has undertaken a hunger strike in protest at his rearrest and the conditions of his arrest and detention. The source states that Mr. Heshmat has not been presented before a judge or been tried. Accordingly, the source considers that Mr. Mohamed Gamal Heshmat was detained arbitrarily between 26 September and 26 November 2009 and is again detained arbitrarily, as his detention cannot be justified and as it results from his exercising of his right to freedom of opinion and expression.

23. The source contends that the fact that the Government states in its response to the Working Group that these individuals were investigated in different ways, and yet all were released without officially been charged or tried, shows that there was insufficient evidence against them to justify their detentions. Their rearrests and continued prosecution on the same charges is thus not driven by evidence but motivated by a desire on the part of the authorities to hinder their potential for organizing any campaign for their election to Parliament in November 2010.

24. The source concludes that, in light of the elements confirmed by the Government's response to the Working Group and the further clarifications on the current situations provided above, the detention of Messrs. Hosni Ali Omaar and Mohamed Gamal Heshmat have been arbitrary as there is no legal justification for it, and it results from the exercising of their right to freedom of opinion and expression.

25. The Working Group reiterates its prior considerations on similar cases of detention in Egypt (such as its Opinions No. 3/2007 and 27/2008, 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).

26. In particular, the Working Group, in its Opinion No. 27/2008, paragraph 82, recalled that pursuant to articles 9 and 10 of the Universal Declaration and articles 9 and 14 of the International Covenant everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. This shall 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. An arrest of these individuals again under the same charges by administrative authorities will have no legal basis and will imply a non-observance of a judicial decision.

27. The Working Group also concurs with the position taken by the Human Rights Committee in its general comment No. 29 (2001) that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during the state of emergency and that in order to protect non-derogable rights, the right to take proceedings before a court and to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant. This implies that release orders of courts competent to exercise control over the legality of detention must be honoured by the Government even in a state of emergency.

28. In its Opinion No. 21/2007, paragraph 19, as well as on earlier occasions (Opinion No. 5/2005 (Egypt), paragraph 19; Decision No. 45/1995 (Egypt), paragraph 6; and Decision No. 61/1993 (Egypt), paragraph 6), the Working Group considered that maintaining a person in administrative detention once his release has been ordered by a court competent to exercise control over the legality of detention, renders the deprivation of liberty arbitrary.

29. The Working Group reiterates its opinion that, in such cases, no legal basis can be invoked to justify the detention, least of all an administrative order of the Executive issued to circumvent a judicial decision ordering the release.

30. In the current case before the Working Group, Mr. Ali Omaar had been released in January 2010, and then was rearrested by the SSI on 18 March 2010. On 22 March 2010, the criminal court of Damanhour ordered his immediate release. However, despite the judicial order, the SSI kept him in detention, and the Ministry of Interior issued an administrative detention order against him.

31. The Working Group also refers to the report of 14 October 2009 of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, on his mission to Egypt (17 to 21 April 2009). It is emphasized in the report (para. 20), that the lack of a clear indication in the Emergency Law as to what exactly constitutes a threat to public security and order is at variance with the principle of legality. This deficiency, according to the report, coupled with the fact that SSI officers in practice enjoy *carte blanche* in deciding on whom to arrest and that terrorist suspects are in many cases detained without receiving sufficiently detailed information, if any, on the reason for their detention, is incompatible with article 9 (2) of the International Covenant and seriously diminishes any real possibility for the detainee to contest the legality of detention, as stipulated by article 9 (4). The Special Rapporteur expressed particular concern as to the widespread practice that persons are not actually released after a release order is given, but are transferred by SSI officers to non-official premises or police stations where they are held illegally until a new detention order is given.

32. Indeed, in the current case, the Government did not further specified what crimes the holding of "extremist ideas" may constitute and in what way the activities of Mohamed Gamal Heshmat, Hosni Omar Ali Omaar, and the 10 other individuals pose a threat to the stability and public security of the country. Such allegations are inconclusive if the

individuals concerned are unaware of what exact crimes they are accused of, especially in view of courts' orders for their release. In the absence of such specifications the Working Group has no reason to question the allegation of the source that their detention is solely connected to the exercise of their right to freedom of opinion and expression as guaranteed by article 19 of the International Covenant. Accordingly, the detention of Mohamed Gamal Heshmat and Hosni Omar Ali Omaar, as well as of the 10 other individuals detained with them was arbitrary (category II).

33. In fact, Mohamed Gamal Heshmat had been released in November 2009 and was re-arrested by SSI in May 2010, after the Government sent its response to the Working Group, under the same accusations of belonging to a prohibited organization, the Muslim Brotherhood. He remains in detention and has not been presented before a judge or been tried.

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

The deprivation of liberty of Messrs. Mohamed Gamal Heshmat and Hosni Omar Ali Omaar has been arbitrary, being in contravention of articles 9 and 19 of the International Covenant on Civil and Political Rights, to which Egypt is a Party, and falls within categories I and II of the categories applicable to the consideration of the cases submitted to the Working Group.

35. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mohamed Gamal Heshmat and Hosni Omar Ali Omaar and 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. The Working Group believes that the adequate remedy would be their immediate release.

Adopted on 1 September 2010

## **Opinion No. 22/2010 (Egypt)**

### **Communication addressed to the Government on 2 February 2010**

**Concerning: Mr. Abdel Hakim Abdel Raouf Hassan Soliman**

#### **The State is a Party to the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
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. 18/2009)
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 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 the observations by the source.
6. Mr. **Abdel Hakim Abdel Raouf Hassan Soliman**, born in 1965, a citizen of Egypt, resident in Abu Rish, Damanhur, Al Bahira Governorate, working as a cotton expert; was

initially arrested on 17 May 2009, and according to the source remains detained to this day at Wadi Natroun Prison.

7. Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** was initially arrested without a warrant on 17 May 2009 together with other 26 individuals at Mr. Ahmed Ali Hussein Eid's home by agents from the Special Security forces of the State Security Investigation (SSI), the General Intelligence and the General Security. Ten persons arrested have since then been released. The names of the 16 individuals presumed to still be in detention were given as follows:

- (a) Emad Mohamed Fathi Abdelhafez;
- (b) Ahmed Ali Hussein Eid;
- (c) Hani Mohamed Gaber El Bakatouchi;
- (d) Mohamed Abdel Nazir Mohamed Etman;
- (e) Mohamed Ahmed Hakim Abdel Rashid Abdel Moawad;(f) Mohamed Ahmed Abdel Mawogoud Mohamed;
- (g) Ashraf Mohamed Nagib El Kateb;
- (h) Magdy Zaky Atya Oda;
- (i) Mohamed Mamdouh Ali Salman;
- (j) Mohamed El Esawi El Zahabi;
- (k) Mohamed Hassan El Sayed Abou Hassan;
- (l) Mohamed Abdel Monem Ibrahim Zeidan;
- (m) Mohamed Hassan Mahmoud El Sakhawy;
- (n) Aboul Fotouh Mohamed Abou El Yazid Aboufoutouh;
- (o) Osama Mohamed Ibrahim Soliman; and
- (p) Amine Abdullah Ali Al Naggar.

8. On 18 May 2009, Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** was accused of belonging to the "Muslim Brotherhood" in application of the Emergency Law No. 162 of 1958. Following his initial arrest, Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** was detained at Sahrawi Prison 2 in Wadi al Natroun, with intermittent transfers to the cells of the Supreme State Security Prosecution in Cairo, until 27 July 2009.

9. On 27 July 2009, the Damanhur Criminal Court ordered Mr. **Abdel Hakim Abdel Raouf Hassan Soliman**'s release given the lack of evidence against him. However, he was immediately re-arrested upon an administrative detention order issued by the Ministry of the Interior by officers from the SSI and detained at their headquarters until 3 August 2009. On that day, Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** was transferred to Wadi Natroun Prison.

10. The source alleges that the detention of Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** is arbitrary and his continuous detention is devoid of any legal basis as a release order was issued by a court. The source further argues that the lack of a foreseeable trial and the exceptional nature of possible future jurisdictions in Mr. **Abdel Hakim Abdel Raouf Hassan Soliman**'s case, the military court or the Supreme State Security Court, are in violation of article 14, para. 2 (c), and 14, para. 5, of the International Covenant on Civil and Political Rights.

11. In its response, the Government informs that the arrests of Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** and 26 other people on 18 May 2009, were related to the charges of being members of an illegal organization, the Muslim Brotherhood, and possession of written material and publications which promote that organisation's beliefs. The response states that all 26 people were released between 12 July 2009 and 26 July 2009 on orders from the Office of the Public Prosecutor and the courts.

12. The Government refuted the allegations that these Muslim Brotherhood members were arrested to prevent them from standing in the forthcoming elections and considers these allegations to be without any basis in fact.

13. The Government does not provide any response to information received from the source about the immediate rearrest of Mr. **Abdel Hakim Abdel Raouf Hassan Soliman**, about his detention in the headquarters of the SSI, and his subsequent transfer to Wadi Natroun Prison.

14. In the light of the foregoing, the Working Group reiterates the provisions set forth in the its previous Opinion 21/2010 (Egypt) concerning **Abdul Mohamed Gamal Ahmed Heshmat Abdalhamid, Hosni Omar Ali Omaar and 10 other persons**. The Working Group, furthermore, recalls its considerations in previous cases of detention within the territory of Egypt, such as Opinions 3/2007 and 27/2008, 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, on 6 October 1981, of the state of emergency in Egypt and renewed since then (documents CAT/C/CR/29/4, par. 5 and E/C.12/1/Add.44, para. 10).

15. In its Opinion 27/2008, paragraph 28, the Working Group recalled that pursuant to 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, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. This shall be interpreted as meaning that if such independent and impartial judicial authority decides that a detention order issued by an administrative authority is not appropriate, those arrested should be immediately released. Consequently, if the police or the security forces arrest these individuals again under the same charges, the new arrest by the administrative authorities will have no legal basis.

16. The Working Group also concurs with the position taken by the Human Rights Committee in its general comment No. 29 of 2001, that the principles of legality and the rule of the law require that fundamental requirements of fair trial must be respected during the state of emergency and that, in order to protect non-derogable rights, the right to take proceedings before a court and to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant. Release orders of courts competent to exercise control over the legality of detention must be honored by the Government even in a state of emergency.

17. In its Opinion 21/2007, paragraph 19, as well as on earlier occasions set forth in Opinion 5/2005, paragraph 19, Decision 45/1995 (Egypt), paragraph 6, and Decision 61/1993 (Egypt), paragraph 6; the Working Group considered that maintaining a person in administrative detention once his release has been ordered by the court competent to exercise control over the legality of detention, renders the deprivation of liberty arbitrary.

18. The Working Group reiterates its view that, in such cases, no legal basis can be invoked to justify the detention, least of all an administrative order of the Executive issued to circumvent a judicial decision ordering a release.

19. The Working Group also refers to the report dated 14 October 2009 of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms

while countering terrorism, Martin Scheinin, on its mission to Egypt (from 17 to 21 April 2009). It is emphasized in the report (para. 20), that the lack of a clear indication in the Emergency Law as to what is considered to be a threat to public security and order, violates the principle of legality. When combined with the fact that SSI officers, in practice, enjoy a “carte blanche” in deciding to whom arrest or rearrest, and that terrorist suspects are in many cases detained without receiving sufficiently detailed information, if any, on the reasons for their detention, this results incompatible with article 9, paragraph 2, of the International Covenant on Civil and Political Rights and seriously diminishes any real possibility for the detainee to contest the legality of detention, as stipulated by article 9, paragraph 4. The Special Rapporteur expressed particular concern as to the widespread practice that persons are not actually released after a release order is given, but are instead transferred by SSI officers to non-official premises or police stations, where they are held illegally until a new detention order is given.

20. The Working Group notes that, in the current case, the Government has not refuted the information from the source about the immediate re-arrest and current administrative detention of Mr. **Abdel Hakim Abdel Raouf Hassan Soliman**.

21. This establishes a violation of article 9 of the International Covenant on Civil and Political Rights to which the Arab Republic of Egypt is a party, and an arbitrary deprivation of liberty where it is clearly impossible to invoke any legal basis justifying the deprivation of liberty, according to category I of the categories applicable to the cases submitted to the Working Group.

22. The Government’s reply to the allegations ‘that these Brotherhood members were arrested to prevent them from standing in the forthcoming elections’ as being “without any basis in fact”, does not assist the Working Group in its deliberation. The Government’s reply does not provide any support for this assertion. Thus, the Working Group has not been provided with clear reasons to question the allegation of the source that the detention of Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** and others intends to limit their exercise of the right to freedom of opinion and expression as guaranteed by article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The arbitrary detention also falls within category II of the categories applicable to the cases submitted to the Working Group.

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

The deprivation of liberty of Mr. **Abdel Hakim Abdel Raouf Hassan Soliman** is arbitrary, being in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and of articles 9 and 19 of the International Covenant on Civil and Political Rights, and falls within categories I and II of the categories applicable to the consideration of the cases submitted to the Working Group.

24. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation, which, under the circumstances of this case, would be the immediate release of Mr. **Abdel Hakim Abdel Raouf Hassan Soliman**.

Adopted on 2 September 2010

## **Opinion No. 23/2010 (Myanmar)**

### **Communication addressed to the Government on 10 March 2010**

**Concerning: Mr. Kyaw Zaw Lwin, a.k.a. Nyi Nyi Aung**

#### **The State has not ratified the International Covenant on Civil and Political Rights**

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group notes that the Government has replied to a previous urgent appeal sent on 16 December 2009 but not to the communication dated 10 March 2010 concerning its regular procedure.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case summarised hereinafter was reported by the source to the Working Group on Arbitrary Detention as follows:
5. Mr. Kyaw Zaw Lwin, a.k.a. Nyi Nyi Aung, an American citizen, was arrested in Rangoon on 3 September 2009, after he disembarked a flight from Bangkok, by Special Branch and military intelligence officers.
6. Kyaw Zaw Lwin was taken to various interrogation centres and later to the Insein Central Prison.
7. On 24 September 2009, the State media carried reports accusing him of involvement in a terrorist plot.
8. Kyaw Zaw Lwin was charged of cheating and forgery under Section 420 of the Penal Code. On 14 October 2009, Presiding Judge U Than Lwin opened the trial in Mingalardon Township Court. According to the source, under Section 468 of the Penal Code, read with Section 463, there must be intent to commit forgery for the purpose of cheating. However, on 5 January 2010, Police Captain Than Soe admitted in Court that the accused at no time produced the supposedly forged card and nor do the Police have any record of his having used a forged card or of any intent to use one, so there was no act or intent to act upon which to lay this charge.
9. Subject was also charged with the commission of acts against Foreign Exchange Regulation Act, 1947, Section 24 (1), on a complaint of the Airport Customs Investigation Unit. The trial started on 30 October 2009 and took place before the Yangon Southern District Court. This foreign exchange charge is, according to the source, also baseless because personnel of Military Affairs Security (MAS) intercepted and took away Kyaw Zaw Lwin even before he had given any declaration forms to Customs. The next day, 4 September, personnel came to take forms from the concerned office and then returned them, completed, to the Airport Customs. The Assistant Director of the Customs Department, U Khin Maung Cho, openly admitted in Court this illegal procedure. He was the fifth Prosecution witness.
10. Lastly, Kyaw Zaw Lwin was charged with the commission of acts against Section 6 (3) of the Residents of Burma Registration Rules, 1951. According to the source, being Kyaw Zaw Lwin an American citizen and a resident in the United States, these rules do not apply to him. This third trial was held at a special court in Insein Central Prison, which was in violation of Section 2 (e) of the Judiciary Act 2000. There is no law which permits trials to be conducted inside a special closed court in a jail.

11. The source denounces that Kyaw Zaw Lwin was tortured while in custody. He was assaulted and denied food and sleep. He has also been kept in a tiny space adjacent to dog pens.
12. The source further denounces that the authorities are intent upon using possible judicial sentences passed through Courts as a means to pursue other forms of cruel and inhuman treatment in prisons and other places of custody.
13. The source alleges that the detention of Kyaw Zaw Lwin is arbitrary because it is based on totally unfounded charges and oriented to punish him with cruel and inhuman treatment while in prison. His detention is in violation of Articles 9 and 10 of the Universal Declaration of Human Rights.
14. The Working Group notes that the Government has replied to a previous urgent appeal sent on 16 December 2009 but not to the communication dated 10 March 2010 concerning its regular procedure. The Government has not replied within the 90 days deadline, nor has requested an extension of the delay to respond as stipulated in paragraph 16 of the Working Group's Methods of Work.
15. In its reply to the urgent appeal, the Government reports that this person was arrested under charges of forging an identity card and failing to declare currency at customs. In addition, he was also charged with violating immigration law for not formally renouncing his earlier nationality and for not giving back his Myanmar's identity card to the authorities.
16. The Government added that the legislation of the Union of Myanmar was fully respected in this case. All international standards concerning the arrest and detention of this person were respected, as well as those concerning the gathering and collection of evidence; testimonies of witnesses; legal aid and competent and impartial tribunal. Diplomatic representatives from the United States of America were authorized to assist to the hearings. Thus, the principles contained in articles 9 and 10 of the Universal Declaration of Human Rights were fully respected.
17. The Working Group thanks the Government for its response to the urgent appeal, which was accompanied of annexes concerning the attention to the detainee's health; as well as to several visits to him carried out by his relatives, lawyers and Consular representatives.
18. The Working Group notes that the Government has not explained the reason to hold three different judicial processes for each of the three charges. The three alleged infractions are related to the same person and were discovered at the same time. It has not explained why one of the judicial processes was carried out in closed sessions. It has not informed neither why one of the processes took place before a Special, not an ordinary, Court.
19. The Working Group recalls that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of any criminal charge brought against him, as stipulated in Article 10 of the Universal Declaration of Human Rights.
20. A judicial process in closed sessions, before a Special Court, without explicit reasons, on common criminal charges, did not appear consistent with the principles and norms contained in the Universal declaration of Human Rights nor with the international human rights standards. Consequently, the Working Group considers that the detention of Kyaw Zaw Lwin is arbitrary and corresponds to category III of the categories applied by the Working Group.

21. Consequently, the Working Group asks the Government to remedy the situation, proceeding to the immediate release of this person and to consider the possibility of providing him with adequate reparation.

22. The Working Group further recommends the Government to consider the possibility to become a Party to the International Covenant on Civil and Political Rights.

Adopted on 2 September 2010

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