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

Opinions adopted by the Working Group on Arbitrary Detention

The present document contains the opinions adopted by the Working Group on Arbitrary Detention at its forty-ninth, fiftieth, and fifty-first sessions, held in September 2007, November 2007 and May 2008, respectively. A table listing all the opinions adopted by the Working Group and statistical data concerning these opinions are included in the report of the Working Group to the Human Rights Council at its tenth session.

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OPINION No. 14/2007 (United Kingdom of Great Britain and Northern Ireland)

Communication addressed to the Government on 3 April 2007.

Concerning Mr. Abdesslam Mahdi.

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 Commission on Human Rights. Its mandate was clarified and extended by Commission resolution 1997/50. The Human Rights Council assumed the mandate of the Working Group by its decision 1/102 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 notes with appreciation the information received from the Government of the United Kingdom in respect of the case in question.

3. The Working Group further notes that the Government has informed the Group that the above-mentioned person has been deported. The response of 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 case of Mr. Abdesslam Mahdi under the terms of paragraph 17 (a) of its methods of work.

Adopted on 11 September 2007

OPINION No. 15/2007 (Central African Republic)

Concerning Colonel Bertrand Mamour.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group regrets that the Government has not replied despite the 90-day extension of the time limit requested by it and granted by the Working Group.

3. The Working Group considers detention to be arbitrary when:

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

(ii) The deprivation of liberty results from the exercise of the rights and 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);

(iii) The partial or total non-observance of the international laws relating to the right to a fair trial, spelled out 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. This case was reported to the Working Group on Arbitrary Detention as follows: Colonel Bertrand Mamour, born in 1956 at Ouadja, a citizen of the Central African Republic resident in Bangui (Résidence Mackin), is a networks and communications engineer and Deputy Chief of Staff of the army of the Central African Republic.

5. According to the information gathered by the source, Colonel Mamour was arrested on 18 November 2006 in Bangui by the Presidential Security Unit, without a warrant and for reasons not stated, and is now being held at Camp de Roux, Bangui. Some hours before his arrest, Colonel Mamour, previously Operations Commander, had been appointed a senior administrator at the Public Service Ministry by presidential decree.

6. The source states that he was probably suspected of being in league with the rebels of the Union of Democratic Forces for Unity (UFDR). According to the military hierarchy, Colonel Mamour was passing information to the UFDR and had been arrested on the basis of a document accusing him of having informed the rebels about the deployment and strategies of the armed forces of the Central African Republic (FACA).

7. Colonel Mamour, who has now been in detention for more than three months, has not had access to the assistance of a lawyer and has been deprived of all contact with his family. The source also states that he has been subjected to inhuman and degrading treatment, which has had a serious impact on his health. Moreover, the source states that a member of Colonel Mamour's family died in October 2006 under similar circumstances.

8. The Government has not provided any information regarding the alleged facts, although invited to do so. In accordance with its procedures, the Working Group believes that it is in a position to render an opinion regarding the facts and circumstances of the case on the basis of the allegations made by the source.

9. It should be noted that Colonel Mamour was subjected to detention already in 2002, in the buildings of the gendarmerie command in Bangui. On 29 November 2002, the Working Group rendered an opinion (Opinion No. 18/2002 [Central African Republic], see E/CN.4/2004/3/Add.1) in which, noting that Colonel Mamour had been arrested on 16 May 2002, it stated that it considered his detention after 15 June 2002 to be arbitrary. The source adds that Colonel Mamour is not being held as a result of a judicial decision or on the basis of a legal instrument. He has not been informed of the charges brought against him or of the duration of his detention. He has not been granted the assistance of a defence counsel of his choice and he has still not been brought before a judge or a competent authority.

10. In the absence of all comment by the Government, the Working Group believes, in view of the circumstances of the case, that the detention of Colonel Mamour is arbitrary, being without any legal basis, and falls within category I of the categories applicable to the consideration of cases submitted to the Working Group.

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

The deprivation of liberty of Colonel Bertrand Mamour is arbitrary, being in contravention of the provisions of paragraphs 1, 2 and 3 of article 9 of the International Covenant on Civil and Political Rights, and falls within category I of the categories applicable to the consideration of cases submitted to the Working Group.

12. The Working Group requests the Government of the Central African Republic to take the necessary steps to remedy the situation, in order to bring it into conformity with the norms and principles enshrined in the International Covenant on Civil and Political Rights.

Adopted on 13 September 2007

OPINION No. 16/2007 (Libyan Arab Jamahiriya)

Communication addressed to the Government on 7 February 2007.

Concerning Dr. Mohamed Hassan Aboussedra

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. The case summarized hereafter has been reported to the Working Group on Arbitrary Detention as follows: Dr. Mohamed Hassan Aboussedra, aged 51, of Libyan nationality, is a medical doctor domiciled in Al Bayda. It was reported that he was arrested by agents of the Internal Security Services in Al Bayda on 19 January 1989, without informing him of any formal arrest warrant or charges laid against him. His four brothers were also secretly detained for three years until information was made available that they were detained at Abou Slim prison.

5. In 1995, Dr. Aboussedra was kept in detention while his brothers were released. According to the source, he was brought before a court in 2004, unfairly tried and sentenced to life imprisonment. The source affirms that no penal offence was put forth during the trial and that he was only reprimanded for his political attitude towards the People's Committees.

6. Dr. Aboussedra appealed to his verdict on 2 June 2005 and was sentenced to 10 years imprisonment. The Appeals Court ordered his release since he had already served his prison term while in pretrial detention.

7. However, on 9 June 2005, the detainee was removed from Abou Slim prison by agents of the Internal Security Services. No information has been provided on his current place of detention or on the reasons for his continued detention in spite of a judicial order for his release. The source adds that Dr. Aboussedra has been subjected to inhuman and degrading treatment while in detention and that his life is consequently put at risk.

8. According to the source, Dr. Aboussedra's detention is arbitrary in the sense that he is being kept in detention irrespective of the fact that he has already

completed his sentence. It is therefore not possible to invoke any legal basis to justify his deprivation of liberty.

9. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government. Nevertheless, despite the absence of any information from the Government, the Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, especially since the facts and allegations contained in the communication have not been challenged by the Government.

10. The Working Group notes that Dr. Mohamed Hassan Aboussedra has been sentenced in 2005 to a prison term of 10 years and that the Appellate Court ordered his release on account of the years he had already spent in prison, from 1989 until 2005. However, he was not released. He was kept in detention instead and transferred to an unknown location. He has been secretly detained ever since, neither being able to consult a lawyer, nor presented to any judicial authority, nor charged by the Government with any offence.

11. In the light of the foregoing, the Working Group considers that the deprivation of liberty of Dr. Mohamed Hassan Aboussedra is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, falling under category I of the categories applicable to the consideration of cases submitted to the Working Group.

12. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of the Dr. Aboussedra and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights, i.e. releasing him.

Adopted on 14 September 2007

OPINION No. 17/2007 (United States of America)

Communication addressed to the Government on 2 April 2007.

Concerning Mr. Ahmed Mohamed Barodi.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group notes with appreciation the information received from the Government of the United States of America in respect of the case in question.

3. The Working Group further notes that the Government has informed the Group that the above-mentioned person was removed from the United States on 21 December 2006. The response of 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 case of Mr. Ahmed Mohamed Barodi under the terms of paragraph 17 (a) of its methods of work.

Adopted on 22 November 2007

OPINION No. 18/2007 (Jordan)

Communication addressed to the Government on 4 June 2007.

Concerning Mr. Issam Mohamed Tahar Al Barqaoui Al Uteibi.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. The 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.

6. The case summarized below was reported to the Working Group as follows: Mr. Issam Mohamed Tahar al Barqaoui Al Uteibi, aka Sheikh al Maqdissi, (hereinafter Mr. Al Uteibi), born on 7 March 1959 in Barqa, Jordan, is a citizen of Jordan resident in Haï Djaffar, Manteqat al Rashed, Muhafadat al Racifa. He is a writer and theologian known in Jordan and in the Arab world, who has been repeatedly accused of "promoting and glorifying terrorism" by the security services. He was detained a first time between 1994 and 1999.

7. On 28 November 2002, Mr. Al Uteibi was again arrested together with 11 other persons on charges of "conspiracy to commit terrorist acts". This arrest followed public statements he had made to Jordanian media in which he justified the Palestinian Intifada and condemned United States policies in the Arab region. He was brought to trial before a State Security Court, which acquitted him on 27 December 2004. Instead of being released, however, Mr. Al Uteibi was transferred to a secret detention facility. At this facility, which subsequently turned out to be the seat of the intelligence services at al Jandawil in Oued Essir, he was detained until 28 June 2005, when he was released and allowed to return home.

8. According to the source, on 4 July 2005, Mr. al Uteibi gave an interview to the satellite TV channel Al Jazeera, in which he again condemned the United States military presence in Iraq. The following morning, 5 July 2005, he was again arrested and taken to a secret place of detention. The officers proceeding to his arrest did not show any arrest warrant, nor did they inform him of the reasons for his arrest. The only indication as to the reasons for his arrest comes from statements released on 6 July 2005 by the Deputy Prime Minister and Spokesman of the Government, Mr. Merouane al Maacher, who declared on television that "al Maqdissi was detained following his contacts with foreign entities, outside of Jordan, who are considered terrorist".

9. The source further mentions that Mr. Al Uteibi's family did not receive any information concerning his fate and whereabouts for approximately one year, until end of June 2006, when the intelligence services allowed them to visit Mr. Al Uteibi. He informed them that he had not been the subject of any legal

proceedings and that his requests to be allowed to contact a lawyer in order to challenge the legality of his detention had been refused.

10. According to the source, since then, Mr. Al Uteibi's family has been able to visit him twice a month, each time for just a few minutes. The short duration of these visits and the strict surveillance under which they take place makes it impossible for the family to determine whether Mr. al Uteibi is being subjected to torture or other forms of ill-treatment. However, it is clear that both his physical and his mental health are seriously suffering under the difficult conditions of detention and the complete isolation in which he is kept.

11. The source further indicates that the detention of Mr. Al Uteibi is arbitrary since his arrest on 5 July 2005, i.e. a year and 11 months ago, Mr. Al Uteibi has been detained without any legal basis. The previous six months of detention, from his acquittal by the State Security Court on 27 December 2004 until 28 June 2005, were equally devoid of any justification in law.

12. The source states that there can be no doubt that Mr. Al Uteibi's detention is due to the statements he made and interviews he gave following his release from detention on 28 June 2005, and particularly his interview to al Jazeera on 4 July 2005. The source concludes that the deprivation of freedom is thus due to the expression of his political views.

13. In its observations, the Government notes that Mr. Al Uteibi is neither a writer nor a theologian, as he has not acquired any qualification on this field. It adds that he is well known for his radical statements, which constituted a platform that has been widely used by radical groups propagating hatred and intolerance. It also points that he was arrested under an arrest warrant issued by the public prosecutor on charges of conspiring with the objective to commit terrorist acts, which was informed to him. According to the government, Mr. Al Uteibi is not deprived of the right of the visit; his family members, the International Committee of the Red Cross (ICRC) and the National Centre for Human Rights have been visiting him regularly. Finally, it states that the arrest was carried out according to the applicable laws and regulations and that Mr. Al Uteibi has a lawyer who is acting on his behalf and communicating with him.

14. In its comments on the government observations, the source reaffirms that Mr. AlUteibi was arrested without a warrant and without notification of any charges. It is only on 19 April 2007, almost two years after his arrest that he was brought for the first time before a magistrate, the prosecutor of State Security Court and notified of the charges of conspiring with the objective to commit terrorist acts. The source indicates that the public prosecutor has refused the lawyer chosen by the family and put pressure on them to choose another one and because Mr. Al Uteibi insisted on his right to have a lawyer of his choice he was beaten.

15. The source concludes that the Government did not reply to all the substantiated allegations included in the communication, in particular: the link between the arrest and the exercise of the right to freedom of expression, as the arrest was carried out the day following an interview given to Al Jazeera channel; his secret detention for two times; the ill-treatments suffered by him, the refusal to allowed him to have a lawyer of his choice; to challenge the lawfulness of his detention.

16. The Working Group notes that the assertions received from the sources and the Government are in most respect contradictory. However, the Government has not indicated the dates of arrest and indictment of Mr. Al Uteibi. The Government has also not denied the allegations made by the source indicating that Mr. Al Uteibi was arrested on 28 November 2002 and accused of "conspiracy with the objective of committing acts of terrorism" following a statement issued by the Jordan press. In addition, the Government does not deny the fact that on 27 December 2004, Mr. Al Uteibi was acquitted by the State Security Court but was only freed on 28 June 2005 and was re-arrested on 5 July of the same year, following an interview on Al Jeezera in which he condemned the occupation of Iraq by the United States.

17. The Government accuses Mr. Al Uteibi of extremism without detailing the exact nature of the facts on which is based the accusation of "conspiracy with the objective of committing terrorism acts". The Working Group concludes that Mr. Al Uteibi's conduct actually consists of what was indicated in the communication, that is: having granted interviews to journalists during which he expressed his political opinions. The Working Group considers that expressing political opinions which diverge from or criticize government policy, forms part of the peaceful exercise of freedom of expression and opinion, a right guaranteed by article 19 of the International Covenant on Civil and Political Rights to which Jordan is a Party.

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

> The deprivation of liberty of Mr. Issam Mohamed Tahar Al Barqaoui Al Uteibi is arbitrary being in contravention of article 19 of the International Covenant on Civil and Political Rights to which Jordan is party and falls under category II of the categories applicable to the consideration of cases submitted to the Working Group

19. Consequent upon the opinion rendered the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Issam Mohamed Tahar Al Barqaoui Al Uteibi.

Adopted on 22 November 2007

OPINION No. 19/2007 (Saudi Arabia)

Communication addressed to the Government on 22 June 2007

Concerning Mr. Zhiya Kassem Khammam al Hussain

The State has not signed nor ratified the International Covenant on Civil and Political Rights

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. The 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.

6. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Zhiya Kassem Khammam al Hussain, born on 16 July 1966, a citizen of Iraq, with Iraqi passport No. 1670846/846, resident in Al Farouania, Kuwait, married with nine children, a trader by profession, was arrested at his home on 15 January 2007 by around 20 members of a Kuwaiti State Security Agency, which is subject to the Ministry of the Interior (Amn Addaoula). Neither an arrest warrant was shown to him nor was he informed of the reasons and legal basis for his arrest.

7. Mr. al Hussain was taken to the premises of Amn Addaoula, where he was allegedly tortured during one week. Later, he was transferred to a detention centre for foreigners awaiting deportation. At that detention centre he was able to inform a relative of Kuwaiti nationality about his situation, expressing his fears to be expelled to Iraq. On 31 January 2007, he was sent by plane to Riyadh.

8. Upon his arrival in Riyadh, Mr. al Hussain was transferred to a detention centre run by the Ministry of the Interior. In April 2007, he was able to phone his family, informing them that he was detained at Al Hayr Prison in Riyadh. Since then, he has been authorized to call his family every two weeks on a regular basis.

9. The source alleges that Mr. al Hussain is being kept in detention without having been formally charged with an offence, without having received any information on the reasons of his deportation from Kuwait to Saudi Arabia or about the proceedings initiated against him. He has not had the possibility to challenge the legality of his detention before a judicial or other competent authority.

10. The source further alleges that Mr. al Hussain is being detained without any legal basis. Article 2 of Royal Decree No. M.39 of 16 October 2001 stipulates that any arrest or detention should be based upon a legal provision and that the length of detention must be determined by the authorities. Any person accused of a penal offence must be brought before a judicial authority, be informed of the reasons for his arrest and must be shown an arrest warrant. The source further reports that Mr. al Hussain has not been allowed to contact a defence lawyer.

11. In its reply, the Government indicates that Mr. al Hussain was handed over to the Saudi authorities on 31 January 2007 after having been found to illegally raise and receive funds and to transmit them to Iraq through Qatar and Jordan with the help of Saudis and Qataris. These funds were allegedly delivered to groups in Iraq. He underwent the requisite medical examinations immediately after his arrival at the detention centre and was permitted to contact his family on three occasions on 2 February 2007 in the following manner: the first contact was with Sulaiman Qabalan al Ghariba, a relative by marriage, in Kuwait; the second contact was with his sister Fatima in Kuwait; and the third contact was with his brother Abdul Karim al Hussain in Qatar. On these occasions he reassured them about his situation and his state of health and informed them about his place of detention, where he is still being questioned.

12. The Government points out that it is noteworthy that Mr. al Hussain is still questioned as he was involved in an illegal fund raising operation that could be linked to groups threatening regional peace and stability.

13. The source comments on the government reply as follows: It emerges from the reply of the Government that Mr. al Hussain was "handed over" to the authorities of the country on 31 January 2007, because "he was involved in an illegal fund raising operation that could be linked to groups threatening regional peace and stability".

14. The source points out that irrespective of the allegations, the "handing over" of Mr. al Hussain, who is an Iraqi citizen, by Kuwait to a third country, Saudi Arabia, was carried out outside a lawful extradition proceeding.

15. The source also adverts to the fact that the Government satisfies itself with maintaining that Mr. al Hussain was subjected to medical examinations and that he was allowed to contact his next-of-kin by telephone, facts which are confirmed by the source.

16. The source further mentions that, in its reply, the Government did not question the following facts: Mr. al Hussain has not been brought before an independent and impartial tribunal so as to have the grounds of a possible charge examined and that he has never been made the subject of any legal procedure; Mr. al Hussain has not had the possibility of benefiting from an effective remedy to question the legality of his detention; Mr. al Hussain has not enjoyed any juridical assistance, since no lawyer has been authorized by the authorities to assist him until this day in spite of his requests and those of his family.

17. Finally, the source adds that no member of the family of Mr. al Hussain has been authorized by the Ministry of the Interior to visit him at his place of detention, the latest request, made by his brother-in-law, Mr. Qabalan al Ghariba, having been rejected without reasons.

18. From the above-mentioned information, the Working Group notes that the Government has not challenged the allegations of the source that on 31 January 2007 Mr. al Hussain was handed over by Kuwaiti authorities to the Saudi Government outside of any legal procedure and without having received any information about the proceedings initiated against him. The Working Group has already stated that this practice known as "renditions", i.e. the informal transfer of a person from the jurisdiction of one State to that of another on the basis of negotiations between administrative authorities of the two countries without procedural safeguards, is irremediably in conflict with the requirements of international law.[1]

19. The Working Group also notes that the Government has not disputed that Mr. al Hussain has neither been formally charged with any offence, nor been informed of the duration of his detention, nor been brought before a judicial officer, nor been allowed to name a lawyer to act on his behalf, nor otherwise been provided the possibility to challenge the legality of his detention. The only argument given by the Government to justify his prolonged detention of more than 10 months is that "Mr. al Hussain is still questioned as he was involved in an illegal fund raising operation that could be linked to groups threatening regional peace and stability."

[1] See the report of the Working Group on Arbitrary Detention (A/HRC/4/40).

20. Consequently, the Working Group can only conclude that the detention of Mr. al Hussain is devoid of any legal basis. This circumstance in itself already renders his detention contrary to applicable international norms and constitutes a violation of the right to liberty irrespective of the nature and the motives of the accusations against him.

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

The detention of Mr. Zhiya Kassem Khammam al Hussain is in contravention of article 9 of the Universal Declaration of Human Rights and falls within category I of the categories applicable to the consideration of the cases submitted to the Working Group.

22. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation in order to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights. The Working Group recommends that the Government considers signing and ratifying the International Covenant on Civil and Political Rights.

Adopted on 22 November 2007

OPINION No. 20/2007 (Mexico)

Communication addressed to the Government on 11 April 2007.

Concerning Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group expresses its appreciation to the Government for having provided the requested information in a timely manner.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the Government's reply to the source and has received its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, taking account of the allegations made and the Government's reply regarding them and also of the comments of the source.

5. Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López were arrested by members of the Preventive Federal Police on 12 January 2006, when, on the Mexico City-Veracruz highway, they stopped to repair their vehicle.

6. Without being informed of the reasons for their arrest or being shown a legal warrant, they were taken to the station of the Preventive Federal Police in the city of Orizaba, where they were accused of trying to bribe the police officials who had arrested them. Some hours later, they were taken to the Orizaba office of the Federal Public Prosecutor.

7. The head of the office, without telling them the reasons for their arrest, ordered that they be placed in incommunicado detention. Two days later, the three of them made statements, without the assistance of defence counsel, to the Special Kidnapping Investigation Unit, since it appears that they were suspected of having kidnapped a senator. At no time during this period were they allowed to inform family members that they were being detained or to have legal assistance.

8. Subsequently they were transferred to Mexico City. There, the head of the Special Kidnapping Investigation Unit of the Office of the Deputy Attorney-General for the Investigation of Organized Crime (SIEDO), of the Office of the Attorney-General, ordered their release.

9. However, unidentified police officers transferred them to the Special Unit for the Investigation of Terrorism and Arms Hoarding and Trafficking, where they were held until 18 January 2006. On that day, they were informed that the Fourteenth District Judge for Federal Criminal Cases had issued a 90-day curfew order for offences connected with terrorism and arms hoarding and trafficking. The purpose of the curfew order was to enable the Special Unit for the Investigation of Terrorism and Arms Hoarding and Trafficking to collect the evidence necessary for instituting criminal proceedings against the three men, who were moved to a curfew house of the Office of the Attorney-General located in Mexico City.

10. On 6 March 2006, the detained men lodged a complaint against unconstitutional behaviour on the part of the authorities (an amparo complaint) with the First District Judge for Amparo Complaints in Criminal Matters in Mexico City. That judge agreed to consider the amparo complaint, but only in order that the constitutionality of the men's detention might be examined – not with a view to ending the deprivation of liberty. Ultimately, the complaint was dismissed when the men appeared before the judge. The judge also dismissed a further amparo complaint, submitted by the men on the grounds of prevention of access to a lawyer during the events that had taken place while they were being detained.

11. While the men were subject to the curfew order, officials of the Office of the Attorney-General hampered the efforts of the defence lawyers in various ways, denying them access to the file on the preliminary investigation, objecting to evidence offered by them and – inter alia – not allowing an expert graphoscopy test to be carried out.

12. On 31 March 2006, the home of the mother of the Zompaxtle Tecpile brothers, the home of Mr. Maximino Zompaxtle Tecpile and the houses and shops belonging to the two detained brothers were searched. No search warrant was presented.

13. On 10 April 2006, the file on the preliminary investigation was submitted to the Third District Judge for Federal Criminal Cases in Mexico City, with the number 43/2006. On 11 April 2006, this judge ordered that the three detained men be brought before him on the charge of violating the federal law against organized crime (terrorism). On 17 April 2006, the Office of the Attorney-General complied with the order in question and produced the three men in court. The judge ordered that they be held in custody on the same day.

14. In their statement to the judge, the three men denied having committed any offence. On 22 April 2006, the judge ordered that they continue to be held in custody on suspicion of having violated the federal law against organized crime. He

argued that it was not sufficient that the detained men deny the charges brought against them; they needed to support their denial with convincing evidence in refutation of the charges. His argument was based on jurisprudence supported by the Second Collegiate Tribunal of the Fourth Circuit of Mexico City.

15. Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López were transferred on 17 April 2006 to the Northern Prison for Men in Mexico City, where they still are. Their trial is to take place before the Twelfth Federal District Judge for Criminal Cases in the state of Veracruz.

16. Human rights defendant Ms. Elena López Hernández, of the organization Red Solidaria Década contra la Impunidad [Decade against Impunity – Solidarity Network] has received death threats over the phone for having taken an interest in the situation of Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López. These men consider themselves to be victims of numerous human rights violations, and they are afraid of being transferred to a maximum-security prison where it will be more difficult to communicate with the outside world and they will be physically more vulnerable. They are said to be seriously depressed as a result.

17. On 10 August 2007, the Government of Mexico submitted a reply to the allegations made by the source. It stated that the facts referred to in those allegations were not correct; the men had indeed been arrested by members of the Preventive Federal Police, but not under the circumstances described by the source.

18. According to the Government, the reason for the men's detention was the start of a preliminary investigation (No. PGR/SIEDO/UEITA/004/2006) relating to their probable involvement in organized crime and terrorism. As it was feared that they would run away, the federal authorities obtained from the Fourteenth District Judge for Federal Criminal Cases a curfew order for 90 days during which a thorough investigation might be carried out.

19. Also, the Government stated that while they were subject to the curfew order the men were visited by representatives of the General Directorate for the Promotion of a Human Rights Culture, the Victim Care Service and the Community Services of the Office of the Attorney-General and the National Commission for Human Rights, but they did not make any complaint about their situation.

20. Lastly, the Government stated that, once the preliminary investigation had yielded enough evidence of probable guilt, in April 2006, the men were brought before the Third District Judge for Federal Criminal Cases and accused of involvement in organized crime and terrorism. Criminal case 43/2006 is now being prepared.

21. On 29 August 2007, the source responded to the information provided by the Government, pointing out that the Government itself admitted that Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López had been subjected to a curfew order, which is a form of preventive detention, since persons subjected to a curfew order are not brought before a judge and there is consequently no judicial control over their deprivation of liberty, as the Working Group itself indicated in its report on its visit to Mexico in October 2002.

22. Also, the source pointed out that, although the Government maintained that the facts referred to in the allegations were not correct, it did not provide any

information in support of its version of the facts, simply stating that the detention was connected with preliminary investigation No. PGR/SIEDO/UEITA/004/2006, whereas the defence lawyers of Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López had been informed that the preliminary investigation relating to their clients had the identification number PGR/SIEDO/UESIS/0022/2006. In the opinion of the source, this indicates that there were no genuine reasons for the men's detention over so many months.

23. In the opinion of the Working Group, it is necessary to distinguish between two periods in the detention of Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López. The first period ran from 12 January 2006, when the three men were arrested, to 17 April 2006, when they appeared before the Third District Judge for Federal Criminal Cases in Mexico City, who on the same day ordered that they be held in custody.

24. It has been established, since the Government acknowledges the fact, that during the more than three months that elapsed between their arrest by members of the Preventive Federal Police and their appearance before the competent judge, the three men were held in a so-called "curfew house" in order that the Office of the Attorney-General might carry out a preliminary investigation into them.

25. Thus, during this first period of detention Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López were deprived of their right to be brought, personally and without delay, before the competent judge in order that they might contest their detention, although the mere fact that on 18 January 2006, six days after their arrest by members of the Preventive Federal Police, the Fourteenth District Judge for Criminal Cases imposed a 90-day curfew order on them for offences connected with terrorism could in no way be regarded as taking legal precedence over their right to be brought before the competent judge.

26. As indicated by the source, during its visit to Mexico in 2002 the Working Group expressed concern about the curfew order arrangement used for detaining people.[2] In the report made by it after the visit, the Working Group stated "this arrangement in fact amounts to a form of preventive detention of an arbitrary nature, given the lack of oversight by the courts".

27. Article 9 of the International Covenant on Civil and Political Rights establishes the right of every detained person to be brought promptly before a judge or another officer authorized by law to exercise judicial power. The obligation to bring detained persons before the competent judge can never be regarded as a purely formal obligation. Thus, the due presentation of detained persons to the competent judge cannot be subordinated to the mere authorization of detention by a judge, at the request of the Office of the Attorney-General, without the latter having effective jurisdictional control over their detention.

28. As regards the period from when Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López were placed in custody as expressly ordered on 16 [17?] April 2006 by the Third District Judge for Criminal Cases in Mexico City to the present, the Working Group considers that there has been a failure to properly inform the three detained men about the nature of the charge that has been brought against them and because of which they are being detained.

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[2] E/CN.4/2003/8/Add.3.

29. The Working Group notes that, although the Government stated that the version of the facts presented by the source was not completely correct, it has not presented any facts whatsoever that might contradict that version. Thus, while the confusion regarding the identification number of the preliminary investigation, referred to by the lawyers of the detained men, may be a purely formal matter (something that, at all events, the Government has not expressly denied), one certain fact is that those three men have been held in detention for over a year and a half and have not received a clear, specific and precise enumeration of the acts of which they are accused. Of course, merely assigning a number to a supposed preliminary investigation and imputing a terrorism-related offence in general terms is not enough. In its paragraph 3, article 14 of the International Covenant on Civil and Political Rights provides – as an inviolable right essential for a fair trial – that during the trial every accused person shall be entitled to be informed in detail of the nature and cause of the charge against him/her.

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

> The deprivation of liberty of Jorge Marcial Zompaxtle Tecpile, Gerardo Zompaxtle Tecpile and Gustavo Robles López is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

31. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in accordance with the norms and principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 22 November 2007

OPINION No. 21/2007 (Egypt)

Communication addressed to the Government on 7 February 2007.

Concerning Mr. Yasser Essayed Chaabane Al Dib and 18 other persons.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. According to the source, the following 19 persons were arrested in the course of 1996 by agents of the State Security Intelligence (SSI). Upon their arrest, they were held incommunicado for periods ranging from one to three months during which they were allegedly tortured. At the time of the arrest, the officials did not show any arrest warrant or other relevant decision by a public authority, nor did they orally inform them about the reasons for their arrest. They continue to be kept in detention. Their names and other identifying information were given as follows:

(a) Yasser Essayed Chaabane Al Dib, aged 18, student, residing at Kerdasa, Imbada center, Muhafadat Al Gizeh, arrested on 26 February 1996, and detained at Istiqbal Tura High Security Prison;

(b) Hanni Ibrahim Abdel Aal Ibrahim, aged 25, student, residing in Cairo, arrested on 16 May 1996, and detained at Abou Zaabel High Security Prison;

(c) Assaad Hilmi Essayed Attiya, aged 32, farmer, residing in Assiout, arrested on 20 May 1996, and detained at Oued Al Jahid Prison;

(d) Mohamed Hussein Mahmoud Abdelfadil, aged 28, student, residing on Ali Grib avenue, Taraat Zenine, Boulaq, Al Dakrour, Muhafadat Al Gizeh, arrested on 22 May 1996, and detained in Abou Zaabel High Security Prison;

(e) Fethi Tantaoui Mohamed Yunes, aged 46, trader, residing at Cherchama Hahia, Al Zaqazig, Muhafadat Al Sharquia, arrested on 27 May 1996, and detained at Abou Zaabel High Security prison;

(f) Essayed Mohamed Essayed Dahr, aged 38, teacher, residing at Al Mutawaa, Al Zaqaziq, Muhafadat Al Sharquia, arrested on 27 May 1996, and detained at Abou Zaabel High Security Prison;

(g) Imadeddine Mustapha Mohamed Marsa, aged 38, trader, residing at Al Mutawaa, Al Zaqaziq, Muhafadat Al Sharquia, arrested on 27 May 1996, and detained at Abou Zaabel High Security Prison;

(h) Ibrahim Mohamed Barakat Al Nahas, aged 36, trader, residing on 14, Avenue Difallah, Meydane Al Khalfaoui, Chabrah in Cairo, arrested on 30 May 1996, and detained at Istiqbal Tura High Security Prison;

(i) Aymen Said Djaballah Attiya, aged 36, trader, residing at al Chibanete, Al Zaqazig, Muhafadat Al Sharquia, arrested on 30 May 1996, and detained at Abou Zaabel High Security Prison;

(j) Assadaq Mohamed Mohamed Assadaq, aged 50, public servant, residing at Al Mutawaa, Al Zafazif, Muhafadat Al Sharquia, arrested on 30 May 1996, and detained at Abou Zaabel High Security Prison;

(k) Magdy Samy Mohamed, aged 34, trader, residing at Al Chebanate, Al Zaqaziq, Muhafadat Al Sharquia, arrested on 30 May 1996, and detained at Abou Zaabel High Security Prison;

(l) Mohamed Khellil Djaballah Attiya, aged 46, trader, residing at Al Chebanate, Al Zaqaziq, Muhafadat Al Sharquia, arrested on 30 May 1996, and detained at Abou Zaabel High Security Prison;

(m) Mohamed Samy Mohamed Al Kilani, aged 28, employee in a public company, residing at Markez Wassim, Bartos, Muhafadat Gizeh, arrested on 25 May 1996, and detained in Istiqbal Tura High Security Prison;

(n) Saad Mabrouk Abou Sariee, aged 20, trader, residing at Center Imbaba, Kerdasa, Muhafadat Gizeh, arrested on 15 June 1996, and detained at Al Fayoum Prison;

(o) Gamal Ali Assyed Salim, aged 42, teacher, residing at Al Chebanate, Al Zaqaziq, Muhafadat Al Sharquia, arrested on 20 June 1996, and detained at Abou Zaabel High Security Prison;

(p) Khaled Ibrahim Mohamed Salama, aged 29, State officer, residing at Al Chebanate, Al Zaqaziq, Muhafadat Al Sharquia, arrested on 20 August 1996, and detained in Abou Zaabel High Security prison;

(q) Nada Qarni Ibrahim Mohamed Hassane, aged 38, agricultural engineer, residing in Dahal, Samssata, Beni Souif, arrested on 16 October 1996, and detained in Oued Al Natroune Prison;

(r) Ahmed Eid Mutawally Hassane, aged 33, trader, residing on 175 Avenue Ali Abdel Aal-Zaky Matar, Imbaba, Muhafadat Al Gizeh, and detained in Abou Zaabel High Security Prison;

(s) Ramadhan Eid Ahmed Al Abd, aged 31, trader, residing at Sounouras, Al Siliyine, Al Fayoum, arrested on 22 December 1996, and detained in Oued Al Natroune Prison;

6. At the end of their incommunicado detention, these persons were informed that they would be imprisoned by virtue of an administrative order issued by the Minister of the Interior. No detention term was fixed. These administrative orders were issued following the regulations on the state of emergency which have been in force without interruption since 6 October 1981. It was reported that the emergency regulations were extended on 30 April 2006 for another three years.

7. The regulations on the state of emergency are based on the Emergency Law, Law No. 162 of 1958, which permits arrest and indefinite detention without trial. The source considers that it creates an atmosphere of impunity which may give place to cases of torture and other forms of ill-treatment.

8. All detainees were able to challenge their detention before a competent judicial authority, which ordered, in all cases, their release. However, the Ministry of the Interior ignored these rulings, failed to release the detainees and subsequently issued new administrative detention orders pursuant to the Emergency Law.

9. Egypt is a State party of the International Covenant on Civil and Political Rights. It has not informed the other State parties that it avails itself of its right of derogation, according to article 4 of the Covenant.

10. According to the source, the above-mentioned persons are being kept in detention without charges or trial exclusively under administrative detention powers. They have never been tried or convicted of a crime. Their interrogation with the State Security Intelligence related to their political beliefs, or their real or supposedly allegiance to banned Islamist groups. They have furthermore never participated in any acts of violence, because if they had, the detainees would have been brought before military or exceptional courts and would have been charged and tried.

11. The source argues that the detention of these persons is arbitrary, inter alia, because it is devoid of any legal basis. Article 3 of the Emergency Law stipulates that the President of the Republic may take appropriate measures to maintain security and public order through imposing restrictions on individuals' freedom such as administration detentions of suspects without trial for prolonged periods. Such administrative detention orders are issued without any control by the judicial authority or the Prosecutor's office. A complex process to challenge these administrative measures before the courts is provided by the Law. But all the

judicial rulings ordering the release of the said detainees were made vain by new administration detention orders, making the judicial control over legality of detention futile. Hence, according to the source, the deprivation of liberty of the 19 above-mentioned detainees is devoid of a legal basis since the Egyptian courts have ordered their release.

12. The source adds that numerous international human rights bodies, including the Human Rights Committee, have expressed their concern about the circumstance that the emergency laws enacted in 1981 in Egypt are still in force, as well as about the impact these laws have on the enjoyment of the rights protected under articles 6, 7, 9 and 14 of the Covenant.

13. The source further argues that the detention of the 19 persons results from their political opinions and the consequent exercise of their rights to freedom of expression, guaranteed by article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights.

14. In its reply to the allegations of the source the Government states that "the elements named in the complaint belonged to extremist groups which carried out a number of terrorist operations in Egypt in the 1990s". It added that "preventive measures were taken vis-à-vis these elements, in accordance with the Emergency Act No. 162 of 1958, in order to avert the criminal threat that they posed and to prevent them from realizing their terrorist designs. The Ministry of the Interior complied with court orders providing for the release of some of these elements. However, follow-up inquiries by the security forces revealed that the elements in question remained committed to their extremist ideas and thus posed a threat to stability and public security. Preventive measures were therefore reapplied in their regard. The Government pointed out that "this is not incompatible with the law. A total of 15 of the above-mentioned elements were released after they were found to have moderated their views and to no longer pose a criminal threat. The four remaining elements (Yasser Essayed Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq and Gamal Ali Assyed Salim) were released. However, follow-up investigations revealed that they had resumed their criminal activities with a view to realizing their terrorist designs. Preventive measures were therefore applied in their regard."

15. In its comments to the Government's observations, the source confirms that all except Messrs. Yasser Essayed Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq and Gamal Ali Assyed Salim were released on 23 July 2007. However, it stresses that they had been detained without judgment or without a judicial procedure for 11 years. As for the other four, the source maintains that they have never been released. They were transferred during the last week of July 2007 from their place of detention to the premises of the SSI where they were subjected to further days of incommunicado detention and interrogation concerning their political convictions. Thereafter, they were transferred back to prison where they continue to be detained by virtue of an administrative decision of the Minister of the Interior. The assertion of the Government according to which they were subjected to surveillance by the police following their alleged release, which established their involvement in criminal activities, is bereft of any basis according to the source.

16. Having assessed all information before it, the Working Group decides that the cases of Messrs. Hanni Ibrahim Abdel Aal Ibrahim, Assaad Hilmi Essayed Attiya, Mohamed Hussein Mahmoud Abdelfadil, Fethi Tantaoui Mohamed Yunes, Essayed Mohamed Essayed Dahr, Imadeddine Mustapha Mohamed Marsa, Ibrahim Mohamed Barakat Al Nahas, Magdy Samy Mohamed, Mohamed Khellil Djaballah Attiya, Mohamed Samy Mohamed Al Kilani, Saad Mabrouk Abou Sariee, Khaled Ibrahim Mohamed Salama, Nada Qarni Ibrahim Mohamed Hassane, Ahmed Eid Mutawally Hassane, and Ramadhan Eid Ahmed Al Abd are serious cases of deprivation of liberty. Consequently, acting in accordance with its Methods of Work, paragraph 17 (a), reserves the right to render an opinion, notwithstanding the information received from the Government about their release, which has been confirmed by the source of the communication.

17. Concerning them and also concerning the further four individuals who are the subject matter of this opinion, Messrs. Yasser Essayed Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq, and Gamal Ali Assyed Salim, the Working Group observes that it is undisputed that they were arrested without a warrant between February and December 1996 by members of the SSI and were held in incommunicado detention for periods of one to three months during which they were tortured. Furthermore, the Government has not challenged the allegations of the source that the individuals concerned have been detained for a considerable period of about 11 years without charges or trial exclusively under administrative detention powers. According to the information received from the source, which have not been disputed by the Government, all of them were able to challenge the lawfulness of their detention before a competent judicial authority, which ordered their respective releases. As the allegations by the source have not been refuted by the Government, the Working Group considers them to be well-founded.

18. The Working Group observes that there are different accounts by the Government and the source regarding the fact as to whether Messrs. Yasser Essayed Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq, and Gamal Ali Assyed Salim were released briefly complying with court orders and re-arrested, or whether they have never been freed since their arrests in contempt of court decisions. It does not seem necessary to definitely decide this question.

19. The Working Group has on earlier occasions[3] 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. The Working Group is of the opinion that, in such cases, no legal basis can be invoked to justify the detention, least of all an administrative order issued to circumvent a judicial decision ordering the release. Since it transpires already from the Government's reply that these four individuals would have been re-arrested for the same reasons for which they had been detained for a period of up to 11 years without charge or trial, it does not make any difference for the classification of these cases under category I whether Messrs. Yasser Essayed

[3] Opinion No. 5/2005 (Egypt), paragraph 19 (E/CN.4/2006/7/Add.1), Decision No. 45/1995 (Egypt), paragraph 6 (E/CN.4/1997/4/Add.1), and Decision No. 61/1993 (Egypt), paragraph 6 (E/CN.4/1995/31/Add.1). See also Opinion No. 3/2003 (Egypt) (E/CN.4/2004/3/Add.1).

Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq, and Gamal Ali Assyed Salim had been briefly released or have simply continued to remain in custody despite a court order to the contrary.

20. Concerning the remaining 15 individuals who are the subject matter of this opinion, the same observations apply. 11 years of administrative detention without charge or trial and despite a court order are considered to be unjustifiably excessive by the Working Group.

21. It is the position of the Working Group that not even a state of emergency may justify such long administrative detentions and the non-observance of the guarantees of a fair trial. Insofar the Working Group 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. The Working Group concludes that the continued deprivation of liberty of Messrs. Yasser Essayed Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq, and Gamal Ali Assyed Salim is arbitrary and that the detention of the 15 remaining individuals was arbitrary between their respective dates of arrests and their release on 23 July 2007, being devoid of any legal basis (category I).

22. Furthermore, the Government has not further specified what crimes the holding of "extremist ideas" may constitute and in what way the activities of Messrs. Yasser Essayed Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq, and Gamal Ali Assyed Salim 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 on Civil and Political Rights. With respect to the 15 individuals who were released the Government furthermore confirms implicitly that they had been detained solely for holding specific views since they were released after they were found to have moderated them. The Working Group considers that expressing opinions which are not in conformity with government views and policies is a legitimate exercise of the right to freedom of opinion and expression. The deprivation of liberty of the 19 individuals solely for dissenting opinions, thus, falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

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

(a) The deprivation of liberty of Messrs. Hanni Ibrahim Abdel Aal Ibrahim, Assaad Hilmi Essayed Attiya, Mohamed Hussein Mahmoud Abdelfadil, Fethi Tantaoui Mohamed Yunes, Essayed Mohamed Essayed Dahr, Imadeddine Mustapha

Mohamed Marsa, Ibrahim Mohamed Barakat Al Nahas, Magdy Samy Mohamed, Mohamed Khellil Djaballah Attiya, Mohamed Samy Mohamed Al Kilani, Saad Mabrouk Abou Sariee, Khaled Ibrahim Mohamed Salama, Nada Qarni Ibrahim Mohamed Hassane, Ahmed Eid Mutawally Hassane, and Ramadhan Eid Ahmed Al Abd was arbitrary between the respective dates of their arrests in 1996 and their release on 23 July 2007, 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.

(b) The continued deprivation of liberty of Messrs. Yasser Essayed Chaabane Al Dib, Aymen Said Djaballah Attiya, Assadaq Mohamed Mohamed Assadaq, and Gamal Ali Assyed Salim, who remain in detention, is 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.

24. Having found the detention of the above mentioned individuals to be arbitrary, the Working Group requests the Government to take the necessary steps to remedy the situation of the four individuals who are still being deprived of their liberty and bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights. The Working Group believes that in view of the long period of time spent in detention the adequate remedy would be their release.

Adopted on 22 November 2007

OPINION No. 22/2007 (Egypt)

Communication addressed to the Government on 23 February 2007.

Concerning Mr. Abdeldjouad Mahmoud Ameur Al Abadi.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Abdeldjouad Mahmoud Ameur Al Abadi, aged 52, of Egyptian nationality, worked in an electrical company in Ajhour, Al Kubra, Al Qalubia, where he is also domiciled.

6. It was reported that he was arrested during the night of 6 February 1994 by agents of the State Security Intelligence Services (SSI) and was held in incommunicado detention for one month at its headquarters in Qalubya during which he was allegedly tortured and threatened with death.

7. The officials did not produce an arrest warrant or any other relevant decision by a public authority, or informed him orally about the reasons for his arrest.

8. Mr. Al Abadi was then detained at Abou Zabel High Security Prison for more than three years without being brought before a judge or an official authorized to exercise judicial power.

9. It is said that the agents of the SSI imputed Mr. Al Abadi for having openly articulated his political views opposed to the Government and criticising the Head of State.

10. The source indicates that Mr. Al Abadi was, however, able to challenge his detention before competent judicial authorities, which ordered his release. Irrespective of these orders, administrative authorities of the Ministry of the Interior refused to do so on several occasions.

11. In March 1997, the detainee, in spite of being a civilian, was brought before a military court. In the course of an alleged unfair trial, during which he could not be assisted by a defence lawyer of his choice, he was sentenced to 10 years of imprisonment on charges of a being a member of a banned Islamist organization.

12. Although Mr. Al Abadi had served his sentence as of February 2004, he was not released at that date and was kept in detention pursuant to a new administrative order.

13. According to the source, these administrative orders are issued following the regulations on the state of emergency, which has been in force without interruption since 6 October 1981 and which has been extended on 30 April 2006 for another three years. According to the source, the Emergency Law, Law N° 162 of 1958 permits arbitrary arrest and indefinite detention without trial. The source considers that it creates an atmosphere of impunity which may give rise to cases of torture and ill-treatment.

14. The source alleges that in spite of the fact that the Egypt is a party to the International Covenant on Civil and Political Rights its Government has never informed the other State parties of its intention to derogate from some of its provisions, as required by article 4 of the Covenant.

15. Furthermore, it adds that article 3 of the Emergency Law stipulates that the Minister of the Interior may take appropriate measures to maintain security and public order through imposing restrictions on individuals' freedoms. Suspects may be subjected to administrative detention without being tried for prolonged periods. Even though a complex process to dispute these administrative measures is provided by the Law, the source mentions that the judicial rulings ordering the release of the said detainee has been frequently overturned by a new administrative detention order, making the dispute process ineffective.

16. Mr. Al Abadi was sentenced to 10 years of imprisonment and must have already been released but is nevertheless kept in detention. According to the source, his detention is thus devoid of any legal basis and is, in consequence, arbitrary.

17. The source further alleges that Mr. Al Abadi's detention was the result from the expression of his political opinions and the exercise of his right to freedom of expression, a right guaranteed by article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights. Finally, the

source considers that Mr. Al Abadi was sentenced after a trial in which the international norms relating to the right to a fair trial were not observed.

18. In its response, the Government indicates that Mr. Al Abadi was arrested in 1994 in the framework of a State security case carrying the number 123/93, but he was released in 1994 and left Egypt for Saudi Arabia where he stayed up until 1998, date of his return to Egypt. The Government points out that upon his return, Mr. Al Abadi resumed his links and contacts with radical elements who advocate for the use of violence. On 30 January 1999, he was arrested again in the framework of the military case file No. 8/1998 related to an organization so-called "The Returnees from Albania" and was condemned to five years of imprisonment for having committed crimes of a military nature.

19. The Government adds that Mr. Al Abadi was released on 24 September 2003, after purging his penalty, but was rearrested pursuant to the Emergency Act No. 162 of 1958, for having resumed his activities promoting radicalism among the public. The Government recognizes that Mr. Al Abadi has obtained court rulings ordering his release, but it asserts that every time Mr. Al Abadi was released, he reverted to his activities propagating extremist ideas, raising concerns that he might commit acts of terrorism. The Government adds that Mr. Al Abadi's last arrest dates back to 3 January 2007 and that he remains in detention. Mr. Al Abadi has not contested his detention before the competent courts. The Government concludes that Mr. Al Abadi is detained in pursuance of the Emergency Act No. 162 of 1958 in order to prevent him from committing any acts of terrorism.

20. The commentaries of the source on the government reply contain the following precisions. On the claimed liberation of Mr. Al Abadi following his arrest in 1994 and his stay in Saudi Arabia between 1994 and 1998, the source points out that since Mr. Al Abadi arrest on 6 February 1994, he has never been released. Consequently, he was not in Saudi Arabia during this period, contrary to that reported in its response by the Government. The source invites the Government to bring the proof of its assertion that Mr. Al Abadi travelled to Saudi Arabia.

21. During the first three years of his detention, Mr. Al Abadi was not charged nor subjected to penal pursuits but he was simply kept in administrative detention. Later, he was subjected to an inequitable judicial process before a military court, being condemned without having benefited of the right to a fair trial.

22. The source also notes that, contrary to the affirmations of the Government, Mr. Al Abadi was not released on 24 September 2003, at the end of his prison term, being instead transferred from the prison to a detention centre belonging to the Security Services. Some days later, he was brought back to the same prison in a new measure of administrative detention. The source points out that the Government has recognized that Mr. Al Abadi is currently being held in administrative detention since 3 January 2007.

23. The source underlines that following each judicial ruling providing for Mr. Al Abadi's release, Mr. Al Abadi was extracted from prison and transferred to a detention centre belonging to the Security Services and some days later brought back to the same prison or transferred to other prison.

24. Of what precedes, it appears that the allegations from the source and the declarations from the Government differs in several important points and notably on

the length of the administrative detention of Mr. Al Abadi; on his supposed stay in Saudi Arabia and on the modalities of execution of the judicial resolutions ordering his liberation. The Working Group will limit itself in its assessment of the case to those allegations from the source which have not been contested by the Government, i.e. Mr. Al Abadi's trial before a military court; the violation of the fair trial norms and Mr. Al Abadi's maintenance in detention after having served his judicial sentence.

25. Concerning Mr. Al Abadi's trial before a military tribunal, the Working Group notes that the Government has recognized that Mr. Al Abadi, who is a civilian, was tried and condemned to five years' imprisonment by a military court.

26. The Working Group recalls that in its general comment No. 32 concerning the interpretation of article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee has clarified that although the Covenant does not prohibit the trial of civilians in military or special courts, it requires such trials to be in full conformity with the requirements of article 14 as well as its guarantees be not limited or modified because of the military or special character of the court concerned. The Committee also notes that the judgement of civilians in military or special courts should be exceptional, i.e. limited to those cases in which the State can show that resorting to such trials is necessary and justified by objective and serious reasons or when the regular civilian courts are unable to undertake the trials considering the specific categories of persons and offences at issue.

27. The Working Group notes that the Government has not provided any explanation to justify the trial of Mr. Al Abadi, who is a civilian, by a military court. The Government has solely pointed out that Mr. Al Abadi has committed offences of a military character but it has not specified in what consisted those offences nor the facts which gave place to such qualification. The Working Group also notes that the Government has not refuted the allegation that Mr. Al Abadi could not benefit from the norms of due process. The Government has not refuted the allegations that Mr. Al Abadi was arrested during the night of 6 February 1994 without an arrest warrant, that he was subjected to torture and ill-treatment during a month and that he was tried without the assistance of a defence lawyer of his choice.

28. The Working Group concludes that in the afore-mentioned circumstances, the judgement of Mr. Al Abadi and his condemnation by a military jurisdiction were incompatible with the prescription of article 14 of the International Covenant on Civil and Political Rights to which the Egypt is a party. These violations are of such gravity to confer to the deprivation of liberty an arbitrary character (category III).

29. Concerning Mr. Al Abadi's administrative detention, the Working Group notes that according to the Government, Mr. Al Abadi was released on 24 November 2003 after serving his sentence but was re-arrested and placed in administrative detention pursuant to the Emergency Act No. 162 of 1958 given the fact that he pursued his propaganda activities in favour of extremist ideas. The above-mentioned Law authorizes the Minister of the Interior to order the administrative detention of persons who represent a danger for the public security. The Working Group notes nevertheless that the Government has not specified the time Mr. Al Abadi spent at liberty nor when he was re-arrested nor the exact nature of the facts he would be responsible and that had justified his re-arrest. The Government has not explained

why the civilian courts, competent to appreciate the lawfulness of the detention, ordered the liberation of Mr. Al Abadi in several occasions.

30. The Working Group, which has already had to pronounce itself on similar cases of administrative detention in Egypt[4] considers that the maintenance of a person in administrative detention once his liberation has been ordered by a court having competence to control the lawfulness of the detention is deprived of any legal basis. The Working Group considers that in this case, no legal basis can be invoked to justify the maintenance in detention of this person, and less an administrative decision taken to circumvent a judicial resolution ordering the liberation of the detainee.

31. The Working Group 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 decision of the State party 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. The Working Group concludes that the deprivation of liberty of Mr. Al Abadi is arbitrary being devoid of any legal basis (Category I).

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

The deprivation of liberty of Mr. Abdeldjouad Mahmoud Ameur Al Abadi is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights and falls within categories I and III of the categories applicable to the consideration of cases submitted to the Working Group.

33. Consequent upon this Opinion rendered the Working Group requests the Government to remedy the situation and bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights. The Working Group believes that the adequate remedy would be his release.

Adopted on 22 November 2007

OPINION No. 23/2007 (Eritrea)

Communication addressed to the Government on 16 February 2007.

Concerning Messrs. Petro Solomo, Ogbe Abraha, Haile Woldensae, Mahmoud Sherifo, Berhane Ghebregzabher, Slih Idris Kekya, Hamed Himed, Stefanos Syuom, Germano Nati, Berraki Ghebreslasse and Ms. Aster Feshazion.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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[4] Opinion No. 21/2007 (Egypt), Opinion No. 24/2007 (Egypt) (both to be published in Addendum 1 of the Working Group on Arbitrary Detention's annual report for 2008), Opinion No. 5/2005 (Egypt), paragraph 19 (E/CN.4/2006/7/Add.1), Decision No. 45/1995 (Egypt), paragraph 6 (E/CN.4/1997/4/Add.1), and Decision No. 61/1993 (Egypt), paragraph 6 (E/CN.4/1995/31/Add.1). See also Opinion No. 3/2003 (Egypt) (E/CN.4/2004/3/Add.1).

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. 15/2007.)

4. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments. 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. According to the information submitted to the Working Group: Messrs. Petro Solomo, Ogbe Abraha, Haile Woldensae, Mahmoud Sherifo, Berhane Ghebregzabher, Slih Idris Kekya, Hamed Himed, Stefanos Syuom, Germano Nati, Berraki Ghebreslasse and Ms. Aster Feshazion are former Eritrean government officials and are part of a group of 15 senior officials of the ruling People's Front for Democracy and Justice (PFDJ). The Government indicts them for having been openly critical of the Government policies and for having committed a crime against State security and sovereignty. In May 2001, they wrote an open letter to ruling party members criticizing the Government for "acting in an illegal and unconstitutional manner" and calling all PFDJ members and Eritrean people in general, to express their opinions through legal and democratic means.

6. It has been alleged that these persons have not been given access to legal assistance or authorization to receive visits from their relatives. None of them has been brought before a judicial court or charged with any criminal offence. Moreover, a request for habeas corpus was made to the Minister of Justice on 26 November 2001 pursuant to article 17 of the Eritrean Constitution, asking, inter alia, to reveal the place of detention of these 11 persons; to either charge and bring them before a court or release them; to guarantee that none of them would be ill-treated and to ensure their immediate access to lawyers of their choice, their families and adequate medical care. No response was obtained from the Government.

7. On the same date, an urgent communication was submitted to the Special Rapporteur of the African Commission on Human and Peoples' Rights on Prisons and Conditions of Detention in Africa, asking him to request the Government to reveal the whereabouts of the 11 detainees and urging that none of them be ill-treated. However, this action has allegedly not produced any results, either.

8. According to the source, these 11 persons are being kept in incommunicado detention without specific charges laid against them since their arrest in September 2001. They have furthermore not been tried yet or convicted of any crime. The detainees have not had access to defence lawyers or to their families, either.

9. Consequently, the source argues that the detention of these 11 persons is arbitrary as applicable international norms relating to the right to a fair trial spelled out in the International Covenant on Civil and Political Rights, to which Eritrea is a party, are not observed.

10. The Government, in its comments of 29 August 2007 to the communication sent by the Working Group, notes that "the 11 persons are detained for conspiracy and attempt to overthrow the legal government in violation of relevant United

Nations resolutions and international law; for colluding with hostile foreign powers with a view to compromising the sovereignty of the country; and for undermining Eritrean national security and the general welfare of its people", which constitute violations of the Transitional Penal Code of Eritrea. The Government invokes articles 259, 260 and 261 of the Code, which are related to crimes against the State.

11. Regarding the allegations that the 11 persons have been detained for "peaceful expression of their opinions", the Government emphasizes that they are factually unfounded and perpetrated by involved groups to cover up "grave crimes committed against the national security of the country at war time". The Government stresses that expressing one's opinions or belief is not considered a crime in Eritrea.

12. The Government also refers to the discussion held by the National Assembly at its fourteenth session from 29 January to 2 February 2002, about the report concerning the nature of the acts committed by the persons concerned. It concluded that these people had perpetrated "serious crimes against the nation and its people" and "mandated the Government to handle the matter appropriately and bring it to its logical end".

13. Referring to the absence of a speedy and fair trial, the Government explains that the persons are accused of "conspiracy with hostile foreign powers at a time of war" and that the evidence gathered so far cannot be made public and forwarded to judicial proceedings since the war situation is not yet over. In the view of the Government, taking the persons to court under the circumstances, which does not allow for the declassification of crucial evidence, could seriously compromise a fair trial. In addition, there exist co-offenders who are not yet apprehended due to the situation. The Government also considers that the concern about legal representation is premature since the charges have not yet been defined and submitted to the accused.

14. Concerning the detention conditions, the Government stresses that making the place of detention public and allowing relatives to visit detainees is not possible because of the "particular time". The vulnerability of the country, whose sovereign territory is considered by the Government to be still under occupation, justifies the "non-fulfilment of some elements of due process of law for the detainees". Nevertheless, the Government states that they are being treated humanely and have access to medical treatment.

15. On 11 September 2007, the source has commented on the reply of the Government. It notes that the allegations of conspiracy are not founded and already used before the African Commission on Human and Peoples' Rights (ACHPR) on 20 May 2002. It also adds that the letter to the members of the PFDJ was a reaction to the efforts to convene a meeting of the Central and National Council and its content is public and well known.

16. Concerning the report of 2002 which led the National Assembly to the conclusion that the detainees have committed crimes, the source notes that State's political organs are not competent to establish guilt. It also invokes a letter of 6 February 2003 to ACHPR in which the Government recognized the separation of powers in the country and the exclusive competence of the judiciary regarding issues like habeas corpus. However, the detainees have never been brought before a judge and no formal charges have been formulated against them.

17. For the source, the reference to a wartime situation to justify the lack of trial and other judicial guarantees is not relevant. It adds that even the Government, in its communication to ACHPR, has never invoked the state of war as a justification for the prolonged incommunicado detention. Furthermore, a peace agreement was signed between Eritrea and Ethiopia in June 2000 and the sporadic border disputes are not considered as an armed conflict, an assessment which is also supported by the United Nations (Security Council resolution 1767 (2007)).

18. Regarding the state of public emergency and the conditions imposed by article 4 of the International Covenant on Civil and Political Rights upon countries which proclaim such state, the source notes that Eritrean Government has "declined both to officially proclaim a state of public emergency and to inform the other States parties that it derogated from its human rights obligations. Furthermore, a "derogative measure leading to incommunicado detention for six years can impossibly be seen as strictly required", and infringements of the detainees' human rights are not justified by the need for confidentiality or the existence of other co-offenders in the country.

19. The source notes that the detainees have been held incommunicado since September 2001 at an unknown place and without any contact. However, incommunicado detention is considered by the Human Rights Committee as an inhuman treatment and a six year incommunicado detention cannot be justified in any case. Concerning the charges, the source considers that the fact that they have not yet been formulated amounts to a flagrant human rights violation as much as the denial of access to a lawyer.

20. The source also considers that, despite the pledge made by the Government in 2002, the detainees' human rights have been violated during the past six years. The Government also disregarded the findings of ACHPR in November 2003, which held that the Government has violated human rights and asked for the immediate release of and compensation for the 11 detainees.

21. Regarding the government statement that the detainees are being humanely treated and have access to medical treatment, the source concludes that the main issue in this case is to ascertain that the detainees are still alive and well.

22. On 9 April 2002, a communication was sent to the ACHPR concerning these11 detainees. The African Commission, at its 34th ordinary session from 6 to 20 November 2003 in Banjul, examined the communication and found the State of Eritrea in violation of articles 2, 6, 7, paragraph 1, and 9, paragraph 2, of the African Charter on Human and Peoples' Rights, but also of international human rights standards and norms. ACHPR also notes that the incommunicado detention is a "gross human rights violation that can lead to other violations" and the "prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment" and considers that "all detentions must be subject to basic human rights standards". The whereabouts of detainees should be known and they must have prompt access to a lawyer and their families, as well as been promptly brought before a judge, and have proper detention conditions. ACHPR has also urged the State of Eritrea to order the immediate release of the 11 detainees and recommended the compensation of these persons.

23. The Working Group observes at the outset that in its reply, the Government confirms the facts alleged by the source, facts which constitute a serious violation of human rights entrenched in the International Covenant on Civil and Political Rights and the African Charter of Human and Peoples' Rights as it has been established by the African Commission on Human and Peoples' Rights in its decision 250/2002 taken during its 34th session, held from 6 to 20 November 2003. Furthermore, the Working Group has already adopted Opinion No. 3/2002 regarding the same case and the same individuals, in which it considered the deprivation of liberty of these 11 persons as being arbitrary.[5]

24. The Working Group notes that no new elements have been received regarding this case since then except for the decision of the African Commission on Human and Peoples' Rights to which it has already referred to above. Consequently upon the above-mentioned Opinion rendered on 17 June 2002, the Working Group has requested the Government of Eritrea to take the necessary steps to remedy the situation of these 11 individuals and to bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights. However, the Government, in its reply, does not make any reference to the recommendations issued in Opinion No. 3/2002 and clearly confirms that it has not taken any measures to remedy the situation of Messrs. Petro Solomo, Ogbe Abraha, Haile Woldensae, Mahmoud Sherifo, Berhane Ghebregzabher, Slih Idris Kekya, Hamed Himed, Stefanos Syuom, Germano Nati, Berraki Ghebreslasse and Ms. Aster Feshazion.

25. The Working Group further notes that the Government has neither formally proclaimed a state of emergency nor informed the other States parties of the International Covenant on Civil and Political Rights of any provisions from which it has derogated as required by article 4 of the Covenant. Even if the Government had, any person deprived of his liberty would still have to be presented before a competent judicial authority and informed in detail about the charges against him.[6]

26. The deprivation of liberty suffered by these 11 individuals since September 2001 at a secret location, during which they have had no access to legal counsel or contact with their families, have not been presented before a judicial authority, and have not been formally charged, seriously contravenes article 9 of the International Covenant on Civil and Political Rights.

27. The Government still attributes to these 11 persons the commission of crimes against the sovereignty, the safety and the well-being of the State of Eritrea. However, it does not define exact criminal charges against them that relate to actions, which have been described by the source of consisting of written declarations urging the population of Eritrea to express criticism in a democratic manner against the performance of the Government. Their detention solely on these grounds, therefore, constitutes a clear violation of the rights of these 11 persons to exercise their right to freedom of opinion and expression as recognized by article 19 of the International Covenant of Civil and Political Rights.

28. The Working Group notes that the obvious unwillingness of the Government to comply with the Working Group's Opinion No. 3/2002 and recommendations to put

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[5] E/CN.4/2003/8/Add.1, p. 54.

[6] See Human Rights Committee, general comment No. 29 (2001), paragraph 16.

an end to the detention of Mr. Petros Solomon and the ten others is particularly worrying.

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

> The deprivation of liberty of Messrs. Petro Solomo, Ogbe Abraha, Haile Woldensae, Mahmoud Sherifo, Berhane Ghebregzabher, Slih Idris Kekya, Hamed Himed, Stefanos Syuom, Germano Nati, Berraki Ghebreslasse and Ms. Aster Feshazion is arbitrary, being in contravention of articles 9 and 19 of the International Covenant on Civil and Political Rights, to which Eritrea is a party, and falls within categories I and II of the categories applicable to the consideration of cases submitted to the Working Group.

30. Consequent upon the Opinion rendered the Working Group repeatedly requests the Government to remedy the situation and to bring it into conformity with the provisions of the International Covenant on Civil and Political Rights. The Working Group believes that under the circumstances the adequate remedy would be the immediate release of Mr. Petro Solomo and the ten others.

Adopted on 27 November 2007

OPINION No. 24/2007 (Egypt)

Communication addressed to the Government on 14 June 2007.

Concerning Mr. Mustapha Hamed Ahmed Chamia.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. According to the source, Mr. Mustapha Hamed Ahmed Chamia (hereinafter Mr. Chamia) is a citizen of Egypt, aged 54. He used to be a low-level employee and resident at Ahmed Arabi Avenue 3, Chebra Al Kheima, Mufahadat Al Qalubia.

6. During the night of 15 to 16 January 1994 agents of the State Security Service (Amn Addaoula) arrested Mr. Chamia at his home. They did not show an arrest warrant or any other document justifying his arrest, but told him that he was arrested because of his membership of a prohibited religious organization. Mr. Chamia was taken to their facilities where he was tortured and ill-treated over several months. The security agents torturing him told Mr. Chamia that they had to punish him for having publicly expressed fundamentalist and extremist religious ideas.

7. During the more than 13 years since his arrest Mr. Chamia has been held at various high security prisons. He is currently held at Liman Tara high security prison.

8. Mr. Chamia is detained under article 3 of Law No. 162 of 1958 on the state of emergency, which allows the Minister of the Interior as representative of the President of the Republic to order administrative detention of individuals. Mr. Chamia has never been brought before a judicial authority or been charged with any offence. Agents of the State Security Service have explained to Mr. Chamia orally that he will never be brought before a judge "because there are no precise facts he could be charged with".

9. Mr. Chamia has filed numerous written requests to be released. Each time, a judicial authority has accepted his request and ordered his release. The Minister of Interior, however, has each time issued a new administrative detention order and refused to release Mr. Chamia.

10. Mr. Chamia's mental and physical health is still suffering from the torture he was subjected to 13 years ago. Since 2006 his state of health has further deteriorated. He was denied medical treatment until he fell into a coma at the beginning of February 2007. He is now held at the hospital of Liman Tara prison, where he is not allowed to receive visits by his lawyer and his family, who are very concerned about his state of health.

11. The source alleges that the detention of Mr. Chamia is arbitrary because it is devoid of any legal basis. Article 3 of the Egyptian Emergency Law stipulates that the President of the Republic may take appropriate measures to maintain security and public order through imposing restrictions on an individual's freedom such as administrative detention of suspects without trial for prolonged periods. Such administrative detention orders are issued without any control by the judicial authority or the Prosecutor's office. A complex process to challenge these administrative measures before the courts is provided for by the Law. However, all judicial rulings ordering the release of Mr. Chamia have been made in vain in view of new administrative detention orders passed, rendering judicial control over the legality of detention futile. Hence, according to the source, the deprivation of liberty of Mr. Chamia is devoid of a legal basis since the Egyptian courts have ordered his release.

12. The source further recalls that the security agents who arrested Mr. Chamia told him that he was detained because of his membership of a prohibited religious organization and that while tortured he was explained that he was being punished for having publicly expressed fundamentalist and extremist religious ideas.

13. In its comments, the Government affirms that Mr. Chamia "belongs to extremist organizations which use violence in pursuit of their objectives. He was placed in preventive detention in accordance with the Emergency Act No. 162 of 1958 in order to avert the criminal threat that he posed and prevent him from engaging in any hostile operations."

14. The Government further indicates that the "Ministry of the Interior is bound to implement judicial rulings providing for the release of elements in preventive detention. Security checks made it clear, however, that the elements in question continued to advocate radical ideas which threaten stability and public safety. Measures were taken to keep those elements in preventive detention, which did not contravene the law." The Government informed that a "recent re-evaluation of the attitude of the person in question in this case revealed that his views have moderated and that he no longer presents a criminal threat. He was therefore included among

the group of persons benefiting from a ministerial release order issued to commemorate the 23 July Revolution."

15. The source, in its comment on the government response, indicates that Mr. Chamia, whose health condition worsened after the communication addressed by the Working Group, was indeed released on 23 July 2007. The source emphasizes that Mr. Chamia was detained without judgment or judicial procedure during 13 years and 6 months under preventive detention only because of his religious ideas, considered as extremist. The source further highlights that he was not reproached with any material fact.

16. Having assessed all information before it, the Working Group decides that the case of Mr. Chamia, because of the gravity of the allegations made and the length of his period of detention without charges or trial (13 years and 6 months) is a serious case of deprivation of liberty and consequently, acting in accordance with its methods of work, paragraph 17 (a), reserves the right to render an opinion, notwithstanding the information received from the Government about Mr. Chamia's release.

17. The Working Group notes that the Government, in its response, does not discuss or deny the allegations made by the source, which are the following: Mr. Chamia was arrested during the night of 15 to 16 January 1994 without arrest warrant; he was subjected to torture and ill-treatment during several months; and he was deprived of liberty during 13 years without indictment and judgement.

18. The Government also acknowledges that Mr. Chamia, despite numerous court decisions ordering his release, was kept in detention in accordance with the Emergency Act No. 162 of 1958 which authorizes the Minister of Interior to take such measures against persons representing a threat to stability and public safety.

19. The Working Group has on earlier occasions[7] 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. The Working Group is of the opinion that in such cases no legal basis can be invoked to justify the detention, least of all an administrative order issued to circumvent a judicial decision ordering the release.

20. It is the position of the Working Group that not even a state of emergency may justify such long administrative detention and the non-observance of the guarantees of a fair trial. Insofar the Working Group concurs with the position taken by the Human Rights Committee in its general comment No. 29 (2001)[8] 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 decision of the State party to derogate from the Covenant. This implies that release orders of courts competent to exercise control over the legality of detention must be

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[7] Opinion No. 21/2007 (Egypt) above, Opinion No. 22/2007 (Egypt) above, Opinion No. 5/2005 (Egypt), paragraph 19 (E/CN.4/2006/7/Add.1), Decision No. 45/1995 (Egypt), paragraph 6 (E/CN.4/1997/4/Add.1), and Decision No. 61/1993 (Egypt), paragraph 6 (E/CN.4/1995/31/Add.1). See also Opinion No. 3/2003 (Egypt) (E/CN.4/2004/3/Add.1).

[8] Paragraph 16.

honoured by the Government even in a state of emergency. The Working Group concludes that the deprivation of liberty of Mr. Chamia was arbitrary being devoid of any legal basis (Category I).

21. Moreover, the Government has not further specified what crimes the holding of "radical religious ideas" may constitute and in what way the activities of Mr. Chamia pose a threat to the stability and public safety of the country. In the absence of such specifications the Working Group has no reason to question the allegation of the source that his detention is solely connected to the exercise of his right to freedom of religion and to freedom of opinion and expression as guaranteed by articles 18 and 19 of the International Covenant on Civil and Political Rights to which Egypt is party. Furthermore, the Government confirms implicitly that Mr. Chamia had been detained solely for holding specific view since he was released after they were found by the Government to have moderated. The deprivation of liberty of Mr. Chamia, thus, falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

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

> The deprivation of liberty of Mr. Mustapha Hamed Ahmed Chamia from 15 January 1994 to 23 July 2007 was arbitrary, being in contravention of Articles 9, 18 and 19 of the International Covenant on Civil and Political Rights to which Egypt is party and falls under categories I and II of the categories applicable to the consideration of cases submitted to the Working Group.

Adopted on 22 November 2007

OPINION No. 25/2007 (Australia)

Communication addressed to the Government on 2 April 2007.

Concerning Mr. Konstantinos Georgiou.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, but has not received any comments on it.

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.

6. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Konstantinos Georgiou, 39 years old, of Australian nationality, a mechanic, was reportedly convicted in 2000 for a triple murder committed in 1997. He was sentenced to life imprisonment. He will be eligible for release on 2 February 2031.

7. Mr. Georgiou has been detained for more than nine years at various maximum security prisons in New South Wales. In July 2003, the said detainee was transferred without written notice from Lithgow to the High Risk Management Unit (HRMU) of the New South Wales prison system, a maximum security unit inside the prison designated to admit high risk convicts, where he continues to remain. The HRMU is considered by the source to be a prison within the prison. Convicts cannot participate in the usual rehabilitation programs.

8. According to the source, rules at the HRMU change on a daily basis: Prisoners complain that one day they could do something they have been doing for several months, and without warning from the officers they may be charged and punished. Correctional staff can withdraw what little privileges prisoners have been given without even being charged with any offence or any other formal disciplinary action taken against them.

9. Mr. Georgiou has been placed by the Commissioner of Corrective Services in solitary confinement in an isolated and unclean HRMU cell, without fresh air or ventilation and with only negligible natural light. HRMU cells have no windows to the outside world.

10. Mr. Georgiou was considered by the Commissioner of Corrective Services to be a high risk prisoner. According to the source, the Commissioner of Corrective Services has absolute discretion to designate a prisoner as high risk and place that prisoner into the HRMU.

11. Mr. Georgiou is subjected to the harsh standard conditions within the HRMU, in addition to his confinement in an individual cell for up 23 hours per day. Prisoners at the HRMU complain about freezing temperatures, stale air, and claustrophobia exacerbated by daily 23-hour lockdowns. Access to external areas is at the whim of prison guards.

12. Mr. Georgiou had not right to challenge the Commissioner's decision on his placement before a higher or a judicial authority. However, during an appeal against the severity of his 33 years custodial sentence, he raised the issue of his segregation in the HRMU as a mitigating factor. The New South Wales Court of Criminal Appeal had affirmed the principle that more onerous conditions of confinement justify some moderation in sentence. During the sentencing proceedings, the Court is thus required to make some prediction about the nature of the custody that will be endured by the prisoner. However, Mr. Georgiou was transferred to the HRMU post-sentence. He was designated a high security prisoner on 16 February 2003, five years into his sentence.

13. Mr. Georgiou was explained that three reasons were set forth for his transfer to this unit. Those reasons were: the suspected possession of three mobile phones; a suspected attempt to conduct a business at the interior of the prison; and a level of desperation on the detainee's part about being in prison. However, no evidence was ever tendered to support these allegations and no official charges were laid against Mr. Georgiou for possession of mobile phones within correctional centres. The authorities could not verify that Mr. Georgiou had cellular phones in his cell and he had never been charged with such an offence. There was no evidence of any risk of escape, either.

14. The source further emphasizes the severe psychological impact of such solitary confinement and isolation upon Mr. Georgiou's mental health. Prisoners in the HRMU are experiencing stress and frustration, anger and a feeling of injustice over the continual deprivation of necessary goods which ordinary discipline prisoners receive. This situation has motivated continuous incidents of physical and verbal altercation between prisoners and correctional staff.

15. In addition, it was reported that Mr. Georgiou had to wait eight years for shoulder reconstruction surgery at an external hospital and that only some hours after emerging from surgery he was transported back to his isolated cell.

16. According to the source, the placement of this person in solitary confinement at the HRMU is arbitrary and violates his right to fair proceedings protected by article 10 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights and Principles 7 and 31 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

17. The source adds that Mr. Georgiou has been condemned to disciplinary punishment inside the prison without having been given the opportunity to be heard by the authorities before the disciplinary action was taken. In addition, the source mentions that this disciplinary punishment at the HRMU is contrary to articles 1, 10, 11, 12, 16 of the Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment as well as to article 11 of the United Nations Standard Minimum Rules for the Treatment of Prisoners.

18. In its reply, the Australian Government contests the Working Group's authority to address the merits of the claims made in the communication. It considers that there is nothing in any of the resolutions establishing the Working Group, or in any of the comments or reports of the Working Group to suggest that its mandate extends to prison administration or to investigating prison conditions.

19. The Government upholds that the transfer of Mr. Georgiou to the HRMU was an administrative action and not a punishment and even if it is considered to amount to 'punishment', the communication remains inadmissible because the Working Group's mandate does not extend to prison disciplinary offences. The Government further stated that even if the mandate of the Working Group extended to applicable international instruments dealing with the right to a fair hearing for prison disciplinary offences, to its knowledge, however, the Working Group has never commented on this particular issue. The Government also raises the issue of limited resources and duplication with other United Nations human rights mechanisms if the Working Group interprets its mandate beyond arbitrary detention to include prison conditions and prison disciplinary offences.

20. Notwithstanding its belief that the communication is beyond the mandate of the Working Group, the Government submits in a spirit of cooperation, the following information in response to the claims made in the communication: On 22 July 2003, Mr. Georgiou was transferred from Lithgow Correctional Centre to the HRMU in accordance with the HRMU referral guidelines. In New South Wales (NSW), the transfer between correctional institutions is an administrative matter, based on operational considerations, including security. Mr. Georgiou's transfer to the HRMU was not a punishment for a disciplinary offence, but an administrative decision based on security considerations. There is no requirement under the Crimes

(Administration of Sentences) Act 1999 NSW (the Act) or the Crimes (Administration of Sentences) Regulations 1999 NSW (the Regulations) that inmates be provided with written notice of an impending transfer.

21. Under the Act, all inmates in NSW prisons are given a security classification. The High Security Inmate Management Committee (HSIMC) advises the Commissioner on whether serious offenders should be classified as a High Security Inmate (HSI) or as an Extreme High Security Inmate (EHSI). The HSIMC is a committee of the Serious Offenders Review Council (SORC) which is a statutory body comprised of judicial members, community members and departmental members.

22. If the HSIMC recommends that an inmate be given an HSI or EHSI classification, the Commissioner can only act on that recommendation if there is material that identifies the inmate as either a danger or an extreme danger to other people, or a threat or an extreme threat to good order and security. The HSINIC recommended to the Commissioner on 6 February 2003 that Mr. Georgiou be classified as an EHSI. The Commissioner approved this recommendation on 16 February 2003.

23. Mr. Georgiou was transferred to the HRMU because of serious concerns about his ability to be securely detained in other correctional centres. Mr. Georgiou is known to have strong ties with the outlaw "Rebels Motorcycle Gang", and has been assessed as posing a high escape risk. Security concerns are also evidenced by the fact that he was found guilty of two correctional centre disciplinary offences relating to the possession of mobile phones. Mobile phones represent a serious threat to the security of a correctional centre, as they can be used to intimidate correctional centre staff and their families, to interfere with witnesses, and to organize an escape from custody.

24. The classification of all inmates designated as EHSI is regularly reviewed by the HSIMC. In addition, Mr. Georgiou is entitled to apply to the SORC at any time for it to reconsider his classification and placement. Mr. Georgiou's classification has been reviewed on 20 occasions between September 2003 and March 2007, and the HSIMC has maintained the view that Mr. Georgiou ought to be designated as an EHSI. The Commissioner has agreed with this recommendation on each occasion.

25. If Mr. Georgiou is aggrieved by administrative decisions, including his classification, he may also complain to the NSW Ombudsman, who has jurisdiction to consider serious complaints by inmates which cannot be, or have not been, resolved by the Department of Corrective Services.

26. With regard to the claim that the rules in the HRMU change on a daily basis, which would violate Principle 30, paragraph 1, of the Body of Principles, the Government explains that centre routine and the offences which amount to disciplinary offences are set out in the Act and Regulations. If it is alleged that an inmate has committed a disciplinary offence, the general manager of the correctional centre may charge the inmate with the offence and conduct an inquiry into the allegation. Formal disciplinary action cannot be taken without an inmate being charged and found guilty of a disciplinary offence.

27. The Act and Regulations provide that an inquiry must be conducted with as little formality and technicality, and with as much expedition and fairness to the

inmate charged as the requirements of the Act and Regulations and the proper consideration of the charge permit. The inmate is entitled to be heard at any hearing during the inquiry and to examine and cross-examine witnesses.

28. A General Manager may refer serious disciplinary offences to a Visiting Magistrate for hearing and determination. An inmate is entitled to be represented by a legal practitioner at such hearing. The General Manager or Visiting Magistrate can only impose penalties in form of a reprimand or caution, withdrawal of privileges, confinement to a cell, and the cancellation of any additional payments for work performed. General Managers and Visiting Magistrates do not have the power to transfer an inmate to another prison.

29. The Australian Government is of the view that the procedures outlined above and contained in the Act and Regulations are sufficient to meet any obligations under international law Australia might have towards prisoners accused of disciplinary offences.

30. The Government also gives detailed information to challenge the allegations related to conditions at the HRMU, to solitary confinement and to access to rehabilitative and medical care. It is affirmed that solitary confinement is prohibited from being used as a punishment in all NSW prisons.

31. The observations of the Government were transmitted to the source, which has not commented on them, despite having been invited to do so.

32. In the light of the foregoing, the Working Group agrees with the Government that its mandate does not extend to the control of execution of prison sentences or of prison conditions as such. However, the Working Group has always considered itself to be competent to deal with questions related thereto in two situations. First, the Working Group examines the conditions in detention of pretrial detainees if they affect the right to fair trial, particularly the right to defence and the right not to be compelled to testify against oneself or to confess guilt.[9] Second, the Working Group resumes competence if the conditions of detention during the serving of a prison term or if disciplinary measures imposed upon the prisoner without observing the guarantees contained in 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 have an impact on the possibility for early release.[10]

33. Since the source has not addressed the question of a potential impact of the situation of Mr. Georgiou on the possibility of his early release in its communication submitted to the Working Group and has failed to comment on the observations of Government and to contest them, the Working Group considers that it is lacking sufficient information to conclude that the detention of Mr. Georgiou is of an arbitrary nature.

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[9] See the following reports of the Working Group on Arbitrary Detention: A/HRC/4/40, para. 66; A/HRC/4/40/Add.2, paras. 90 and 98; E/CN.4/2005/6, paras. 68 et seq.; E/CN.4/2005/6/Add.3, paras. 48 et seq.; E/CN.4/2004/3/Add.3, paras. 32 et seq.; E/CN.4/2005/6/Add.2, paras. 65 et seq.

[10] See the Working Group on Arbitrary Detention's reports E/CN.4/2002/77/Add.1, Opinion No. 34/2000 (Jan Borek/United States of America), page 16; E/CN.4/2004/3/Add.1, Opinion No. 16/2002 (George Atkinson/United Arab Emirates), page 7; A/HRC/7/4/Add.2, paras. 85 et seq.

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

The detention of Mr. Konstantinos Georgiou is not arbitrary.

Adopted on 27 November 2007

OPINION No. 26/2007 (Israel)

Communication addressed to the Government on 2 April 2007.

Concerning Mr. Issam Rashed Hasan Ashqar.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the light of the allegations made and the response of the Government thereto, as well as the observations by the source.

6. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:

7. Mr. Issam Rashed Hasan Ashqar (hereinafter Issam Ashqar), born on 16 June 1958, holds a Palestinian identity card issued by the Israeli Civil Administration of the West Bank. He is a lecturer of physics at An-Najah National University in Nablus and author of scientific publications. His usual place of residence is in Nablus in the Al-Ma'ajeen neighbourhood.

8. Issam Ashqar was arrested by Israeli military forces at his home in Nablus on 2 March 2006. The arrest warrant had been issued by the Israeli Defence Forces' (IDF) Military Commander of the West Bank. His family was not informed about where he was taken and unsuccessfully searched for him. However, the International Committee of the Red Cross (ICRC) later on found out and informed them that he had been detained for four days at the Howara Military Camp. Thereafter, due to high blood pressure and breathing problems, he was taken to Belinson Hospital in Betah Tikva, from where he was subsequently transferred to Offer Military Prison. Due to continuing medical problems Issam Ashqar has been repeatedly transferred to hospital.

9. The Military Commander of the West Bank issued a six month administrative detention order on 14 March 2006. On 27 March 2006, a session of the military court was held in the presence of the military judge, the prosecutor, the detainee and his defence counsel. Issam Ahqar was accused of supporting terrorism. His lawyer requested details of the activities supporting terrorism Issam Ashqar was charged with, but the prosecution objected, stating that the evidence of these activities had to

remain confidential. The military judge held a closed session only with the prosecutor, excluding Issam Ashqar and his lawyer, to review the evidence.

10. Thereafter, the military judge issued a decision confirming the six months detention order on the ground that Issam Ashqar poses a danger for the security of the territory and the public, stating however that it ran from 2 March 2006 (the date of arrest) until 1 September 2006. In his decision, the military judge stated that in order to protect public security none of the confidential material he had been shown should be disclosed. He explained that credible intelligence material proved that the detainee was involved in terrorist activities within the Hamas organization. The military judge concluded that he was thus persuaded that "it is necessary and right to put the said detainee in administrative detention so as to defend the security of the territory and the safety of the public in addition to neutralizing the potential future danger associated with the said detainee."

11. The findings and conclusions of the military judge were upheld by the appeals judge in a decision of 30 April 2006.

12. The administrative detention order was renewed at the beginning of September 2006 and Issam Ashqar continues to be detained.

13. The source alleges that the detention of Issam Ashqar is arbitrary. While the Israeli authorities claim that administrative detention is a preventive measure, it is in fact a form of punishment for Palestinians who are suspected of committing security violations. This punishment nature of administrative detention is proven by the duration such detention can take. The source mentions the case of Waleed Khaled Husni Ali of the village Shaka in Salefeet District, who has been detained on the basis of three-month administrative detention orders since 30 July 2001.

14. The source argues that, therefore, articles 9, paragraph 2, and 14 of the International Covenant on Civil and Political Rights) should be applied to these cases. These articles are, according to the source, patently violated, inter alia, by:

(a) The non-public nature of the hearings before the military judge, which can be attended only by the detainee, his lawyer, the judge, the military district attorney and sometimes intelligence officers;

(b) The failure of the authorities to provide the detainee with prompt and sufficient information about the reasons for his arrest;

(c) The fact that the judge decides on the basis of secret evidence, which prevents the detainee from being able to effectively challenge the grounds for his detention.

15. According to the source, the Israeli authorities claim that this form of administrative detention is in accordance with article 78 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention), which reads:

> "(1) If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.
>
> (2) Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in

accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

(3) …"

16. At the same time, however, the Israeli Government denies that the Fourth Geneva Convention is applicable to the territories occupied by Israel in 1967. Moreover, even assuming article 78 of the Fourth Geneva Convention was applicable, Israel could not rely on it to justify its administrative detention practice, because the high number of Palestinian administrative detainees (810 as of May 2006) is incompatible with the exceptional nature of the deprivation of liberty allowed by article 78. Furthermore, detention lasting for several years cannot be justified as a "safety measure", which is "necessary, for imperative reasons of security". Its duration belies the label "safety measure" and reveals the punitive nature. As a consequence, the guarantees applicable to criminal proceedings should apply.

17. In its response the Government emphasizes the struggling with terrorism and the growing numbers of terrorist attacks targeting Israeli civilians. It states that where sufficient and admissible evidence exists against an individual, that individual is brought to justice. However, sometimes, for reasons of confidentiality and protection of intelligence sources, evidence cannot be presented in court. In these circumstances, administrative detention provides an effective and lawful counter measure against terrorist attacks. According to the Government this measure may only be used when the evidence in existence is clear, concrete and reliable, but cannot be presented as evidence in ordinary criminal proceedings for the reasons stated above.

18. The Government recalls that the use of administrative detention measures against detainees who pose a danger to public security is recognized by international law and is in full conformity with article 78 of the Fourth Geneva Convention. The Government further notes that an administrative detention order is limited to six months and subject to judicial review. Its extension requires a re-evaluation of the relevant intelligence material as well as further judicial review.

19. Local legislation governing the process grants individuals the right to appeal to the Military Court of Appeals for judicial review of the order. Petitioners may be represented by counsel of their choice at each and every stage of these proceedings. Additionally, all individuals have the right to petition the Israeli High Court of Justice for a repeal of the order. The judicial organs scrutinize these orders, carefully examining in each case whether the criteria outlined in case law and legislation are fully met.

20. The Government confirms that an administrative detention order against Mr. Ashqar was first issued in 15 March 2006, for a period of six months, on grounds of endangering the public security in the area. On 16 March 2006 and again on 27 March 2006, the administrative detention order was judicially reviewed and approved by the Military Court which examined the confidential material upon which the administrative detention order had been based. The Military Court held that Mr. Ashqar was involved in distinct military activity within the Hamas terrorist

organization, and further pointed to the still existent danger posed by him, and ruled that the detention order would remain effective until its expiration date of 1 September 2006.

21. Mr. Ashqar appealed this decision on 30 April 2006. The Military Court of Appeals, which examined the confidential material, stated that it was reliable and held that its exposure would cause damage to the security of the area. The Court concluded that securing the safety of the area and the public requires that Mr. Ashqar remains in custody and approved the decision of the lower court.

22. On 16 July 2006 Mr. Ashqar submitted a petition to the Supreme Court against the Military Court of Appeals' decision. The petitioner claimed that there was no evidence justifying his administrative detention and that the detention was derived from alien considerations. In addition, he claimed that he had a severe medical condition and that his detention caused damage to students under his supervision in AI Najah University in Nablus, where he served as a physics professor.

23. Following an examination of the confidential material, the Supreme Court informed the petitioner that the respondent agreed to consider allowing the petitioner to exit the country for a period of three years as an alternative to administrative detention. Beyond that, the Court did not find any reason for intervention in the respondent's decision. Accordingly, the petitioner requested to strike off his petition.

24. On 30 August 2006, the military commander ordered the extension of the administrative detention for additional six months on grounds of endangering the public security in the area. On 5 September 2006, the Military Court again examined the confidential material and re approved the detention order. Mr. Ashqar appealed to the Military Court of Appeals against the lower court's decision to re approve the extension of his administrative detention. On 27 September 2006, the Court of Appeals rejected the appeal and approved the decision of the lower court.

25. On 21 December 2006, Mr. Ashqar petitioned the Military Court of Appeals' decision to the Supreme Court. The petitioner denied the accusations against him and claimed that the extension of his administrative detention was not proportional since he has no criminal or security record and because of his severe medical condition. The State reiterated that administrative detention was the only way to protect the public and the security of the region against the severe danger expected from the petitioner. Following the recommendation of the Supreme Court, Mr. Ashqar requested to strike off his petition on 7 February 2007. Since then, Mr. Ashqar's administrative detention has been periodically renewed and is to expire on 27 October 2007.

26. In its comments on the observations of the Government, the source maintains its previous allegations and put forward the following arguments to support the assertion that the deprivation of liberty of Mr. Ashqar is arbitrary:

(a) The Israeli Government informed that administrative detention is sometimes used to maintain undisclosed secret intelligence information. The available statistics show that the total number of Palestinians administratively detained in Israeli prisons range from 9,000 – 10,000 detainees, including children and women. This means that the Israeli authorities often resort to administrative

detention rather than sometimes which contradicts the principle according to which administrative detention was enacted in article 78 of the Fourth Geneva Convention.

(b) Regarding the statement of the Government that such kind of detention provides efficient and legal means in confronting terrorist attacks, the source recalls that the Israeli judiciary already permitted torture of Palestinian detainees during interrogation periods under the pretext of what is called "the human ticking bomb" despite the fact that the international law does not, in any way, tolerate torture as well as the arbitrary detention.

(c) Referring to the Israeli claim that administrative detention is limited to a six-month period and that the extension of the detention period is subject to review of the intelligence information and a judiciary review as well, the source indicates that this claim is only true in theory. In reality, hundreds of Palestinians have been administratively detained for three to four years. This proves that the judiciary and intelligence review of the files every six months is only formalistic and is simply a way to legalize the administrative detention. As the lawyer is not aware of the evidence and proof against his client, and he is not allowed to question the witnesses, in most of the cases, the courts reject the presented disapproval and support the detention extension decisions based on the same secret information presented. Issam Ashqar is confronted with exactly the same situation.

27. The Working Group notes that the Government claims that Mr. Ashqar's prolonged (more than 20 months) administrative detention is in full conformity with article 78 of the Fourth Geneva Convention. The Working Group recalls that the Fourth Geneva Convention makes it explicitly clear that internment and assigned residence are the most severe measures of control that a detaining authority or Occupying Power may take with respect to protected persons against whom no criminal proceedings have been initiated. In both cases it is stipulated that recourse to these measures may be had only if the security of the Occupying Power renders it "absolutely necessary" (article 42) or for "imperative reasons of security" (article 78). The Working Group notes, however, that according to documented information, administrative detention against Palestinians of the Occupied Territories is not used as an exceptional measure by Israel.[11]

28. In addition the Working Group notes that although the Government bases Mr. Ashqar's administrative detention on a provision of the Geneva Conventions, he continues to benefit from the protection afforded by international human rights norms, namely those of the International Covenant on Civil and Political Rights as undertaken by Israel.[12] Accordingly, Mr. Ashqar's detention should not only be in

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[11] See the concluding observations of the Human Rights Committee on the second periodic report of Israel (CCPR/CO/78/ISR3, para.12). See also the report to the Human Rights Council of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard (A/HRC/4/17, 2007, para. 43).

[12] In relation to this observation the Working Group recalls that the Human Rights Committee has clarified, in its general comment No. 31 (2004), paragraph 1, that "the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable." Before the adoption of this general comment, the Committee had expressed its view, in its concluding observations on the second periodic report of Israel where it is said that "that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation." (CCPR/CO/78/ISR, para. 11). Similarly, the

conformity with article 78 of the Fourth Geneva Convention but also with relevant provisions of the International Covenant. In the review proceedings regarding his detention, Mr. Ashqar should thus benefit from all procedural guarantees with the exception of those derogated from in full conformity with article 4 of the International Covenant on Civil and Political Rights.[13]

29. According to the Government, Mr. Ashqar is suspected of terrorist activities; however, for reasons of confidentiality and protection of intelligence sources, evidence against him cannot be presented in court and, under these circumstances, administrative detention provides an effective and lawful counter measure against terrorist attacks. The Working Group disagrees and stresses that administrative detention is not a measure that is meant to replace criminal proceedings and it should not be used as a means of circumventing the criminal justice system and avoiding the due process safeguards it provides.

30. The Working Group has already clarified that "individual liberty cannot be sacrificed for the Government's inability either to collect evidence or to present it in an appropriate form".[14] The Working Group recalls that a person suspected of a criminal offence, whether during an armed conflict or in any other situation, has the right to benefit from strict judicial guarantees set up by humanitarian and/or human rights law for individuals charged with criminal offences. These guarantees apply regardless of whether or not such suspicions have been formalized in criminal charges.

31. It appears from the facts as described above that Mr. Ashqar, irrespective of the nature and the motives of the accusations against him, has been denied his right to a fair trial, and in particular the rights that any person deprived of his freedom must enjoy, namely to be promptly informed of the reasons for his arrest and of any charges against him, to be brought promptly before a judge or other judicial authority, to take proceedings before a court so that the latter may decide on the lawfulness of his detention, and the right to be tried within a reasonable time or be released. These rights are guaranteed by articles 9, paragraph 2, 9, paragraph 3, 9, paragraph 4 and 14, paragraph 3 (a), (c) and (d) of the International Covenant on Civil and Political Rights to which Israel is a party.

International Court of Justice (ICJ) has concurred with the Committee's opinion on two occasions: In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the Court stressed that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency" (I.C.J. Reports 1996 (I), p. 239, para. 24). This was confirmed in the Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, para. 105.

[13] As Israel has derogated from article 9 of the International Covenant, the Working Group, concurring with the position taken by the Human Rights Committee in its general comments No. 29 (2001), has already expressed its view that "the right to personal liberty and security […must i]n all circumstances, […] conform to and be continuously evaluated in accordance with the fundamental principles of necessity, proportionality, humanity and non-discrimination", see the report of the Working Group on Arbitrary Detention (E/CN.4/2005/6/Add.1), Opinion No. 3/2004 ('Abla Sa'adat, Iman Abu Farah, Fatma Zayed and Asma Muhammad Suleiman Saba'neh/Israel, para. 32).

[14] See the report of the Working Group on Arbitrary Detention(E/CN.4/1995/31/Add.2), Decision No. 16/1994 (Sha'ban Rateb Jabarin/Israel, page 18, para. 11).

32. The Working Group concludes that the authority given to the Executive power, by law, to place a person in administrative detention for a six-month period which may be renewed indefinitely, the only alternative given by the authorities in the case under consideration being that Mr. Ashquar leaves the country for three years, constitutes in itself an abuse of power conferring on the detention an arbitrary character. The possibility provided to the detained person to appeal against this measure cannot attenuate its arbitrary character, since the appeals are heard by a military judge sitting in camera, who examines evidence in the absence of the detainee or his lawyer.[15] Accordingly, this constitutes a violation of the right to a fair trial of such gravity that it confers on the detention, once again, an arbitrary character.

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

> The deprivation of liberty of Mr. Issam Rashed Hasan Ashqar is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights to which Israel is party, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

34. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to rectify the situation and bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 27 November 2007

OPINION No. 27/2007 (Saudi Arabia)

Communication addressed to the Government on 19 February 2007.

Concerning Dr. Saud Mukhtar Al-Hashimi and eight other persons.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. The Working Group forwarded to the source the reply of the Government. The source submitted its comments on the information given by the Government. In the light of the allegations made the reply of the Government and the comments of the

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[15] In this respect, the Working Group recalls the concluding observations of the Human Rights Committee on the second periodic report of Israel (CCPR/CO/78/ISR, para. 12), where it is stated that 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 disclosure of full reasons of the detention". The Committee considers that: "[t]hese 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".

source thereon the Working Group believes that it is in a position to render an opinion.

5. The cases summarized hereinafter have been reported to the Working Group on Arbitrary Detention as follows: It was alleged that the following nine persons were arrested on 2 February 2007 by agents of the Intelligence Services (Mabahith) in Jeddah and Medina and have been held in incommunicado detention in an unknown location since then. Their names were given as follows:

6. Dr. Saud Mukhtar Al-Hashimi, aged 45, a medical doctor, a human rights defender, and an activist in a movement for constitutional reforms in Saudi Arabia. He is residing in Hai Assafa, avenue Emir Majeed, S.B. 53201, 21583 Jeddah. Dr. Al-Hashimi runs a prominent intellectual discussion forum (diwaniya) in his house. It was said that the secret police frequently summoned him to instruct him to stop inviting prominent Islamist personalities to his house for discussion;

7. Mr. Sulaiman Al-Rashoudi, an elderly former judge and human rights activist, also engaged in the defence of persons detained for the exercise of their right to freedom of expression and an activist for fair trials;

8. Mr. Essam Basrawy, a lawyer and an advocate of political and constitutional reform. A physically disabled person;

9. Mr. Abdulrahman Al-Shumairi, a former University Professor and an activist in the movement for constitutional reforms;

10. Mr. Abdulaziz Al-Khuraiji, a physician and an activist in the above-mentioned movement for constitutional reforms;

11. Dr. Moussa Al-Garni, a university professor and an activist in the above-mentioned movement. He was among four men who, in April 2006, petitioned the King for permission to open an Islamic civil society organization with the aim of “discussing freedom, justice, equality, citizenship, pluralism, proper advice and the role of women”;

12. Mr. Abdulrahman Sadeq Khan, an academic and an activist in the movement for constitutional reforms;

13. Mr. Al-Sharif Seif Al-Dine Shahine, a businessman and an activist in the above-mentioned movement;

14. Mr. Mohammed Hasan Al-Qurashi, a businessman and an activist in the movement for constitutional reforms.

15. It was reported that the arrest of the above-mentioned nine persons, all of them longstanding advocates of political and social reforms, was ordered by the Ministry of the Interior based on allegations of financing terrorism and illegal activities which included collecting donations in order to send Saudi youth to disturbed areas.

16. According to the source, the detainees had gathered on several occasions to discuss about the creation of a committee to strengthen the defence of civil and political rights and the need for constitutional reforms. These activities were made public. They were arrested when Mabahith agents stormed the villa of Mr. ‘Isam Basrawi, where he was meeting with a group of five associates. Another associate was arrested in his car in Jeddah and two others in Medina. They were reportedly handcuffed and transported to an Intelligence Services detention centre.

17. Dr. Al-Hashimi has intervened in several media in Arabic expressing his point of view on the situation in the Middle East and on different international and domestic political issues, and was reportedly asked by the authorities not to convey his opinions on the Al Jazeera satellite television channel. Three days before his arrest, he had participated in a television debate about the demands of the political reformers.

18. The source considers that the detention of these nine persons is arbitrary because it is devoid of any legal basis. As far as the source is aware, the authorities have so far failed to provide any decision justifying arrest and detention according to Articles 33, 34, 35, 101 and 116 of the Criminal Procedure Code. Article 2 of the Royal Decree Nº M.39 of 16 October 2001 stipulates that any arrest or detention must be based upon a legal provision and that the length of detention must be determined by the authorities. These persons should be immediately released or formally charged. Evidence should be presented against them.

19. Intelligence Services agents also failed to comply with Article 41 of the Code of Criminal Procedure which specifies that house searches require a search warrant stipulating the reasons for the search, issued by the Bureau of Investigation and Prosecution.

20. According to the source, the detention of these nine persons results from their political opinions and the consequent exercise of their right to freedom of expression, guaranteed by article 19 of the Universal Declaration of Human Rights.

21. In addition, the source reports that the Intelligence Services authorities have denied to the detainees access to legal counsel, to family visits and to adequate medical care. They have not even informed the detainees' relatives about the location where they are kept.

22. According to the government response, the competent authorities in the Kingdom of Saudi Arabia have indicated that the above-mentioned persons were arrested and charged with "engaging in activities involving the collection of donations in an illicit manner and the smuggling and transmission of funds to bodies suspected of using such funds to deceitfully incite Saudi citizens into travelling to locations where disturbances are taking place". This was announced officially and the said persons are currently being treated in accordance with the Kingdom's judicial standards, which respect human rights, prohibit injustice, comply with international rules and conventions, permit visits by relatives, ensure that no physical or mental humiliation or harm is inflicted on the accused, and guarantee them a fair trial.

23. The Government adds that those proved guilty will be referred to the judicial authority of the Kingdom, which is well known for its independence and is the only body competent to adjudicate in all crimes, determine penalties after conviction and hand down a final judgement on the accused. It is noteworthy that the said persons and their families are currently enjoying all aspects of care (health, social and financial).

24. In its comment to the reply of the Government, the source points out that the concerned persons are still being detained as of 25 October 2007 without following a legal process and without having been presented before a magistrate to be charged or officially notified about any lawful reasons of their arrest.

25. The source further states that the above-named persons have so far not had any opportunity of consulting a lawyer or of questioning the legality of their detention by filing an appeal before a judicial authority.

26. The source further informs that seven of the persons concerned were transferred from Rouis Prison in Djedda to a villa administered by the Security Services. Their conditions of detention have improved according to their families from which they are allowed to receive visits; however, they are not able to leave their place of detention.

27. Dr. Saud Mukhtar Al-Hashimi and Dr. Moussa Al-Garni are still being detained in complete isolation at Rouis Prison in Djedda. They have received only four visits since the beginning of their period of detention and certain family members, among whom their spouses and their children, are not authorized to see them at all. The state of health of Dr. Saud Mukhtar Al-Hashimi is particularly worrying because he is suffering from chronic digestive diseases.

28. The source further notes that the Government did not contest its allegations concerning the political motives linked to freedom of expression and peaceful assembly and that their arrests were carried out following their intervention in the mass media. According to the source, the Government further did not refute the long duration of secret detention (156 days for Dr. Saud Mukhtar Al-Hashimi), without there being the possibility of receiving visits or having access to a remedy to question the legality of detention or enjoying the assistance of a lawyer.

29. Having examined all the above information, the Working Group notes that the Government has not challenged the allegations of the source that the detainees were arrested and remain detained without having been brought before any judicial authority or formally charged. Therefore, they are detained without any legal basis in violation of article 9 of the Universal Declaration of Human Rights. Although the Government states that those proven guilty will be referred to the judicial authority of the Kingdom, it has not specified the particular judicial authority which is currently handling the proceedings or the charges against these nine individuals. The Working Group further observes that there is no legal basis of detention which could be invoked for the inconclusive purpose of referring them to the authorities at an uncertain date.

30. Whereas the Government has not clarified the places of detention of the nine individuals in its reply, although it had reasons to do so in view of the allegations by the source contained in its initial communication and transmitted to the Government, the source has made known in its observations on the response of the Government that it is aware of their present whereabouts. The source has communicated that seven of them are not held in prison but rather in a villa under surveillance and which they are not allowed to leave, whereas Dr. Saud Mukhtar Al-Hashimi and Dr. Moussa Al-Garni remain detained at Rouis Prison in Djedda.

31. Although the Government has accused these nine persons of engaging in activities of “deceitfully incit[ing] Saudi citizens into travelling to locations where disturbances are taking place”, it has not refuted the allegations of the source concerning the activities in which the nine individuals concerned have engaged in their professional capacity during the time before their arrests and concerning the political opinions they hold. The Working Group, which has already examined and has pronounced itself on similar cases, has consistently held that expressing

opinions not in conformity with or critical to government politics is a legitimate exercise of the right to freedom of opinion and expression, guaranteed by article 19 of the Universal Declaration of Human Rights. Thus, the Working Group considers that in the present case it has been proven that the cause of the arrest of these nine persons falls within the scope of the right to freedom of opinion and expression and assembly as guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights.

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

> The deprivation of liberty of Dr. Saud Mukhtar Al-Hashimi and the other 8 aforementioned persons is arbitrary, being in contravention of articles 9, 19 and 20 of the Universal Declaration of Human Rights and falls within categories I and II of the categories applicable to the consideration of the cases submitted to the Working Group.

33. Consequent upon this Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation in order to bring it into conformity with the norms and principles enshrined in the Universal Declaration of Human Rights. The Working Group recommends that the Government considers signing and ratifying the International Covenant on Civil and Political Rights.

Adopted on 28 November 2007

OPINION No. 28/2007 (Algeria)

Communication addressed to the Government on 17 August 2006.

Concerning Mr. Fouad Lakel.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group thanks the Government for transmitting the requested information in a timely manner.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. Having seen the allegations made, the Working Group welcomes the cooperation of the Government. It transmitted the reply of the Government to the source and has received the source's comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, taking account of the allegations made, the reply of the Government and the source's comments.

5. According to the source, Mr. Fouad Lakel, an Algerian secondary school [lycée] pupil born on 21 June 1973 and resident at Cité Ofaress Cosider, bat No. 2, Dergana, Bordj El Kiffan, was arrested on 31 May 1992 at la cité des Annassers, Kouba (a suburb of Algiers), by uniformed police following a dragnet operation in his neighbourhood. The police officials did not present an arrest warrant. They handcuffed him and went with him to his parents' home, where they carried out a search, before taking him for questioning to the police station, where he was tortured. After 15 days, Mr. Lakel was transferred to Châteauneuf prison, where the torturing continued.

6. Two months later, Mr. Lakel was transferred to El Harrach prison (where he was registered under the number 63631). His mother, Zakia Belkhaznadji, visited him there once. She noted that her son's body was badly bruised and that he had a broken nose and broken teeth. Subsequently, Mr. Lakel was transferred to Serkadji prison, in Algiers (registration number 30027).

7. The source adds that Mr. Lakel spent 18 months in detention without being brought before an examining judge or a representative of the public prosecution service. Throughout that period he was held with no legal justification.

8. On 22 December 1993, Mr. Lakel was sentenced by a special court to 15 years' imprisonment without remission for violating the anti-terrorism laws. He did not have the right to the services of a lawyer during the judicial proceedings.

9. After being sentenced, Mr. Lakel was transferred to Tazoult prison, 400 km east of Algiers, near the town of Batna (registration number 3159), where he was kept in solitary confinement. The members of his family were not informed of the transfer. His mother was told by another prisoner that her son was in Tazoult prison, where she visited him on 4 February 1994. He had a scalp injury and had become very thin.

10. During 1994, Mr. Lakel was transferred back to Serkadji prison. Despite permits to visit him granted to his mother by the public prosecutor of the Supreme Court, the first one dated 28 August 1995, the actual visits were declined. In 1996 he was officially deprived of the right to receive visits.

11. The source considers that Mr. Lakel's detention is arbitrary and illegal. Mr. Lakel was arrested without there being an arrest warrant. He was held for 18 months without being brought before an examining judge or a member of the public prosecution service. His trial, before a special court, was far from meeting the minimum conditions for a just and fair trial. Mr. Lakel was unable to benefit from the services of a lawyer, either before or after his trial.

12. The source adds that the solitary confinement of Mr. Lakel and the failure to honour the permits to visit him issued by the public prosecutor of the Supreme Court exposed him to the possibility of acts of torture and other forms of mistreatment.

13. Lastly, the source considers that 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, to which Algeria is a party, were not respected.

14. In its reply, the Government explains that during 1992 Mr. Lakel was wanted by the public prosecutor's office of the Hussein Dey district of Algiers on suspicion of setting up a terrorist organization, undermining the security of the State, inciting to insurrection, committing acts of aggravated theft, setting up a criminal association for the purpose of assassination, and possessing firearms.

15. According to the Government, Mr. Lakel was arrested together with several accomplices and placed under a committal order on 7 June 1992 by the examining judge of the Hussein Dey district court. After the judicial inquiry, he was tried by the competent court and sentenced on 22 December 1993 to 15 years' imprisonment.

16. Mr. Lakel submitted a cassation appeal to the Supreme Court, which rejected it, so that the sentence became final.

17. The Government states that Mr. Lakel was sentenced in a proper court of law. He availed himself of the remedies offered by the law, submitting an appeal to the Supreme Court.

18. The Government also states that no allegations of violence against Mr. Lakel were made during the proceedings, and nothing on the file suggests that violence occurred. Also, the Government refutes the source's allegation that Mr. Lakel was not defended. It maintains that he was defended by Maître Hassine Sisbene during his trial, as indicated in the court's judgement. The barrister even visited him 14 times during his detention, the visits being recorded in the prison visit log.

19. In its comments on the Government's reply, the source states that Mr. Lakel was arrested on 31 May 1992 without there being an arrest warrant and indeed sentenced on 22 December 1993, more than 18 months after his arrest. The Algerian authorities maintain that Mr. Lakel was tried by "the competent court" without saying which court that was. He was tried by a special court.

20. Moreover, the Algerian authorities state that Mr. Lakel submitted a cassation appeal to the Supreme Court, which rejected it. Article 313 of the Algerian Code of Criminal Procedure requires that, after the pronouncement of a sentence in a criminal court, the president of the court inform the sentenced person that he/she has eight days from the time of pronouncement in which to submit a cassation appeal. However, Algerian law does not accord to persons sentenced by a criminal court the right to have the conviction and sentence reviewed by a higher tribunal, contrary to the principle of the double degree of jurisdiction. The scope of a cassation appeal is limited to matters of form, so the sentence is not subjected to a complete review, of the substance as well as of the form. Thus, Algerian law does not conform to paragraph 5 of article 14 of the International Covenant on Civil and Political Rights in that respect and could not offer Mr. Lakel any remedies with regard to his fundamental rights.

21. The source does not contest the fact that Mr. Lakel was tried and sentenced. On the other hand, it maintains that he did not have the assistance of a lawyer when he was transferred to Tazoult prison.

22. In its reply, the Government states that Mr. Lakel was arrested together with several accomplices and placed under a committal order on 7 June 1992 by the investigating judge of the Hussein Dey district court. Once the judicial inquiry had been completed, Mr. Lakel was tried and sentenced on 22 December 1993 to 15 years' imprisonment, the sentence subsequently being confirmed by the Supreme Court, which rejected his cassation appeal. Throughout the trial, Mr. Lakel was assisted by Maître Sisbene Hassine.

23. In its comments on the Government's reply, the source does not contradict the clarifications contained in the reply, but simply emphasizes two points. First, the cassation appeal did not secure the right to the double degree of jurisdiction provided for in paragraph 5 of article 14 of the International Covenant on Civil and Political Rights. Second, although the Government denies that Mr. Lakel was subjected to violence, it has been established that he was mistreated following his arrest and did not have the assistance of a lawyer until his transfer to Tazoult prison.

24. Basing itself on the information provided by the Government, and not contradicted by the source, the Working Group concludes that Mr. Lakel was

brought before an investigating judge six days after being arrested, that he had the assistance of a lawyer, who visited him in prison, and that he was tried and sentenced. Also, the source does not deny that the sentence of first instance was the subject of a cassation appeal to the Supreme Court, which confirmed the sentence. In addition, the Working Group notes that, after stating that Mr. Lakel was tried without the assistance of a lawyer, the source simply states that he did not have the assistance of a lawyer when he was transferred to Tazoult prison, which, according to the source, happened after his conviction. The Working Group therefore concludes that Mr. Lakel did have the assistance of a lawyer.

25. As regards the conviction of Mr. Lakel by a special court, the source did not specify how the special court failed to comply with the norms of a fair trial. In its general observation No. 32 (2007), regarding article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that the Covenant does not prohibit the trial of civilians in military or special courts, but requires that such trials be in full conformity with the provisions of article 14 and that the guarantees provided for in that article not be limited or modified because of the military or special character of the court concerned (para. 22). In the absence of statements contradicting the assertions of the Government, the Working Group cannot conclude that there was a violation of rights so serious as to warrant considering Mr. Lakel's detention to be arbitrary. Also, it cannot conclude that his detention should be considered arbitrary simply because the Algerian judicial system does not provide for the review of a conviction within the framework of a simple appeal – only within the framework of a cassation appeal.

26. As to the allegation of mistreatment and torture, the Working Group is empowered to pronounce on the matter only if it is asserted that Mr. Lakel's conviction was based on confessions obtained through torture. As the source does not make such an assertion, the Working Group cannot consider this allegation. Also, as the Working Group is not empowered to consider the conditions under which a sentence is being served, it cannot reach a conclusion regarding the arbitrary nature of detention on the basis of the fact that the person deprived of liberty was transferred to a place far from his/her family or that his/her family was deprived of the right to visit him/her.

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

> The deprivation of liberty of Fouad Lakel is not arbitrary, in that it does not contravene the provisions of the Universal Declaration of Human Rights or those of the International Covenant on Civil and Political Rights.

Adopted on 27 November 2007

OPINION No. 29/2007 (Mexico)

Communication addressed to the Government on 29 May 2007.

Concerning Mr. Alfredo Santiago Rivera and Mr. Nickel Santiago Rivera.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group thanks the Government for the information transmitted by it regarding the case in question.

3. The Working Group takes note of the information provided by the Government, to the effect that these two men were provisionally released on bail on 19 March 2007 and that the appeal against the decision in question submitted by the Office of the Attorney-General to the First Court for Criminal Cases of the Central Judicial District has still not been ruled on.

4. The Working Group transmitted that information to the source, which confirmed that the two men were provisionally at liberty, although the criminal trial for sedition and resisting arrest is continuing.

5. Having examined all the information made available to it and bearing in mind the fact that the two men are at liberty, the Working Group decides to file the case of the detention of Mr. Alfredo Santiago Rivera and Mr. Nickel Santiago Rivera, in conformity with subparagraph 17 a of its methods of work.

Adopted on 28 November 2007

OPINION No. 30/2007 (Mexico)

Communication addressed to the Government on 20 July 2007.

Concerning Ms. Concepción Moreno Arteaga.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group thanks the Government for the information transmitted by it regarding the case in question.

3. The Working Group takes note of the information provided by the Government, to the effect that the competent district judge, having weighed up the evidence and pursuant to an amparo resolution, ordered this person's release.

4. Having examined all the information made available to it and bearing in mind the fact that this person has been released, the Working Group decides to file the case of the detention of Ms. Concepción Moreno Arteaga, in conformity with subparagraph 17 a of its methods of work.

Adopted on 28 November 2007

OPINION No. 31/2007 (Mexico)

Communication addressed to the Government on 5 June 2007.

Concerning Mr. Pablo Juventino Solano Martínez.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group thanks the Government for the information transmitted by it regarding the case in question.

3. The Working Group takes note of the information provided by the Government, to the effect that this person was provisionally released on bail on

6 March 2007 and that the appeal against the decision in question submitted by the Office of the Attorney-General to the First Court for Criminal Cases of the Central Judicial District has still not been ruled on.

4. The Working Group transmitted that information to the source, which confirmed that this person is provisionally at liberty, on bail, although the preliminary investigation stage of the criminal trial for sedition, resisting arrest and causing fire damage to Government property is continuing.

5. Having examined all the information made available to it and bearing in mind the fact that this person is at liberty, the Working Group decides to file the case of the detention of Mr. Pablo Juventino Solano Martínez, in conformity with subparagraph 17 a of its methods of work.

Adopted on 28 November 2007

OPINION No. 32/2007 (China)

Communication addressed to the Government on 7 November 2006.

Concerning Messrs. Jin Haike and Zhang Honghai.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. (Same text as paragraph 3 of Opinion No. 15/2007.)

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

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. According to the source: Mr. Jin Haike, born on 26 May 1976, a geophysicist, usually resident at No. 2 Courtyard, Lishuiqiaojia, Chaoyangqu, Beijing, and Mr. Zhang Honghai, born on 1 November 1973, a freelance writer, usually resident at 2 East Sihou Road, Wuyun Town, Jinyun County, Zhejiang Province, founded an organization named “New Youth Study Association”, which aims at exploring ways to enact social reform in the People’s Republic of China. Co-founders of this association were Yang Zili, a computer engineer, and Xu Wei, a reporter and editor for Beijing’s Consumer Daily newspaper. The group posted a number of articles online that are critical of the Chinese Government, including those entitled “Be a New Citizen, Reform China” and “What’s to Be Done”. Later, the group was infiltrated by a government official.

6. Jin and Zhang were criminally detained on 13 March 2001 by officers of the Beijing State Security Bureau on suspicion of “inciting subversion of state power” pursuant to article 105 (1) of the People’s Republic Criminal Code, which renders it a criminal offence to “organize, plot or carry out the scheme of subverting the state power or overthrowing the socialist system.” The formal arrest under the authority of the Beijing Municipal People’s No. 1 Procuratorate was carried out on 20 April 2001 by officers of the Beijing State Security Bureau Detention Centre. There they

were both being held in custody until November 2004, the date of their transferral to Zhejiang Qiaosi No. 9 Prison. Jin's and Zhang's families were issued notification of their arrests on 24 April 2001. Upon a search conducted by unknown government officials, several items were confiscated from Jin, Zhang, Yang and Xu, including four floppy discs, two notebooks, a 47-page manuscript, four pieces of loose-leaf paper, one computer circuit, four computer hard discs, one modem, several articles, and one computer. It is not known whether warrants had been issued to authorize the search and seizure.

7. Jin's and Zhang's indictment was delivered to the No. 1 Beijing Intermediate People's Court on 29 August 2001, stating that "the indictees, Xu Wei, Yang Zili, Jin Haike, and Zhang Honghai disregarded the laws of the nation and illegally formed an organization to plot and carry out subversion of State power and overthrow of the socialist system. The four indictees' actions violated the regulation of paragraph 1 of article 105 of the criminal law of the People's Republic of China, and committed the crime of incitement to subvert state power."

8. Jin, Zhang and their two co-defendants' trial commenced on 28 September 2001. Their trial hearing on this day was reported as open to the public, but the court only allowed three family members each and two external observers to attend. The No. 1 Beijing Intermediate People's Court adjourned after four hours, and the trial was not reconvened until 21 April 2003. A verdict was reached after the third trial hearing on 28 May 2003. Zhang Honghai did not enjoy the benefit of the presence of legal counsel on his behalf. Jin Haike was represented by Liu Dongbin. Both defendants repeatedly testified in court that they, like their two co-defendants, had been ill-treated and pressured in detention before and after their arrests in order to make confessions. More particularly, officials holding Zhang in custody reportedly burnt his neck with cigarette butts and made him sit for long hours without moving. Zhang was also forced to eat only a pickled vegetable for twenty days.

9. Jin was sentenced to ten years of imprisonment and two additional years of deprivation of political rights taking into account the period of time already served in detention, for "incitement to subvert state power" in accordance with articles 105 (1), 56 (1), 25 (1), 26 (1) and (4), and 64 of the Chinese Criminal Code. Jin is due for release on 12 March 2011. Zhang was sentenced on identical grounds on the same day to eight years of imprisonment and two additional years of deprivation of political rights. Taking into account the time he had already spent in prison, Zhang is due for release on 12 March 2009.

10. Jin and Zhang both appealed to their sentence on 28 May 2003. Their appeal was heard on 3 November 2003 by the Beijing Higher People's Court and dismissed on 6 November 2003.

11. According to the source, Jin and Zhang's detention is a result of their peaceful exercise of the right to freedom of expression, and the right to access and impart information, and also the result of their legitimate exercise of the right to freedom of association.

12. Jin Haike's and Zhang Honghai's guilty verdict rests in large part on the basis of their exercise of the right to free expression on the Internet by attempting to freely access and post on the Web. This is evidenced by the judgment's reference to specific articles posted on the Internet on behalf of the organization called "New

Youth Study Association" as amounting to incitement of subversion and as efforts to overthrow the Government.

13. According to the source, Jin's and Zhang's postings on the Internet did not incite violence to overthrow the current political system, but rather criticized the Government and political climate in China. Resorting to a serious charge such as incitement to subvert State power in response to peaceful criticism is not an appropriate application of the standard of least restrictive means possible, and Jin's and Zhang's expressions were unrelated to a specific threat to national security. Moreover, since the legal formulation of Chinese state security crimes is vague and not explicitly defined, Chinese law and its application violate the letter and spirit of international law standards.

14. The source alleges that the verdict against Jin and Zhang relies to a great extent on incriminating peaceful activities in exercising their right to freedom of association by participation in the forming of the group and in the writing of papers for posting on the Internet. These activities did not put the People's Republic in peril and the views advocated by the group were not violent in nature. The source suggests that Jin's and Zhang's detention and conviction is carried out in an effort to silence their political dissent, rather than due to any legitimate concerns related to State security.

15. As to the allegations that the arrest, detention and imprisonment of Jin and Zhang violate their right to a fair trail, the source notes that, firstly, both had already been detained for 38 days prior to their formal arrests in contravention to Chinese criminal procedure law. The Chinese Criminal Procedure Code requires that a request for a formal arrest must be made within three days of detention upon which the Procuratorate must take a decision within further seven days. Only in special circumstances or where there is a major suspect on the run, who repeatedly commits crimes or partners with others to commit crimes, the investigating branch is allowed by law to delay requesting an arrest for four days or for up to 30 days, respectively. In the present case, this law could not be applied or was not properly applied within the time limits proscribed.

16. The source further asserts that the Chinese Criminal Procedure Code stipulates that a court must announce judgment within one and a half months after acceptance of the case, with an additional month of extension for major or complex cases. It is also possible to adjourn a trial for a total of two supplemental investigations, or for obtaining new evidence or witnesses if necessary, provided that each of the actions for which postponement is required is completed within one month. Since the indictment of Jin and Zhang was issued on 29 August 2001 and the trial commenced on 28 September 2001 but was not concluded until 28 May 2003, these regulations have clearly not been adhered to in this case.

17. The source also adverts to Zhang's lack of access to adequate legal counsel being in contravention of the fundamental right to fair and impartial trial. The denial of legal counsel also infringes upon Zhang's right under article 96 of the Chinese Criminal Procedure Code, which provides that defendants have the right to obtain legal defence after their first interrogation by investigators or from the day coercive measures are taken against them.

18. In its reply, the Government states that Xu Wei, Jin Haike and Zhang Honghai, in early May 2000, illegally founded the "New Youth Study Group", described as a

secret organization that had as its objective the subversion of State authority, and drafted a charter for the organization. Yang Zili joined the organization on 19 August 2000. The four individuals then met secretly on numerous occasions at such places as Beijing University and Renmin University of China, where they discussed how to subvert the authority of the State. In order to achieve this objective, the group divided its work up into various tasks: designing and setting up a website, creating a publication and shaping public opinion; plotting to expand the organization globally, creating branches around the world; and posting numerous essays on the Internet and using rumour and libel to subvert the authority of the State and to overthrow the socialist system.

19. According to the Government, the First Branch of the People's Procuratorate of Beijing Municipality charged the above four individuals with the crime of subverting the authority of the State and initiated proceedings against them in the Beijing First Intermediate People's Court. The First Intermediate People's Court heard the case in an open trial and found that the four above-mentioned individuals had established an organization in contravention of the law and had plotted and taken action to subvert the authority of the State and to overthrow the socialist system, actions which constituted the crime of subversion of the authority of the State. On 28 May 2003, the Court announced the first-instance verdict. Xu Wei and Jin Haike were each sentenced to 10 years of imprisonment and 2 years of deprivation of political rights for the crime of subverting the authority of the State, while Yang Zili and Zhang Honghai were each sentenced to 8 years of imprisonment and 2 years of deprivation of political rights.

20. The Government further reports that after this judgement had been rendered, the four individuals objected and filed an appeal. The Supreme People's Court of Beijing Municipality, as court of second instance, considered the appeal in an open hearing. The Court found that the facts of the case as established by the court of first instance were clear, that all testimony and evidence relating to the case had been produced and those testifying cross-examined, and that the evidence had been credible and sufficient. Xu Wei and the others had plotted and taken action to set up an organization in contravention of the law, and had met in secret and plotted together to undermine the authority of the State and overthrow the socialist system, actions which constituted the crime of undermining the authority of the State. On 6 November 2003 the Supreme People's Court of Beijing Municipality issued a second verdict rejecting the appeal and upholding the original verdict.

21. The Government states that throughout the time the case was considered, both the courts of first and second instance held open proceedings, and the rights and interests of the defendants were fully protected. Jin Haike and the three other defendants all appointed lawyers to represent them, and not only did their counsel defend them in court, but the defendants themselves were also able to exercise their right to defence. The attorneys formally designated to represent the four defendants were: for Xu Wei: Zhu Jiuhu, of the Mo Shaoping Law Firm; for Yang Zili: Xu Wanlin, of the Chang'an Law Firm, and Li Heping, of the Beijing Gaobo Longhua Law Firm; for Jin Haike: Liu Dongbing, of the Mo Shaoping Law Firm; for Zhang Honghai: Zhang Enzhi and Yan Ruyu, of the Wu Luan Zhao Yan Law Office.

22. Finally, the Government explains that during the hearing in the court of second instance, Xu Yu was represented by Mo Shaoping and Gao Xia of the Mo Shaoping Law Firm, while Yang Zili, Jin Haike and Zhang Honghai retained their defence

counsel from the first hearing. Jin Haike, Xu Wei and Yang Zili are currently serving their sentences in the Beijing No. 2 prison, while Zhang Honghai is serving his sentence in the Qiaosi detention facility in Zhejiang Province. All four enjoy family visits and their health is "completely normal".

23. In its comments to the response of the Government, the source points out the fact that the Government simply restates, as in the verdict, that the men formed an illegal group with the intention to subvert State power. The source considers that the lack of response on the substantive concerns related to Mr. Jin's and Mr. Zhang's detention tends to confirm that the charges invoked against them have been used in retaliation for exercising their rights to freedom of expression and association.

24. The source notes that the rights of all four defendants were fully protected during the trial and appeal, but it considers that the response does not adequately or specifically address the subsequent arrest of Mr. Jin and Mr. Zhang. According to the response of the Government, the trial was held in open court, but does not explain why some family members were barred from entering the hearing.

25. Further, the source indicates that the Government makes no mention of the prolonged pre-arrest detention of both Mr. Jin and Mr. Zhang nor of the period of one year and a half they spent in detention awaiting their verdict after the trial. These prolonged periods of detention, without charge and then without verdict, violate Chinese criminal procedure law and also international human rights standards and principles.

26. Having analysed all information before it, the Working Group finds that Mr. Jin and Mr. Zhang have been detained solely for creating an organization, organizing meetings and posting articles on the Internet on behalf of the organization called "New Youth Study Association". The Government, which recognizes that Mr. Jin and Mr. Zhang have been sentenced to imprisonment because of these facts, does not assert that Mr. Jin and Mr. Zhang ever resorted to violence or incited others to violent behaviour when engaging in the activities for which they were convicted.

27. The Working Group is led to conclude that Mr. Jin and Mr. Zhang have been punished merely for establishing an organization and having expressed their critical personal views on political issues in a non-violent manner. Although national laws might punish such conduct, it is, however, protected by the rights to freedom of opinion and expression and association in international law. As the Working Group has stated in its Deliberation No. 8 on Deprivation of Liberty resulting from the use of the Internet[16] a vague and general reference to the interests of national security or public order, without being properly explained and documented, is insufficient to convince the Working Group that the restrictions on the freedom of expression by way of deprivation of liberty are necessary when using the Internet.

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

> The detention of Jin Haike and Zhang Honghai is arbitrary, as it contravenes the principles and norms set forth in the articles 9, 19 and 20 of the Universal Declaration of Human Rights and falls within category II of the

[16] E/CN.4/2006/7.

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 the necessary steps to remedy the situation in order to bring it into conformity with the standards and principles enshrined in the Universal Declaration of Human Rights. The Working Group recommends that the Government considers signing and ratifying the International Covenant on Civil and Political Rights.

Adopted on 28 November 2007

OPINION No. 33/2007 (China)

Communication addressed to the Government on 7 December 2006.

Concerning Mr. Sonam Gyalpo.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. (Same text as paragraph 3 of Opinion No. 15/2007.)

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

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 on Arbitrary Detention as follows: Mr. Sonam Gyalpo, aged 44, tailor by profession and resident at Lhasa, capital of the Tibet Autonomous Region (TAR), was arrested at his home by 16 officers from the State Security Bureau (Ang jang jue – SSB) on 28 August 2005 at around 6 pm. The arrest took place a few days ahead of festivities marking the 40th anniversary of the TAR, which commenced on 1 September 2005. The authorities did not produce a warrant authorizing his arrest. Instead, Sonam Gyalpo was asked to sign a document. When he made inquiries about it, he was told by the officials that they had received orders from "higher authorities" to apprehend him. After he had signed the document four officers took him away by car. The remaining 12 SBB officers searched Sonam Gyalpo's house and discovered four videotapes containing teachings of the Dalai Lama, political literature relating to Tibetan affairs and pictures of the Dalai Lama. Sonam Gyalpo was initially detained at Sitru TAR Public Security Bureau Detention Centre for about nine months.

6. His wife, Ms. Tsamchoe, was only able meet him there for the first time after months of search not knowing his whereabouts. On her second visit she learned that Sonam Gyalpo had been transferred to Chushul (Qushui) Prison in the west of Lhasa, where he is currently imprisoned to serve a 12 year sentence for "endangering the security of the People's Republic of China" and "espionage", which was handed down by the Lhasa Intermediate People's Court around

mid-2006. Sonam Gyalpo's family appealed to the High Court to reconsider the sentence, however, to no avail.

7. Sonam Gyalpo's arrest, detention and imprisonment appear to have taken place in the context of the "Summer Strike Hard" campaign, launched on 22 July 2005 by the TAR Anti-separatist Committee and the Security Bureau Committee (SBC) in order to prevent any political activities that could undermine the celebration of the 40th anniversary of the establishment of the TAR. According to the source, individuals with a record of political activism in the region were the prime target of this campaign, which was carried out in a concerted effort by the Tibet Affairs Bureau, the SBC, the Lhasa Security Bureau (LSB), the People's Armed Police (PAP) and national security departments. The campaign was accompanied by tightened security measures in Lhasa. These measures included imposing upon Tibetan hosts the obligation, effective from the first week of July 2005, to report their visitors to the Lhasa Security Bureau and to answer for them. Moreover, Tibetans were barred from entering Lhasa for circumambulation for the most part of the day. An extra number of officials from the Government were assigned to the Sera Monastery in the first week of July 2005 in order to resume patriotic re-education and all roads and check posts were monitored in and around Lhasa 24 hours a day by officers from the LSB and the PAP.

8. Together with 21 monks from the Drepung Monastery, Sonam Gyalpo had already been arrested on 27 September 1987 during a peaceful demonstration in Lhasa. He was later charged on accounts of "counterrevolutionary activities" and subsequently served a three years term of imprisonment at Drapchi Prison in Lhasa. He was released on 20 September 1990 upon completion of his term. On 23 July 1993, however, he was again arrested at his home by LSB officers and transferred to Sitru Detention Centre, where he was detained for a couple of days thereafter. The officials then secretly took him to Shigatse Nyari Detention Centre for further interrogations. After six months of detention, he was transferred back to Sangyip TAR Public Security Bureau Detention Centre in Lhasa, where he was detained for further six months.

9. The Government, in its response, indicates that Sonam Gyalpo was in fact born on 14 June 1955 and is a resident of Gongkar county in Lhoka prefecture, Tibet. It goes on to state that, on September 1992, Sonam Gyalpo made contact with members of the "Security Ministry" of the "Dalai clique" and was provided with seals of the underground organizations "Truth Group" and "Tibetan Youth Association", provided by the "Security Ministry" of the "Dalai clique". He then set up an underground separatist organization inside the country, gathered together a wide range of intelligence and transmitted this to the "Dalai clique".

10. According to the Government, on 28 August 2005, Sonam Gyalpo was arrested by the Tibetan public security authorities, in accordance with the law, on suspicion of the offences of endangering State security and espionage and on 28 September, with the approval of the procuratorial authorities and pursuant to the law, he was placed in custody. The Lhasa City Intermediate Level People's Court found that Sonam Gyalpo had been sentenced because he had committed the offence of endangering State security. Once he had completed his sentence, however, Sonam Gyalpo resumed his criminal activities and continued to endanger State security; he was designated in charge of gathering intelligence by an espionage organization based abroad. His conduct was deemed to constitute the offence of espionage and,

on 9 June 2006, as a repeat offender subject to a mandatory heavier sentence, he was sentenced to 12 years' fixed term imprisonment, to run from 28 August 2005 to 27 August 2017, and stripped of his political rights for four years.

11. The Government further states that after receiving the court sentence at first instance, Sonam Gyalpo refused to accept the verdict and lodged an appeal. After considering his case at second instance, the People's High Court of the Tibetan Autonomous Region found that the original judgement had been based on clear facts, the evidence adduced had been sound and ample, the classification of the offence had been accurate, the sentence was commensurate with the offence and the trial proceedings had been in accordance with due process and, on 17 October 2006, it dismissed the appeal and ruled that the original judgement should stand.

12. The Government maintains that, in the course of these proceedings, Sonam Gyalpo's rights in litigation were fully upheld and defence counsel was assigned to him. In addition to exercising his own right to defence, the defence counsel appointed for him also made a full submission in his defence. Sonam Gyalpo is currently serving his sentence at Chushur prison in the Tibetan Autonomous Region and is in good health.

13. In its reply to the observations of the Government, the source states that there has been a miscarriage of justice since the judicial process was arbitrary and summary in nature on the following points: In the Lhasa Intermediate Court, a defence lawyer of his choice did not represent Sonam Gyalpo. He was provided a state appointed lawyer who rubber-stamped whatever the authorities had to say. When Sonam Gyalpo appealed to the higher court, his case was dismissed even before a retrial could open and the Higher People's Court upheld the verdict passed by the lower court. He was charged of "endangering national security" and "espionage" on evidence of possession of pictures and videotapes containing teachings by the Dalai Lama. State authorities and courts freely use the legislation governing "endangering state security". Nowhere has the legislation been defined properly. According to the source, it is used as a blanket cover to disapprove any unacceptable activity and to eliminate anyone who disagrees with the authorities. Finally, the source adds that Sonam Gyalpo's health condition has gravely deteriorated.

14. The Working Group notes that the Government does not contest that Sonam Gyalpo was detained in August 2005 for no other reasons than his record of political activities, and for possessing material related to the Dalai Lama.

15. The Working Group observes that he was punished for these activities on the charge of "endangering national security" and given a 12 years imprisonment sentence. The Working Group, as it has stated before in previous Opinions and on the occasion of its visits to the People's Republic of China, believes that the term "endangering national security" gives rise to numerous abuses and criminalizes activities protected as rights enshrined in the Universal Declaration of Human Rights, either because it is not defined with sufficient precision or because it is interpreted in an extensive manner.[17]

16. The Government has not provided elements that would allow the Working Group to qualify the conduct of Sonam Gyalpo as an activity that endangers State

[17] See E/CN.4/2005/6/Add.4.

security. The Working Group considers that the reasons for which Sonam Gyalpo has been arrested, detained and imprisoned are those maintained by the source. Possessing pictures and videotapes containing teachings of the Dalai Lama and political literature relating to Tibetan affairs, however, amounts to an exercise of the right to freedom of opinion and expression as protected by article 19 of the Universal Declaration of Human Rights, in particular to seek, receive and impart information and ideas through any media and regardless of frontiers and to hold opinions without interference, even if they should contradict official Government policies.

17. As to the allegations of violations of the right to fair trial, the Working Group considers that it does not have sufficient information available to express an opinion in relation to them.

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

> The detention of Mr. Sonam Gyalpo is arbitrary, as it contravenes the principles and norms set forth in articles 9 and 19 of the Universal Declaration of Human Rights and falls within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

19. The Working Group, having rendered this Opinion, requests the Government to take the necessary steps to rectify the situation in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights, and to take the necessary measures to ratify the International Covenant on Civil and Political Rights.

Adopted on 30 November 2007

OPINION No. 34/2007 (Rwanda)

Communication addressed to the Government on 29 June 2007.

Concerning Mr. François-Xavier Byuma.

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group thanks the Government for providing the requested information in a timely manner.

3. According to the information provided by the Government, Mr. François-Xavier Byuma, initially sentenced to 19 years' imprisonment by the Biryogo gacaca court, Nyarugenge district of Kigali, will not go to prison; instead, he will engage in community service as a punishment. According to the Government, that alternative punishment will enable Mr. Byuma to participate in the country's reconstruction.

4. The Working Group notes that Mr. Byuma was held in detention only on the day of his conviction in first instance. He is currently at liberty. The compressed sentence imposed in second instance by the Biryogo court of appeal is an alternative punishment to imprisonment.

5. Having examined all the information available to it and bearing in mind the fact that this person is at liberty, the Working Group decides to file the case of Mr. François-Xavier Byuma, in conformity with subparagraph 17 a of its methods of work.

Adopted on 29 November 2007

OPINION No. 35/2007 (United States of America)

Communication addressed to the Government on 8 March 2007.

Concerning Ms. Vatcharee Pronsivakulchai.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. (Same text as paragraph 3 of Opinion No. 15/2007.)

3. The Working Group regrets the lack of co-operation of the Government despite invitations to provide information on these cases. Yet, the Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case.

4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Ms. Vatcharee Pronsivakulchai, born 12 January 1963 in Ranong, Thailand, was arrested in Thailand in October 2000 and extradited from Thailand to the United States of America on 7 May 2001 to face trial on charges of an alleged drug crime. Until 15 March 2004, she was detained at the Metropolitan Correctional Center in Chicago, IL. While held in federal custody she was offered a plea deal in which the Drug Enforcement Agency (DEA) and the Attorney proposed to assist her with her immigration case. Ms. Pronsivakulchai refused to accept the plea bargain insisting that she was innocent. However, she agreed to help in an investigation by writing letters to Thai members of organized drug gangs she had met in prison and other known gang members from her hometown. At the direction of the DEA agent, her letters falsely stated that she had won her case, that she was out of jail, and that she was interested in buying narcotics. On 15 March 2004, the Government withdrew its case against her and Judge Gottschall granted the government motion and dismissed the case against Ms. Pronsivakulchai accordingly.

5. From 15 March 2004 until present Ms. Pronsivakulchai has been held in administrative immigration custody by the Department of Homeland Security, Bureau of Immigration & Customs Enforcement (ICE), pursuant to civil immigration law powers. Ms. Pronsivakulchai is currently detained at McHenry County Detention Center in Woodstock, IL. She had been detained at Broadview Detention Facility in Broadview, IL, and at Kenosha County Detention Center, Kenosha, WI, before.

6. On 22 July 2004, Ms. Pronsivakulchai filed applications for asylum, withholding of removal, and protection under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. She seeks protection in the United States because she fears that if she is returned to Thailand, she will be killed by the gang members she contacted while serving as an informant for the DEA.

7. At the hearing before the Immigration Judge (IJ), the Government argued that Ms. Pronsivakulchai was ineligible for asylum and withholding of removal because of her criminal background, despite the fact that the criminal charges had eventually been dropped by Judge Gottschall. The Government produced as evidence a translated Thai warrant dated 21 April 2000 for the arrest of "Vatcharee last name unknown" and a corresponding cover letter by the Thai Government, which sought her return. This evidence was admitted by the IJ against her objection and her applications were dismissed. On appeal this decision was affirmed by the Board of Immigration Appeals (BIA), which functions as an administrative review panel.

8. Ms. Pronsivakulchai appealed to the United States Court of Appeals for the Seventh Circuit (hereinafter "the Court"), arguing, inter alia, that her due process rights were violated because the IJ refused to consider her rebuttal testimony and documentary evidence. On 29 August 2006 the Court granted Ms. Pronsivakulchai's petition, vacated the decision of the BIA and remanded the case back to the immigration courts for proceedings consistent with the opinion of the Court (see Pronsivakulchai v. Gonzales, _F.3d_, 2006 WL 2473418 (7th Cir. 2006). The Court, while rejecting the constitutional argument put forward by Ms. Pronsivakulchai on grounds of subsidiary, held that she was denied a fair hearing because she was not afforded a reasonable opportunity to present evidence on her own behalf. The Court found it remarkable that "[a]t oral argument the government counsel conceded that Pronsivakulchai was helpful, but not helpful enough. That is, while she agreed to write letters to drug dealers back in Thailand to assist the DEA in its investigation, her assistance did not prove as fruitful as the DEA and prosecutors had hoped. Now, Pronsivakulchai's reward for helping the DEA is to send her back to the Thai prison, where the gang members and drug traffickers that she informed on still reside." (Id. at 10).

9. Despite the fact that no criminal charges against her have ever been substantiated and no charges are currently pending, Ms. Pronsivakulchai remains in administrative detention without review awaiting further proceedings before the IJ. On 31 August 2006 her counsel made an oral request for parole, which was denied by an ICE official on 8 September 2006. On 15 September 2006, Ms. Pronsivakulchai's counsel submitted a letter to the ICE District Director seeking renewed consideration of the parole request. To date no answer has been provided.

10. The source argues that since Ms. Pronsivakulchai has not been convicted of any of the offences enumerated in section 236 (c) of the Immigration and Nationality Act, she is not subject to mandatory detention. ICE's refusal to release her is owed to a mere legal technicality, because she had entered the United States as an "arriving alien". Under United States laws and regulations ICE is competent to detain an arriving alien for the duration of proceedings and may exercise discretion to release arriving aliens who are applying for asylum. Where ICE declines the release of an arriving alien in removal proceedings, the IJ has no authority to re-determine conditions of custody or to release such alien on bond.

11. Ms. Pronsivakulchai experienced harassment of a sexual, physical and verbal nature by criminal co-inmates while in custody at Kenosha County Detention Center. She requested the prison guards to intervene on at least three occasions, however, to no avail. On 31 December 2005, an inmate assaulted Ms. Pronsivakulchai leaving her arm severely bruised. On 1 January 2006 she was

taken to hospital and required to wear a sling for several days. The harassment continued after the incident. Afraid to report further abuse and unable to speak to her lawyer in private, Ms. Pronsivakulchai wrote a letter to the American Bar Association requesting assistance, which was forwarded to the Office of Civil Rights and Civil Liberties (OCRCL) of the Department of Homeland Security. OCRCL agreed to review her complaint and initiated an investigation.

12. In March, Ms. Pronsivakulchai had an opportunity to speak privately with her attorney at Kenosha County Detention Center and reported the abuse. Counsel detailed the incidents to ICE officials and requested a transfer to another detention facility. The request was granted and Ms. Pronsivakulchai was transferred to McHenry County Jail, where she remains in a mixed population with both criminally charged and immigration detainees as it had already been the case at Kenosha County Detention Center. The Department of Homeland Security subcontracts the detention of immigrants to designated state county detention facilities in the Midwestern region around Chicago. The source argues that these detention facilities are only designed for short-term custody of state criminal offenders rather than for long-term custody, since they are lacking access to outdoor recreational facilities, educational opportunities or proper medical treatment.

13. Ms. Pronsivakulchai has developed several health problems after more than five years in detention in the United States. Her vision has deteriorated. Counsel attempted to arrange for a pro bono eye exam and donated eyeglasses, however, Kenosha County jail officials refused access to Ms. Pronsivakulchai for the necessary examination. She further developed skin problems, but did not receive proper medical treatment. Ms. Pronsivakulchai dentures broke in early 2005, but ICE officers declined a replacement arguing that only the front teeth were broken and the others remain intact. While harassment ceased at McHenry County Jail, she continues to suffer from health problems, including depressions, stomach and knee pain, however, has never been allowed to see a doctor, only a nurse.¨

14. The source argues that Ms. Pronsivakulchai continued detention for more than five years is arbitrary because of an infringement of the principle of proportionality. It also argues that Ms. Pronsivakulchai does not have access to effective review of the circumstances of her detention in contravention of article 9, paragraph 4 of the International Covenant on Civil and Political Rights.

15. Article 31 of the Convention Relating to the Status of Refugees (hereinafter “the 1951 Refugee Convention”), applies to refugees who enter or are present illegally in a country, coming directly from a territory where their life or freedom was threatened, and requires that governments shall not punish these refugees and “shall not apply to the movements of such refugees restrictions other than those which are necessary.” The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has extended this right to be free from arbitrary and punitive detention to all asylum seekers. In its Conclusion No. 44 (XXXVII) (1986) the Executive Committee has made clear that detention of refugees and asylum-seekers should only occur subject to four limited circumstances: “If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used

fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order."

16. The detention of asylum seekers that does not comply with the requirements contained in UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers is in principle arbitrary under international law. The source's argument is that Ms. Pronsivakulchai's continued detention violates the Guidelines in various respects. Her identity is known to the Government, she has a credible fear of persecution recognized by the Court, there is no evidence that she poses a threat to national security or is a danger to the community, and the length and condition of detention is not proportional to the Government's objective to deport her.

17. In applying these standards of proportionality, the source argues that Ms. Pronsivakulchai's continued detention for more than 30 months is not proportional to the purported interest of the Government in protecting society and ensuring that she does not abscond. That is so, as the source alleges, because Ms. Pronsivakulchai has neither been convicted of nor is she presently charged with any crime. Furthermore, she poses no threat to national security or public safety and is not likely to abscond.

18. The source further argues that Ms. Pronsivakulchai has remained in custody for more than 30 months without access to effective review of her detention and due process of law. More particularly, there is no statutory authority for mandatory detention of asylum applicants like Ms. Pronsivakulchai in the laws of the United States. In a seminal case, comparable to that of Ms. Pronsivakulchai, the United States Supreme Court addressed the prolonged and indefinite detention of two aliens. The Supreme Court held that six months of detention is considered to be prolonged when there is "no significant likelihood of removal in the reasonably foreseeable future, see Zadvydas v. Davis, 533 U.S. 678 (2001), at 701. Likewise, in Demore v. Kim, 538 U.S. 510 (2003), at 513, the Supreme Court, while upholding a mandatory detention statute for criminal aliens during removal proceedings, recognized that the detention of the criminal aliens on average lasted only between 47 days and four months. Ms. Pronsivakulchai has now been detained for a much longer period of time and prospects of a speedy settlement of her case are slim. In Chicago the average waiting period for detained asylum seekers to obtain a hearing on the merits is six months. If the IJ denies Ms. Pronsivakulchai's petition in the case remanded by the Court the appeal process will begin anew.

19. Judicial review of a custody determination must be effective, so the source argues, citing the views expressed by the Human Rights Committee in *A. v. Australia*, Communication No. 560/1993 (A/52/40, Vol. II)): "In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal." (para. 9.5). Furthermore, "the drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability." (see *Van Alphen v. The Netherlands*, Communication No. 305/1988 (A/46/40, Vol. II)).

20. Since Ms. Pronsivakulchai's detention is inappropriate, disproportionate, and unjust and the only predictable quality of her prolonged custody is its indefinite nature, the source concludes that her detention is arbitrary.

21. Finally, according to the source, Ms. Pronsivakulchai's detention is in variance of Principles 11 and 32 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (hereinafter "the Body of Principles"), because of her inability to challenge the lawfulness of her detention. Moreover, the conditions of her detention violate Principles 1 and 6 of the Body of Principles, since Ms. Pronsivakulchai has received only substandard medical treatment and experienced physical, verbal, and sexual harassment.

22. Following a request for additional information from the Working Group, the source sent recent documents obtained by Ms. Pronsivakulchai's Counsel. These documents include a Thai arrest warrant issued on 21 April 2000, concerning a drug trafficking charge, for a woman bearing the first name "Vatcharee" whose last name is unknown with a detailed physical description of the woman attached to the warrant; a letter dated 20 April 2001, addressed to the Attorney General of Thailand from the Office of the Secretariat of the Cabinet of Thailand, stating that the extradition of Ms. Vatcharee Prosivakulchai will be conducted under the condition that the United States Government will send Ms. Vatcharee Prosivakulchai back to the Thai Government immediately after she has completed her trials and punishments under the United States laws so the Thai Government will be able to conduct further legal proceedings under the Thai laws; a Note Verbale, dated 24 April 2001, from the Embassy of the United States of America in Bangkok addressed to the Ministry of Foreign Affairs of the Thai Government stating that Ms. Pronsivakulchai will be deported back to Thailand in accordance with Immigration law following the adjudication of her case in the United States; and a letter dated 24 June 2004, addressed to the United States Immigration Court from the Office of the Attorney General of Thailand confirming that there is and outstanding warrant for the arrest of Vatcharee Pronsivakulchai or Promsivakulchai for narcotics violations committed in Thailand.

23. The Working Group shares the reading of the criterion established in Guideline 2 of UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers which reaffirms that, "[a]s to general principle asylum-seekers should not be detained." Guidelines 3, 5 and 7 make clear that governments should detain asylum seekers only in exceptional circumstances, after all alternatives to detention have been considered. Detention should be for the minimum period of time necessary and proportional to the reasons for the detention. Procedural safeguards, such as the effective possibility of judicial review, should be available to detainees to challenge the legality of their detention.

24. The Working Group reiterates its doctrine on the determination of arbitrariness of the detention of asylum seekers and immigrants developed in its annual reports for the years 1997 (E/CN.4/1998/44) and 1998 (E/CN.4/1999/63) and adopted as Deliberation No. 5 in Annex II to the annual report for the 1999 (E/CN.4/2000/4). Namely Principle 7, stating the necessity to set a maximum period by law, and Principle 8, requiring, inter alia, the notification of the asylum seeker or immigrant of the conditions under which they are able to apply for a remedy before a judicial authority. It should also be mentioned the observations and recommendations of the Working Group in the respective reports on its country visits to the United Kingdom

(E/CN.4/1999/63/Add.3) and Australia (E/CN.4/2003/8/Add.2), which exclusively dealt with issues of detention pursuant to immigration powers and raised the concern of the Working Group.

25. Nevertheless, even if as a general principle the Working Group considers that asylum seekers should not be detained, there are in the present case, special circumstances which may justify Ms. Pronsivakulchai's detention pending deportation.

26. As mentioned above, Ms. Pronsivakulchai was arrested in Thailand in October 2000 and extradited from Thailand to the United States to face trial on charges of alleged drug crimes. Her extradition to the United States was granted by the Royal Thai Government authorities under the express condition that she should be returned to Thailand immediately after she had completed her trials and punishments under United States law, in order to make face to charges submitted by the Thai authorities. Once in the United States she collaborated with the DEA in their investigations involving drug trafficking from Thailand to the United States.

27. On 15 March 2004 following the withdrawal of the charges by the Government, the criminal case against Ms. Pronsivakulchai was dismissed by Judge Gottschall. In application of the extradition agreement between the united States and the Thai authorities she should be deported to Thailand. Ms. Pronsivakulchai is currently being held in administrative detention, ordered by the Department of Homeland Security Bureau of Immigration, waiting for her agreed return to Thailand, as settled upon in the extradition agreement. Being afraid of returning to Thailand because of possible reprisals by people against whom she has acted while cooperating with the DEA she has applied to the United States immigration for asylum.

28. The Working Group considers that Ms. Pronsivakulchai is being detained in order to be deported to her country, in application of an extradition agreement between the United States and the Royal Thai Governments. She has been called to respond to drug charges brought against her in Thailand, as showed in the correspondence between the Thai and the U.S. authorities submitted to the Working Group.

29. The Working Group also considers that although Ms. Pronsivakulchai was able to challenge the decisions concerning her request for asylum, inter alia, through her recourse brought before the United States Court of Appeals for the Seven Circuit, she has not been provided with an adequate possibility to challenge the administrative detention orders. The regrettable length of her detention seems to be due, among other things, to her legitimate exercise of all possible recourses and appeals in regards to her request for asylum.

30. In the light of the foregoing, the Working Group cannot conclude that the deprivation of liberty of Ms. Vatcharee Pronsivakulchai is arbitrary.

Adopted on 30 November 2006

OPINION No. 36/2007 (China)

Communication addressed to the Government on 7 November 2006.

Concerning Mr. Dolma Kyab (also known as Zhou Ma Jia).

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. (Same text as paragraph 3 of Opinion No. 15/2007.)

3. The Working Group conveys it appreciation to the Government for having submitted detailed information concerning the allegations of the source. The source made observations on the reply of the Government.

4. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto.

5. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Dolma Kyab, also known as Zhou Ma Jia, 29 years old, resident of Haibei, Tibetan Autonomous Prefecture in Qinghaï, is a writer and a history teacher at a school in Lhasa. He was initially detained in March 2005. On 16 September 2005, he was sentenced to 10 years of imprisonment. While there is no official information publicly available about the charges against him and his trial, it would appear that he was charged with and found guilty of endangering national security by committing an act of espionage and of disclosing State secrets abroad (articles 110 and 111 of the Criminal Code). It would also appear that he may have been refused access to legal assistance prior to his trial.

6. Mr. Kyab appealed against the conviction but the appellate court upheld the sentence on 30 November 2005. According to the source, Mr. Kyab was convicted due to his unpublished book titled “Restless Himalayas”, which deals with Tibetan geography, history and religion and might be seen by the authorities of the Government of the People’s Republic of China as being connected to the question of Tibetan autonomy.

7. Mr. Kyab has been detained for more than 19 months at Qushui prison in the south-west of Lhasa and has encountered serious health conditions while in detention. He has been suffering from tuberculosis and had to be transferred to Lhasa Military Hospital. Following his transfer to that hospital, he was sent to Lhasa Qushui Prison without having recovered. Lhasa Qushui Prison did not accept him as he was still in a very bad physical condition. A few months later, in March 2006, Mr. Kyab was transferred to Lhasa Qushui Prison to serve his sentence.

8. According to the source, the detention of Mr. Kyab is arbitrary. It is contrary to his rights and freedoms guaranteed by article 19 of the Universal Declaration on Human Rights, more specifically his right to freedom of expression. The source also argues that the secrecy surrounding the trial of Mr. Kyab violates his right to a “fair and public hearing” enshrined in article 10 of the Universal Declaration of Human Rights. Moreover, due to the secrecy, it is not possible to verify whether Mr. Kyab

has enjoyed the right to be effectively assisted by legal counsel during the process and at what stages of the proceedings against him.

9. In its observations on the allegations of the source the Government provided the following information. After the arrest on 27 May 2005 of Dolma Kyab, the competent procuratorate charged him with the offence of illegally crossing the border and with espionage and referred his case to the Lhasa Intermediate People's Court for trial. That court, while hearing the case, fully guaranteed Mr. Kyab's procedural rights. It was established that from November 2003 to June 2004 Dolma Kyab passed forth and back the border at Zhangmukou'an under circumstances that contravenes the law, actions which constitute a crime of crossing the border illegally.

10. After having crossed the border he frequently met with members of the Dalai Lama clique's "Security Department" intelligence units and proposed the establishment of an "environmental protection group" to recruit members to carry out separatist activities and obtain support for the Department. He received a total of 12,400 Indian rupees and 6,500 Nepalese rupees for funding of activities. On several occasions after returning across the border he faxed requests for funds to an office of the Security Department. In addition, at the urging of "the Department", Dolma Kyab added considerable separatist content to the book "The Himalayas in Turmoil", referring, inter alia, to the Tibetan national flag and sovereignty. He copied the book onto a compact disk, and carried it across the border with the intent to disseminating it widely throughout China, acts, which constitute the crime of espionage.

11. The court found the defendant guilty of espionage and sentenced him to 10 years of imprisonment, 5 years of deprivation of political rights and confiscation of all his personal property. He was also found guilty of illegally crossing the border, for which he was given a one-year prison sentence, plus one year of deprivation of his political rights. He was also sentenced to pay a fine of 2,000 yuan.

12. The Government explained that an appeal was lodged against the judgement on behalf of Mr. Kyab. It appears that the court confirmed the conviction, but decided to render a concurrent judgement. As a result Mr. Kyab has to serve 10 years and 6 months in prison, is deprived of his political rights for 5 years, and have his personal properties confiscated. The appellate court set aside the fine arguing that under Chinese law confiscation and fine must not be applied together.

13. In its comments on the observations of the Government the source noted with regard to the espionage charges that although some of Mr. Kyab's writings referred to the number and location of military installations, discussion of military installations was only one component of his writings. According to the source there were no indications that reference to military installations was made with any motive other than to document the impact of such installations on the environment and local population. With regard to the charge of secretly crossing the national border the source pointed out that in November 2003 Mr. Kyab travelled into exile and studied for a period in Dharamsala, seat of the Tibetan Exile Government in India, before returning to Tibet. Thousands of Tibetans, the source adds, go into exile each year crossing the Tibet-Nepal border. Many, like Dolma Kyab, do so secretly and at great risk in order to receive an unrestricted Tibetan education.

14. The Working Group observes that Mr. Kyab has been accused of and sentenced for grave criminal charges, including espionage. However, the Government has not denied that the accusation of espionage relates mainly to his activities as a writer and professor of history and as a member of a group accused of carrying out separatist activities, and thus for writing and disseminating the content of a book, which resulted in his detention and further sentences.

15. In the light of the information available, the Working Group considers that Mr. Kyab's statements and activities supporting separatist opinions cannot be regarded as reprehensible unless it could be established that he had resorted to non-peaceful means. However, since nothing indicates that his book, or the group to which he is a member, advocate violence or any behaviour or practices prohibited by the Universal Declaration of Human Rights, Mr. Kyab was merely exercising his right to freedom of opinion and expression and to freedom of association with others in order to express opinions peacefully. Even though the ideas of the group may be contradicting the official policy of the Government, the exercise of the right to freedom of expression and association cannot be punished as such, if there are no violent acts committed on behalf of the group and there is no factual proof of resort to or advocacy of violence.

16. Similarly, crossing a State border should not be considered as a crime, since article 13, paragraph 2, of the Universal Declaration of Human Rights states that "everyone has the right to leave any country, including his own, and to return to his country".

17. The Working Group finds that these particular activities, although contradictory of the government policy, nonetheless relate mainly to the exercise of the right to freedom of opinion and expression, which includes freedom to search for, receive and disseminate information and ideas of any kind, without restrictions of borders, in oral, written, printed or any other form, and to freedom of peaceful assembly and association. The Working Group concludes that the detention of Mr. Kyab on the ground of these facts is thus incompatible with his rights to freedom of opinion and expression, freedom of movement as well as of the rights to peaceful assembly and association, which are guaranteed by articles 13, 19 and 20 of the Universal Declaration of Human Rights.

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

> The deprivation of liberty of Mr. Dolma Kyab is arbitrary, being in contravention of articles 13, 19 and 20 of the Universal Declaration of Human Rights, and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

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

Adopted on 30 November 2007

OPINION No. 37/2007 (Lebanon)

Communication addressed to the Government on 27 April 2007.

Concerning General Jamil Al Sayed, General Raymond Azar, General Ali El Haj, General Mustapha Hamdan, Ahmad Abdel Aal, Ayman Tarabay, Mustapha Talal Mesto and Mahmud Abdel Aal.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group thanks the Government for transmitting the requested information in a timely manner.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. Having seen the allegations made, the Working Group welcomes the cooperation of the Government. It transmitted the reply of the Government to the source and has received the source's comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, taking account of the allegations made, the reply of the Government and the source's comments.

5. The cases mentioned below were reported to the Working Group on Arbitrary Detention as follows: Following the assassination of the former Prime Minister of Lebanon, Mr. Rafiq Hariri, on 14 February 2005, and in response to a request from the Lebanese authorities, on 7 April 2005, the United Nations Security Council unanimously adopted resolution 1595 (2005). This resolution set up an International Independent Investigation Commission. It was headed by Mr. Detlev Mehlis and, from 11 January 2006 on, by Mr. Serge Brammertz.

6. Within the framework of this Investigation Commission entrusted with identifying the perpetrators and sponsors of the act and the accomplices, and with the cooperation of the Lebanese examining magistrate responsible for the case, Mr. Elias Eid, numerous arrests and detentions were ordered.

7. According to the information transmitted by the source, eight persons, all of Lebanese nationality, Ahmad Abdel Aal, Ayman Tarabay, Mustapha Talal Mesto, Mahmud Abdel Aal, General Jamil Al Sayed, General Raymond Azar, General Ali El Haj and General Mustapha Hamdan, have been detained for more than a year and a half without having been charged and without any date for their trial being known. Several applications for release have been submitted by these persons, but all have been rejected. A real grey area exists regarding which authority considers itself competent to rule on the judicial situation of these detainees. According to the information obtained by the source, the Investigation Commission states that it is the Lebanese courts that are competent to decide on questions of detention. This position was reaffirmed in Commissioner Brammertz's last report dated 12 December 2006.

8. Following their arrests during the period from August to October 2005, on the basis of suspicions as to their implication in the assassination, the detainees, after remaining temporarily in various places of detention, were transferred to the Roumieh central prison.

9. Except for Mr. Tarabay and Mr. Mesto, and more recently the brothers Mahmud and Ahmad Abdel Aal, all are being held in isolation in cells without light and ventilation, 2 metres long and 1.3 metres wide. Three of the detainees are said to be suffering from serious physical and mental health problems.

Details of the individual cases

10. On 30 August 2005, at 5.30 a.m., patrols of the International Investigation Commission appeared at the home of General Jamil El Sayed, a former Director of the Lebanese Department of Security (*Sûreté générale*), equipped with an order signed by the Head of the Commission, Mr. Mehlis, describing General El Sayed as a "suspect". General El Sayed was then taken to the headquarters of the Commission where he was subjected to a prolonged interrogation by a Commission investigator, in the absence of a lawyer. General El Sayed was placed in detention at the headquarters of the Internal Security Forces.

11. The next day, the Commission investigator requested General El Sayed to sign the record of the interrogation. General El Sayed asked to see his lawyer, Maître Akram Azoury. Maître Azoury arrived and expressed reservations at the fact that the investigators had not asked General El Sayed whether he needed the assistance of a lawyer in keeping with Lebanese and international law. General El Sayed decided nevertheless to sign the record.

12. On 1 September 2006, General El Sayed was summoned to the headquarters of the Commission to be confronted with a witness, in the presence of his lawyer and the Commission investigators. The interview was recorded and filmed. The witness had his head covered by a bag, apart from his eyes. The witness affirmed that General El Sayed had visited Damascus seven times between November 2004 and February 2005 for meetings with the Chief of the Syrian Presidential Guard and the head of the Syrian intelligence services to plan the assassination of President Hariri and that on the last occasion, he had been accompanied by General Mustapha Hamdan, at that time Chief of the Lebanese Presidential Guard. El Sayed denied these meetings and requested more details on their dates. He also invited the investigators to check every date in his diaries. The masked witness was unable to specify any of the dates of the seven alleged meetings in Syria. General El Sayed remained in detention at the disposal of the Commission on the basis of the verbal order notified to him by one of the investigators on the night of 30 August.

13. On 3 September 2005, he was brought before the Lebanese examining magistrate, Mr. Eid, who subjected him to a purely formal interrogation which did not last more than one hour. Following this investigation, the examining magistrate issued a warrant for his detention.

14. From 3 September to 19 October 2005, five interrogation sessions took place with the Commission investigators. Each time that the investigator alluded to an individual, General El Sayed asked to be confronted with this individual, and the question was immediately shelved.

15. On 19 October 2005, the Investigation Commission presented its first report to the Security Council. This report accuses General El Sayed, General Mustapha Hamdan and General Raymond Azar of being among the main organizers of the assassination of President Hariri. General El Sayed had sight of the passages

concerning him six months after the presentation of the report. The accusations against General El Sayed are based primarily on the declarations of two individuals (identified as "witnesses"). The first, Mr. Hussam Hussam, is probably the masked individual with whom General El Sayed was confronted on 1 September 2005. He later withdrew his declaration publicly at a press conference held on 27 November 2005. No subsequent confrontation was carried out with Mr. Hussam, either before the Commission or before the examining magistrate, who to date has not interrogated him. The second witness is Mr. Zuhair El-Saddik, who has admitted before the Commission that he participated in the preparatory stage of the crime. The Lebanese examining magistrate did not interrogate Mr. El-Saddik and no confrontation was arranged with General El Sayed. Mr. El-Saddik was allowed to remain at liberty and departed for France, where he is today living in total freedom.

16. On 19 January 2006, General El Sayed was taken to the headquarters of the Investigation Commission to be interrogated.

17. On 15 March 2006, the Commission's third report was published (the first under the headship of Mr. Brammertz). The report does not mention General El Sayed. The Commission published its fourth and fifth reports on 6 June and 25 September 2006. Neither of these reports alludes to General El Sayed.

18. On 7 and 8 April 2006, the Commission had a "discussion" with General El Sayed at the General's request (the investigator refuses to describe the session as an interrogation). This discussion is to date General El Sayed's only discussion with the present officials of the Commission.

19. On the basis of this discussion, General El Sayed presented a statement (No. 11) on 23 May 2006, requesting the Commission to revoke its recommendation to keep him in detention. On 6 June 2006, the Commission officially replied to the statement, indicating that all the questions raised in the statement fell within the exclusive competence of the Lebanese judicial authorities.

20. On 20 June 2006, General El Sayed's lawyers presented to the examining magistrate a request for withdrawal of the warrant issued for the detention of their client. Since the request for withdrawal of the warrant was not answered, General El Sayed lodged with the Commission, on 12 October 2006, a further application for revocation of the detention recommendation. In correspondence dated 24 October 2006, the Head of the Commission stated that the Lebanese authorities had exclusive competence to deal with any questions of detention.

21. General Jamil El Sayed presented his last application for release on 25 March 2007.

22. General Mustapha Hamdan was Chief of the Presidential Guard, General Raymond Azar was head of the army intelligence services and General Ali El Haj was Chief of the Internal Security Forces. General Hamdan, General Azar and General El Haj were, like General El Sayed, arrested on 30 August 2005, each at his own home, by representatives of the International Investigation Commission, assisted by the Lebanese Internal Security Forces. A search warrant was presented to them and their homes were searched. They were then taken to the headquarters of the International Investigation Commission at Monteverdi. They were placed under arrest following their hearing at the headquarters of the International Investigation Commission on the same day. The three military officers were interrogated for three

days without the presence of a lawyer. (The Code of Criminal Procedure of Lebanon allows 24-hour custody, renewable once, without the presence of a lawyer.) On 3 September 2005. the Lebanese examining magistrate (Mr. Elias Eid) ordered their detention. They were detained for the requirements of the investigation and have not been charged. However, the applications for release submitted by their lawyers were rejected by the examining magistrate. After three days at the headquarters of the International Investigation Commission, they were detained on premises of the security forces. They were subsequently transferred to Roumieh prison, where they are still being held, in isolation, within the section under the exclusive control of the intelligence services of the Ministry of the Interior. General Raymond Azar, General Ali El Haj and General Mustapha Hamdan presented their last applications for release on 2 February 2007.

23. Mr. Ayman Tarabay and Mr. Mustapha Talal Mesto were working as mobile telephone salesmen. They were arrested on 13 September 2005 for selling telephone cards, at around the time of the assassination of Rafiq Hariri, without taking down the identity of the purchasers of the cards. Mr. Talal Mesto was detained for a month at the headquarters of the intelligence services of the Ministry of the Interior. He was then transferred to Roumieh prison. Both men were held, in isolation, until 7 December 2006. Their detention was ordered by the examining magistrate, Elias Eid, but they were not charged with any crime. Mr. Tarabay suffers from serious neurological problems due, according to his close relatives, to meningitis and he is also said to be under considerable psychological distress. Mr. Mesto has, since his arrest, suffered from not insignificant heart problems, which also require medical assistance. Mr. Ayman Tarabay presented his last application for release in February 2007. It has not been answered. Mr. Mustapha Talal Mesto presented his last application on 9 March 2007. It was rejected two weeks later.

24. Mr. Ahmad Abdel Aal was responsible for public relations in a Muslim charity association. He was summoned on 28 September 2005 by the military magistrate, who wished to question him in connection with an arms trafficking case. He was held at the detention centre of the Military Court of Beirut. Although the military examining magistrate was to order his release on bail, the International Investigation Commission, in conjunction with the Lebanese police, requested his detainment. He was brought before the examining magistrate, Elias Eid, who on 21 October 2005 ordered his detention. Mr. Ahmad Abdel Aal told his lawyer that he was forced to sign statements which he could not read owing to his poor eyesight and because he did not have his spectacles. The authorities suspect him of having had telephone contacts with officers suspected of complicity in the assassination of Rafiq Hariri but no charges have been brought against him. Mr. Ahmad Abdel Aal suffers from progressive cancer. His state of health gives cause for concern and urgently requires medical attention. Mr. Ahmad Abdel Aal presented his last application for release on 30 March 2007.

25. Mr. Mahmud Abdel Aal, director of relations in the Delbani electricity company, was arrested on 21 October 2005 following a police summons to the Basta gendarmerie. He was transferred to the headquarters of the intelligence services of the Ministry of the Interior in Beirut, where he was detained for five days. He was then transferred to the lawcourts, where he remained for one day. Since 26 October 2006, he has been held in the Roumieh prison section under the exclusive control of the intelligence services of the Ministry of the Interior on the ground that he

allegedly had telephone contacts with persons suspected of involvement in the assassination of Rafiq Hariri.

26. In all the cases mentioned, the source considers that the fundamental rights to a fair and just trial are not respected. These persons have been detained for more than one year and seven months without any charge or trial. Although their lawyers have submitted numerous applications for release, the detainees do not have any de facto recourse to a court able to rule on the principle of their indictment and detainment. In the case of General El Sayed, for example, the International Investigation Commission "recommended" detention and then (on 1 October 2005) opposed his release. However, following the replacement of Mr. Mehlis by Mr. Brammertz as Head, the Investigation Commission has indicated that the relations between the International Independent Investigation Commission operate "within the framework of Lebanese sovereignty and of its legal system" and that the Lebanese judicial authorities have exclusive competence with regard to questions of detention. The Lebanese examining magistrate responsible for the case acknowledges that he has no evidence against General El Sayed or against the other detainees but has to date not taken any decision pending completion by the International Investigation Commission of its investigations and its transmission to him of details concerning the detainee. Mr. Brammertz's report dated 12 December 2006 indicates that the International Investigation Commission has transmitted to the Lebanese courts information on the individuals who are in detention, being aware that this can help the Lebanese authorities take the steps which they deem appropriate or necessary concerning their detention, and reaffirms the exclusive responsibility of the Lebanese courts for decisions relating to the detention of these persons.

27. In its response, the Government states that it cannot be held liable for any violations that may have occurred in regard to the investigations conducted by the International Investigation Commission, in particular those concerning the interrogation of Jamil El-Sayed carried out by the international investigator in the absence of his lawyer and without his having been informed of this right. The Government contends that the Lebanese authorities and courts have no connection with investigative acts of the International Investigation Commission.

28. With respect to the allegation of detention of the persons mentioned in the communication, the Government states that they are not detained but on remand in custody as suspects in the case relating to the assassination of the former Lebanese Prime Minister, Rafiq Hariri, in application of the Code of Criminal Procedure of Lebanon, which allows the suspects to be remanded in custody. With regard to the duration of their custody, the Government notes that this is a complex case which has necessitated the intervention of the Security Council and the creation of an international investigation commission, whose investigator has just requested a six-month extension, which the Security Council has granted. The Government considers the suspects' custody to be dependent on the development of the inquiries conducted by the International Investigation Commission. It points out, however, that this does not mean that they will be kept in custody until the end of the investigation.

29. The Government disputes the allegation by the source that the examining magistrate has acknowledged that he does not have any evidence against the above-mentioned persons. In the view of the Government, the investigation is secret; it is

still pending and the Lebanese courts have not yet taken any decision. Regarding the conditions of detention and the allegations of maltreatment, the Government cites the agreement which it has just signed with the International Committee of the Red Cross (ICRC), which enables ICRC representatives to visit all places of detention in Lebanon, including those managed by the intelligence services of the Ministry of the Interior, and it has included a copy of this agreement in the case file.

30. Commenting on the response of the Government, the source points out that, while it is true that the arrests were carried out in conformity with the provisions of the Code of Criminal Procedure of Lebanon, the case in fact involves procedures applicable before a specialized court, the Council of Justice, which is the highest court in Lebanon and allows the indefinite detention of suspects. In the present case, the source notes that, two years after their arrest, the eight above-mentioned persons have still not been notified of the charges against them.

31. The source adds that the detention of the eight persons, although recommended by the International Investigation Commission and ordered by the Lebanese examining magistrate, is under the responsibility of the Lebanese courts. Serge Brammertz, the Head of the International Investigation Commission, has pointed this out on several occasions. The source states that it is deeply concerned by the response of the Lebanese authorities, which suggests that the detention of the suspects could be further extended for an indefinite period, probably pending the establishment of the international tribunal, without these persons being tried, which is in violation of article 9, paragraph 3, and article 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights.

32. The source expresses its concern regarding the suspension, for an unknown duration, of the examining magistrate responsible for this case following the complaint by one of the prosecution lawyers. At the present time, the Lebanese courts are thus no longer in a position to rule on the detention of these persons. With regard to the agreement concluded between the Lebanese judicial and security authorities and ICRC, the source points out that ICRC's prison visits do not fully ensure that maltreatment cannot be inflicted on some of the detainees, in particular in cases of isolated confinement, to which the four generals are subjected.

33. It is apparent from the foregoing that the Working Group has received a communication which is directed against the Lebanese Government but which at the same time alleges serious violations which could give the detention an arbitrary character and which the communication imputes to the investigators of the International Investigation Commission. However, the source considers that, although recommended by the International Investigation Commission, the detention of the eight above-mentioned persons was ordered by the Lebanese examining magistrate responsible for the case and is continuing to date under the responsibility of the Lebanese courts.

34. To recapitulate, the Security Council decided, in its resolution 1595 (2005), to set up an international independent investigation commission based in Lebanon in order to assist the Lebanese authorities in investigating all aspects of the terrorist attack which took place on 14 February 2005 in Beirut and caused the deaths of the former Lebanese Prime Minister Rafiq Hariri and several other persons, including to help identify its perpetrators, sponsors, organizers and accomplices.

35. Regarding the violations allegedly committed by the investigators of the International Investigation Commission, the Working Group points out that, since an individual communication was received by the Working Group, its examination falls under the Opinion procedure provided for in section III.A, of its methods of work.[18] The Opinion procedure presupposes that the communications contain a complaint against one or more States. Under the terms of its mandate, as defined in Human Rights Commission resolution 1991/42 and reaffirmed by the Human Rights Council in its resolution 6/4 of 28 September 2007, the Working Group was given competence to investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.

36. The Working Group considers that it is thus not competent to rule on the arbitrariness of detentions resulting from violations imputed to investigators acting within the framework of an international investigation commission set up by the Security Council.

37. With regard to the question of the responsibility of the Lebanese Government, the Working Group notes that, on 30 August 2005, General Jamil El Sayed, General Mustapha Hamdan, General Raymond Azar and General Ali El Haj, subsequently, on 13 September 2005, Mr. Ayman Tarabay and Mr. Mustapha Talal Mesto, and finally, on 21 October 2005, the brothers Ahmad and Mahmud Abdel Aal were all arrested and interrogated by investigators of the International Investigation Commission, which allegedly recommended to the Lebanese courts that they be detained. In its response, the Lebanese Government affirms that the eight above-mentioned persons were placed in custody, as suspects, in application of the Code of Criminal Procedure of Lebanon, by the examining magistrate appointed by the Lebanese courts to investigate the assassination of Rafiq Hariri and that to date these persons continue to be held as such.

38. The documents submitted to the Working Group for consideration show that the Lebanese authorities had initially entrusted the criminal investigation to the chief military examining magistrate, Rachid Mezher, who undertook the task during the period from 14 to 21 February 2005. At that date, the Lebanese Government decided to treat the crime as a terrorist act against the Republic, which led it to entrust the case to another court, the Council of Justice, which is the highest criminal court in Lebanon. As a result of this decision, a new examining magistrate was appointed to conduct the investigation, judge Michel Abu Arraj, representative of the Attorney-General's Department. On 23 March 2005, judge Abu Arraj resigned from his position as examining magistrate and was replaced by the examining magistrate Elias Eid. It was the latter who ordered the detention of the above-mentioned persons. It its last reply, the source indicated that the examining magistrate Elias Eid had been suspended from his duties as a result of a complaint by one of the prosecution lawyers.

39. It is thus not at all disputed that the eight above-mentioned persons were arrested under warrants issued by a Lebanese judicial authority officially entrusted with the criminal investigation of the assassination of Rafiq Hariri. The Lebanese Government neither contended that the eight persons were kept in detention at the

[18] See E/CN.4/1998/44, annex I.

request of the International Investigation Commission nor maintained that this step was taken in fulfilment of its obligations under Security Council resolution 1595 (2005). The Working Group concludes that, if from the examination of the communication it is concluded that the detention is of an arbitrary character, the Lebanese Government bears full responsibility for it.

40. To justify the fact that the eight above-mentioned persons were detained for more than two years without any notification of charges or any indictment, the Government invokes the complexity of the case and the provisions of the Lebanese Criminal Code, which allows the detainment for an indefinite period of persons suspected of having committed an offence.

41. The Working Group observes that it is not enough that the detention be in conformity with domestic legislation; national law must also be in conformity with the relevant international provisions set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments to which the State concerned has acceded, in this case articles 9 and 14 of the International Covenant on Civil and Political Rights, which has been ratified by Lebanon.

42. Article 9, paragraph 1, guarantees to everyone the right to liberty of person, prohibits arbitrary arrest and detention and stipulates that no one may be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. The prohibition of arbitrary detention indicated in paragraph 1 implies that the law itself must not be arbitrary. The Human Rights Committee has specified that deprivation of liberty allowed by the law must not be manifestly disproportionate, unjust or unpredictable.[19]

43. Article 9, paragraph 2, provides that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Paragraph 3 adds that anyone arrested or detained on a criminal charge has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power and is entitled to trial within a reasonable time or to release. The Human Rights Committee has specified that "promptly" means that time limits must not exceed a few days.[20]

44. It is true that, in the present case, the eight detainees were brought before the examining magistrate within a more or less reasonable time and it was the latter who decided to detain them for the requirements of the investigation but without indicting them or notifying them of any specific charges. The Working Group considers that their detainment without indictment or notification of charges for more than two years deprives the above-mentioned persons of the exercise of the

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[19] The Human Rights Committee has, in the context of lawful pretrial detention or remand in custody, held that the "drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability", Communication No. 305/1988, *Hugo van Alphen v. The Netherlands* (Views adopted on 23 July 1990), paragraph 5.8 (A/46/40 vol. II, p. 131). See also Communication No. 631/1995, *Spakmo v. Norway* (Views adopted on 5 November 1999, paragraph 6.3 (A/55/40, vol. II, p. 27); Communication No. 458/1991, *Albert Womah Mukong v. Cameroon* (Views adopted on 21 July 1994), paragraph 9(8) (A/49/40, vol. II, p. 193); and Communication No. 560/1993, *A v. Australia* (Views adopted on 3 April 1997), paragraph 9.2 (A/52/40, Vol. II, p. 159).

[20] Human Rights Committee, general comment No. 8 (1982), para. 2.

guarantees recognized to all individuals formally charged with a criminal offence, in particular the right to know the charges brought against them and the right to be tried within a reasonable time or released.[21]

45. The Working Group reaffirms that, in international law, detention prior to conviction should be the exception rather than the rule, a rule which stems from the principle of presumption of innocence. The Human Rights Committee has stated that deprivation of liberty, even if initially legitimate, will become arbitrary and be incompatible with article 9 of the International Covenant on Civil and Political Rights if it is of indefinite duration.[22]

46. The Working Group concludes that the detention of the eight above-mentioned persons for indefinite periods without charge or trial violates the most basic norms of the right to a fair trial, as guaranteed by international standards, and gives the detention an arbitrary character.

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

> The deprivation of liberty of Jamil El Sayed, Mustapha Hamdan, Raymond Azar and Ali El Haj, Ayman Tarabay, Mustapha Talal Mesto, Ahmad Abdel Aal and Mahmud Abdel Aal is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights, to which Lebanon is a party, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

48. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of these persons in order to bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 30 November 2007

OPINION No. 38/2007 (Bangladesh)

Communication addressed to the Government on 9 May 2007.

Concerning Mr Abul Kashem Palash.

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

1. (Same text as paragraph 1 of opinion No. 14/2007.)

2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source and informing that Mr. Palash was released on 24 May 2007.

3. The Working Group further notes that the source has confirmed that Mr. Palash is no longer in detention. However, cases against him are still open.

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[21] General comment No. 32 (2007), paras. 31and 35.

[22] Communication No. 560/1993, *A v. Australia* (note 19 above), para. 7.

4. Having examined all the information submitted to it and without prejudging the arbitrary nature of the detention, the Working Group, on the basis of paragraph 17 (a) of its methods of work, decides to file the case.

Adopted on 30 November 2007

OPINION No. 39/2007 (Mexico)

Communication addressed to the Government on 7 June 2007.

Concerning Mr. Álvaro Rodríguez Damián.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group expresses its appreciation to the Government for the information transmitted by it regarding the case in question.

3. The Working Group takes note of the information provided by the Government to the effect that this person was released on 13 July 2007 owing to the disappearance of prosecution data.

4. The Working Group transmitted that information to the source, which confirmed that the person was at liberty.

5. Having examined all the information made available to it and bearing in mind the fact that this person is at liberty, the Working Group decides to file the case of the detention of Mr. Álvaro Rodríguez Damián in accordance with paragraph 17(a) of its methods of work.

Adopted on 30 November 2007.

OPINION No. 40/2007 (Mexico)

Communication addressed to the Government on 4 June 2007.

Concerning Mr. Jayro Vázquez García.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group expresses its appreciation to the Government for the information transmitted by it regarding the case in question.

3. The Working Group takes note of the information provided by the Government to the effect that this person was provisionally released on bail on 13 July 2007 and that the appeal against the decision in question submitted by the Office of the Attorney-General to the First Court for Criminal Cases of the Central Judicial District has still not been ruled on.

4. The Working Group transmitted that information to the source, which confirmed that this person was provisionally at liberty, although the criminal trial for sedition and resisting arrest is continuing.

5. Having examined all the information made available to it and bearing in mind the fact that this person is at liberty, the Working Group decides to file the case of

the detention of Mr. Jayro Vázquez García in accordance with paragraph 17(a) of its methods of work.

Adopted on 30 November 2007

OPINION No. 1/2008 (Syrian Arab Republic)

Communication addressed to the Government on 4 October 2007.

Concerning Mr. Mus'ab al-Hariri.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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. 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.

5. The case summarized below was reported to the Working Group as follows: Mr. Mus'ab al-Hariri, born in Saudi Arabia, detained in Sednaya prison, was arrested by Syrian security forces on 24 July 2002 at the Syrian-Jordanian border shortly after he had arrived in Syria with his mother from exile in Saudi Arabia. At that time, he was 15 years old. His parents had moved to Saudi Arabia in 1981. It was reported that representatives of the Syrian Embassy in Saudi Arabia assured his mother that he could return safely. However, he was arrested upon his return.

6. Mr. Al-Hariri was kept in incommunicado detention without access to a lawyer or visits from his family for more than two years. He was allegedly tortured soon after his arrest and during his interrogation by military intelligence officials. Tortures reportedly included the so-called "*dulab*" ("the tyre"), whereby the victim is forced into a tyre, which is suspended, and beaten with sticks and cables; and "*al-kursi al-almani*", ("the German chair"), whereby the victim is put into a chair with moving parts which bend the spine backwards.

7. On 19 June 2005, according to Law 49 of 1980, the Supreme State Security Court (SSSC) sentenced Mr. Mus'ab al-Hariri to six years of imprisonment after convicting him of membership of the "Muslim Brotherhood", an organization which is banned in Syria. It was alleged that no evidence was presented during the trial indicating that Mr. Mus'ab al-Hariri was a member of or affiliated with the Muslim Brotherhood. The Court ignored this fact and did not investigate into the allegations of torture.

8. It was recalled that the Human Rights Committee stated that SSSC procedures are incompatible with the provisions of the International Covenant on Civil and Political Rights, to which the Syrian Arab Republic is a State party. According to the source, trials before the SSSC are notorious for falling far short of international standards for a fair trial. Verdicts are not subject to appeal; defendants have

restricted access to lawyers; judges are granted wide discretionary powers and confessions extracted under torture are accepted as evidence.

9. The arrest, detention, torture and trial of Mr. Mus'ab al-Hariri followed the same pattern as the case of his brothers, 'Ubadah, aged 18 at the time of his arrest, and Yusuf, aged 15 at time of his arrest. They were arrested in 1998 also after returning from Saudi Arabia to continue their schooling in Syria. They were also allegedly tortured. 'Ubadah was sentenced to three years of imprisonment by a Field Military Court (FMC) in connection with affiliation to the Muslim Brotherhood. Yusuf was sentenced to one year of imprisonment by a FMC; again in connection with affiliation to the Muslim Brotherhood. According to the source, their trials were held in camera and were grossly unfair.

10. The source alleges that the detention of Mr. Mus'ab al-Hariri is arbitrary. His detention and trial, as well as those of his brothers, constitute a gross violation of human rights in breach of obligations of Syria under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, which the Syrian Arab Republic ratified in 1993. Torture is completely banned by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment to which Syria acceded on 19 August 2004.

11. In its response, the Government informs that Mr. Mus'ab al-Hariri was actually arrested on 28 July 2002 on charges of belonging to a terrorist organization (the Muslim Brotherhood) which aims at changing the form of government through any means, especially through terrorist acts. He joined the organization while he was living in Saudi Arabia, where he carried out organizational activities. He came to Syria on the instructions of his superiors in the organization, in order to work in State institutions and departments to set up a base for the organization in the Syrian Arab Republic, to recruit people for the organization and to carry out acts of terrorism planned by the organization in Syria, acting as liaison between the members of the base and the leadership abroad. Mr. Al-Hariri was brought before the SSSC, which sentenced him to six years of imprisonment.

12. The Government draws the attention of the Working Group to the fact that the Muslim Brotherhood, to which Mr. Al-Hariri belongs, has carried out numerous terrorist acts in Syria, killing innocent citizens and destroying several State institutions and facilities. Mr. Al-Hariri was afforded a fair and impartial trial. The SSSC is in open court which applies Syrian law at all stages of the proceedings. Hearings before this Court must be conducted in the presence of defence counsel for every accused person, and if for any reason an accused person does not appoint a lawyer, the court assigns a member of the bar association to his or her or defence. No restrictions are placed on the work of lawyers before this court, and lawyers exercise all the rights in regard to defence of their client, in accordance with Syrian law, which is in conformity with international law. The Government emphasizes that the allegations that Mr. Al-Hariri was arbitrarily detained are untrue.

13. In its comments to the government reply, the source observes that the date of Mr. Mus'ab al-Hariri's arrest and charge levied against him are credible from the Syrian authorities reply. However, no evidence was presented to the court to substantiate the claims in the letter that Mr. Al-Hariri, who was not older than 15 when he was arrested in Syria, was an active member of the Muslim Brotherhood

or that he would have performed any of the roles described in the letter of the Government.

14. The source recalls that the Muslim Brotherhood renounced the use of violence many years ago and it does not hold any credible information suggesting that this position has changed. Hence, even if Mr. Al-Hariri were a member of the Muslim Brotherhood and imprisoned because of that, the source would likely consider him a prisoner of conscience and call for his immediate and unconditional release.

15. The source notes that the Syrian authorities made no mention of the period of more than two years he spent in incommunicado detention or of any investigations carried out into the quite detailed reports of torture that he had suffered from. The source further notes that the assertion of the Government that the procedures before the SSSC afford a fair trial lacks any credibility. Numerous decisions of the Working Group have stressed that the proceedings before the SSSC fall short of international fair trial standards.

16. In the light of the foregoing, the Working Group considers that the Government does not provide any information on or justification for the period of more than two years, Mr. Al-Hariri had spent in incommunicado detention, meaning that he was not granted access to his lawyer or allowed visits by his family in contravention of article 9, paragraph 3 of the International Covenant on Civil and Political Rights, and, taking into account his age, of article 37 (d) of the Convention on the Rights of the Child. Furthermore, the Government does not comment on the detailed and serious allegations by the source on the acts of torture Mr. Al-Hariri was subjected to during this period and on the failure of the SSSC to investigate into such allegations during his trial.

17. The gravity of such violations of the right to fair trial further put into question the credibility of the charges laid against Mr. Al-Hariri, that he was an active member of the Muslim Brotherhood and engaged in activities as described in the information provided by the Government. In the absence of any evidence tabled before the Working Group to substantiate the charges against Mr. Al-Hariri, who was not older than 15 years at the time of his arrest, the Working Group is led to conclude that his conviction was largely based on confessions extracted under torture during the time Mr. Al-Hariri remained without access to legal counsel and that there is no other objective evidence which might have factually supported the criminal sentence.

18. Moreover, the Working Group recalls, as rightly pointed out by the source, that it has already taken issue with the trials conducted before the SSSC in general on numerous occasions[23] in that lawyers are not granted access to their clients prior to the trial, that their conduct of defence is hindered by several other limitations (such as the initiation of proceedings before legal representatives have had the opportunity to study the case file, the frequent denial of the right to speak on behalf of their clients, the requirement of obtaining written permission by the President of the SSSC to meet with the defendant in detention), and that the convict is not afforded the right to appeal his or her sentence. Likewise, the Human Rights Committee,

[23] Opinion No. 8/2007 (A/HRC/7/4/Add. 1), page 110; Opinions No. 15 and 16/2006 (A/HRC/4/40/Add. 1), pages 74 and 76; Opinions No. 4 and 7/2005 (E/CN.4/2006/7/Add.1), pages 22 and 30; Opinion No. 21/2000 (E/CN.4/2001/14/Add.1), page 104.

after having considered the second periodic report of the Syrian Arab Republic, declared in its concluding observations the proceedings before the SSSC as being incompatible with the provisions of article 14, paragraphs 1, 3 and 5 of the International Covenant on Civil and Political Rights.[24]

19. The Working Group would welcome improvements of the proceedings before the SSSC aimed at safeguarding the right of the accused to a fair trial, if the SSSC has developed into a court where no restrictions are placed on the work of defence lawyers and counsel exercise all rights in regard to the defence of their client, as submitted by the Government.

20. Even if Mr. Al-Hariri's lawyer was not restricted in acting properly in his defence during the trial in question, the grave violations of the right not to be compelled to testify against oneself or to confess guilt remain, as well as the contravention of the right to his conviction being reviewed by a higher tribunal according to law in terms of article 14, paragraphs 3 (g) and 5 of the International Covenant on Civil and Political Rights, and articles 37 (a) and 40, paragraph 2 (b) (iv) and (v) of the Convention on the Rights of the Child. Confessions extracted under torture must never be admitted as evidence in a criminal trial.

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

> The detention of Mr. Mus'ab al-Hariri is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls under category III of the categories applicable to the consideration of cases submitted to the Working Group.

22. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Mus'ab al-Hariri and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 7 May 2008.

OPINION No. 2/2008 (Equatorial Guinea)

Communication addressed to the Government on 23 August 2007.

Concerning Mr. Juan Ondo Abaga (Naval Commander), Mr. Florencio Elá Bibang (Lieutenant Colonel), Mr. Felipe Esono Ntutumu (civilian) and Mr. Antimo Edu Nchama (civilian).

The Republic of Equatorial Guinea acceded to the International Covenant on Civil and Political Rights on 25 September 1987.

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. (Same text as paragraph 3 of Opinion No. 15/2007.)

[24] CCPR/CO/71/SYR, para. 16.

3. The Working Group regrets that the Government has not provided the requested information despite repeated invitations to do so.

4. According to the communication received, Naval Commander Juan Ondo Abaga was abducted in Benin – where he was a refugee – on 25 January 2005 by members of the security forces of Equatorial Guinea and taken to his native country. Lieutenant Colonel Florencio Elá Bibang and the civilians Mr. Felipe Esono Ntutumu and Mr. Antimo Edu Nchama were apprehended on 19 April 2005 in Nigeria by that country's security forces, imprisoned and subsequently abducted by the forces of Equatorial Guinea, and were also taken to that country, on 3 July 2005. In Equatorial Guinea they were imprisoned, held incommunicado and tortured over a long period without having access to lawyers or to their relatives.

5. On 6 September 2005, Mr. Ondo Abaga, Mr. Elá Bibang and Mr. Edu Nchama were brought before a military court, in Bata, composed of persons appointed by the Government. The charges were acts against national security, rebellion, treason, negligence and attempting to overthrow the Government, based on their alleged participation in the attempted coup d'état of 8 October 2004. Mr. Esono Ntutumu has not been tried.

6. The source adds an important element: Although they were forcibly taken to the country and detained in Malabo prison (known as Black Beach), their trial was conducted *in absentia* since the authorities denied that they had been abducted abroad and brought into the country, i.e. they were considered missing persons.

7. In the absence of any cooperation from the Government, the Working Group regards the alleged facts as true, especially since they were corroborated by other evidence received. During the Working Group's visit to Equatorial Guinea from 3 to 8 July 2007, it was denied that these persons were in custody and the Working Group could not therefore interview them (A/HRC/7/4/Add. 3, paragraph 69). However, the Working Group received a letter from these persons.

8. The Working Group considers that the crimes with which they were charged (namely acts against national security, rebellion, treason, negligence and attempting to overthrow the Government) are typically classified as political offences and, in the present case, they were allegedly committed by civilians in conjunction with military personnel.

9. The Human Rights Committee, in paragraph 4 of its general comment No. 13, on the administration of justice (article 14 of the Covenant), notes the "existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14".

10. The Working Group has stated in previous Opinions and reports that "one of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called." Although the Covenant does not expressly prohibit such courts, the Working Group observes that "virtually

none of them respects the guarantees of the right to a fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant" (E/CN.4/1996/40, para. 107), adding that they "are not independent, act partially and do not apply the rules of due process of law, all of which is translated into impunity for violations of human rights and arbitrary detentions" (para. 108). In the report on its visit to Peru in 1998 (the era of the Government of Alberto Fujimori), the Working Group strongly criticized the absurd situation where the military courts in that country had convicted foreigners of treason; obviously those persons had no emotional links with the country, the existence of such links being the very essence of the crime of treason (E/CN.4/1999/63/Add.2, paras. 47 to 53).

11. In its above-mentioned visit to Equatorial Guinea, the Working Group observed that the Code of Military Justice, which is still in force in Equatorial Guinea, had been adopted in Spain (former colonial power) on 17 July 1945 (in the midst of the Franco dictatorship) and that it "gives the military courts extremely broad jurisdiction over a long list of civilian offences, including national security offences, offences against the country's territorial integrity and crimes of lese-majesty." (A/HRC/7/4/Add. 3, para. 19). The offences with which Ondo Abaga, Elá Bibang and Edu Nchama were charged are of the same nature.

12. It should be noted that the concern expressed by the Working Group during its visit is fully consistent with the draft set of principles governing the administration of justice through military tribunals, whose preparation was requested by the former Subcommission on the Promotion and Protection of Human Rights (see E/CN.4/Sub.2/2004/7) and which is currently under consideration by the Human Rights Council, and, in particular, with Principle No. 2, which states that "military courts should, in principle, not have competence to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts".

13. Principle No. 5 of the draft establishes the guarantee of habeas corpus, No. 14 that of the public nature of proceedings, No. 8 the guarantee of the rights of the defence and the right to a just and fair trial, and No. 10 recourse procedures in the ordinary courts. These principles are applicable even to military personnel tried in military courts. They were not adhered to in the irregular proceedings referred to in the present Opinion and totally disregarded in the trial conducted against Mr. Ondo Abaga, Mr. Elá Bibang and Mr. Edu Nchama.

14. With regard to Mr. Esono Ntutumu, his detention incommunicado, without trial, for over three years from the time of his abduction in Nigeria or for almost three years since his deprivation of liberty at the hands of the Government of Equatorial Guinea, is a serious violation of the standards of due process, which gives the deprivation of liberty an arbitrary character.

15. It should be pointed out that, in addition to irregular abduction by the security forces of Equatorial Guinea operating in Benin (in the case of Ondo Abaga) and apprehension by the security forces of Nigeria in Nigeria, where the individuals were held incommunicado, they were all detained in secret locations upon their arrival in Equatorial Guinea until the date of the trial, with no orders from any authority, without any legal basis whatsoever and in wretched conditions.

16. The Working Group also notes that Mr. Ondo Abaga had been recognized as a refugee in Benin and that the action by the security services of Equatorial Guinea in

that country amounts to a grave transgression of the principle of *non-refoulement* established in the Convention relating to the Status of Refugees of 1951. In the case of Mr. Esono Ntutumu, Mr. Elá Bibang and Mr. Edu Nchama – the formal recognition of whose refugee status was in process – that transgression was committed by the security services of both Nigeria and Equatorial Guinea.

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

> The deprivation of liberty of Naval Commander Juan Ondo Abaga, Lieutenant Colonel Florencio Elá Bibang and the civilians Felipe Esono Ntutumu and Antimo Edu Nchama is arbitrary, being in serious contravention of articles 1, 5, 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group. It is also arbitrary, under category I, in regard to the entire period prior to the initiation of the trial in Equatorial Guinea, i.e. between 3 July and 6 September 2005.

18. Consequent upon the Opinion rendered, the Working Group requests the Government of Equatorial Guinea to remedy the situation of Mr. Juan Ondo Abaga, Mr. Florencio Elá Bibang, Mr. Felipe Esono Ntutumu and Mr. Antimo Edu Nchama in order to bring it into conformity with the provisions of the Universal Declaration of Human Rights. The Working Group believes that, given the circumstances of the case and bearing in mind the prolonged period during which they have been deprived of liberty, the adequate remedy would be their immediate release.

19. In line with the comments in paragraph 16 of this Opinion, the Working Group agrees to transmit this Opinion also to the Governments of the Republics of Benin and Nigeria and to the Office of the United Nations High Commissioner for Refugees (UNHCR).

Adopted on 7 May 2008

OPINION No. 3/2008 (United Arab Emirates)

Communication addressed to the Government on 20 February 2007 and on 24 January 2008.

Concerning Mr. Abdullah Sultan Sabihat Al Alili.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

4. In the light of the allegations made, the Working Group welcomes the initial cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments. It regrets, however, that the Government did not reply to additional allegations made by the source in its observations to the first response of the Government. Nonetheless, the Working

Group believes that it is in a position to render an opinion on the facts and circumstances of the case.

5. According to the source: Mr. Abdullah Sultan Sabihat Al Alili, aged 46, a citizen of the United Arab Emirates, married, is an agricultural engineer at the Ministry of Agriculture of the Emirate of Adjman, resident in Adjman.

6. It was reported that he was arrested on 15 February 2007 at his residence by agents of the Internal Security Services (Amn Aldawla), who neither showed any arrest warrant nor informed him about the reason for his arrest or about any charges laid against him. His house was searched without a search warrant and his personal documents and books were confiscated.

7. Mr. Al Alili had previously been arrested on 8 August 2005 and interrogated on his political views and about statements he had made regarding the situation of democracy and freedom of expression in the country. He was kept in incommunicado detention. On 13 September 2005, the Working Group on Arbitrary Detention sent an urgent appeal on his behalf to the Government of the United Arab Emirates. Mr. Al Alili was released on 25 October 2005, after 78 days in detention.

8. It was also alleged that, prior to his release, Mr. Al Alili was asked to refrain from further engaging in political activities, particularly from making statements and declarations to the media. As he decided to continue with his activities, the source believes that his current detention is related to his right to freely hold and express political opinions.

9. The source further reported that Mr. Al Alili is being held in incommunicado detention without charge; without having been entitled to have the assistance of a legal counsel and without access to his relatives or to adequate medical care. His current place of detention is unknown. Fears have been expressed that he could be subjected to ill-treatment.

10. In its observations the Government stated that Mr. Al Alili was arrested in accordance with the law of the United Arab Emirates by the competent authorities, which conducted the necessary investigations before handing him over to the judiciary and the prosecution services. According to the Government the prosecuting authorities reviewed the procedural and substantive aspects of the case and verified that the arrest of Mr. Al Alili had been conducted according to the established legal procedure, including the human rights norms applicable in the State. Thereafter, the prosecution service conducted an investigation and charged the accused with “incitement and conspiracy to disclose secrets relating to national defence” and “illegally obtaining secrets relating to national defence”.

11. The Government furthermore stated that Mr. Hasan Al-Idrus, a national of the United Arab Emirates resident in Abu Dhabi, was appointed as defence lawyer for Mr. Al Alili and was assigned to deal with the accused, plead his case in court and present legal arguments to enable him to prove his client’s innocence. Family members have been able to visit the accused, subject to the procedures applicable in such cases, as laid down in prison regulations. On 28 May 2007, the case was referred to a court and registered as State security case No. 394/35 of 2007. The first session was held on 25 June 2007. At the time of the submission of the government reply the case was still pending with the next hearing scheduled for September 2007.

12. In its observations to the reply of the Government the source states that Mr. Al Alili was detained incommunicado between 15 February and 28 May 2007 for 102 days. During this period his family was unaware of his fate because the authorities refused to provide any information on the reasons for his arrest and detention.

13. The source also refers to a letter addressed to the President of the Federal Supreme Court, in which Mr. Al Alili describes his treatment in the detention centre. Mr. Al Alili, inter alia, reported that he had been beaten with a hosepipe and a baton, deprived of sleep for several days, forced to sleep without bedding in the cold on concrete floor, had to stand upright for the whole day for two weeks, forced to carry a chair on his head all day for one week, forcibly treated with medication against high blood pressure and insomnia, although he is not suffering from any of these diseases, placed in an isolation cell for one month, deprived of contact with his wife and his next-of-kin, and threatened with sexual assault and with the arrest of his wife.

14. The source further alleges that Mr. Al Alili was presented before a magistrate for the first time on 28 May 2007 and was accused of "dissemination of secrets concerning the defence of supreme interests of the State". His confession was extracted by torture and during an oral procedure which was applied by officials of the Internal Security Services. He was forced to sign a confession statement without having been able to read it before, which was then admitted by the tribunal as evidence against him.

15. During the first court session the Federal Supreme Court decided to conduct closed hearings. Despite repeated requests by the competent judge during several trial hearings the Office of the Prosecution failed to produce the evidence upon which the accusation of Mr. Al Alili was based and he was kept in detention. The only witnesses were the very Internal Security Service officers who had tortured him and conducted the preliminary investigation.

16. Mr. Al Alili was eventually sentenced on 1 October 2007 to three years of imprisonment after a trial during which he was not permitted to speak and his lawyer was not allowed to plead. His lawyer was only authorized to submit a written brief. The Court did not investigate the allegations of torture in detention Mr. Al Alili had made.

17. The source alleges that the sentencing of Mr. Al Alili followed an unfair trial during which the basic norms of fair trial, including his right to defence, were violated. Furthermore, Mr. Al Alili's right to appeal was infringed, since an appeal or review of the conviction by the Federal Supreme Court is not possible and the judgement has never been delivered to him or his counsel, leaving Mr. Al Alili unaware of the reasons for his sentencing.

18. Despite having been invited to do so, the Government failed to comment on new allegations contained in the source's reply to the observations of the Government. The Working Group notes that the Government, therefore, did not challenge the allegation of the source that Mr. Al Alili was arrested without a warrant and detained for expressing his views publicly in the media. This is evidenced by the fact that the Government did not question the allegation of the source that authorities had warned him not to become furthermore involved in political activities.

19. The exercise of the right to freedom of opinion and expression is protected by articles 19 and 20 of the Universal Declaration of Human Rights, which permit the imparting of ideas of any kind by any means. The case of Mr. Abdullah Sultan Sabihat Al Alili appears to be a case of detention for merely exercising these rights to freedom of opinion and expression, for imparting his ideas through the media, which could include a broad range of ideas, including his political views on the situation related to democracy and to freedom of speech prevailing in the country.

20. At the same time, it is beyond doubt that Mr. Al Alili did not enjoy the benefits of a fair trial, since his confession was extracted by ill-treatment, humiliation and coercion, and the Federal Supreme Court did not investigate into these serious allegations put forward by Mr. Al Alili during his trial. The Working Group considers these allegations as substantiated and credible, for the ordeal Mr. Al Alili suffered from was described in much detail.

21. Since Mr. Al Alili was undisputedly detained incommunicado for a significant period of time without being able to challenge the legality of his detention, it is not necessary to express an opinion on the differing information provided by the source and the Government as to whether Mr. Al Alili could receive family visits or had access to his lawyer and whether his counsel was in fact permitted to plead during the trial. Suffice to state that even assuming in favour of the Government that Mr. Al Alili's lawyer was able to act in his defence, requiring him to prove his client's innocence as asserted by the Government already violates the right to be presumed innocent. All of the elements described constitute a violation of articles 9, 10 and 11 of the Universal Declaration of the Human Rights of such gravity as to confer on his deprivation of liberty an arbitrary character.

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

> The deprivation of liberty of Mr. Abdullah Sultan Sabihat Al Alili is arbitrary, being in contravention of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights and falls into categories II and III of the categories applicable to the cases submitted to the consideration of the Working Group

23. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Abdullah Sultan Sabihat Al Alili. The Working Group invites the Government to consider becoming a State party to the International Covenant on Civil and Political Rights, as soon as is practicable.

Adopted on 7 May 2008

OPINION No. 4/2008 (Islamic Republic of Iran)

Communication addressed to the Government on 30 October 2007.

Concerning Ms. Shamila (Delara) Darabi Haghighi.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. (Same text as paragraph 3 of Opinion No. 15/2007.)

3. In the light of the allegations made, the Working Group conveys its appreciation to the Government for having forwarded the requisite information. The Working Group transmitted the reply provided by the Government to the source, however, has to date not received any comments. Nevertheless, 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.

4. The case summarized below was reported to the Working Group as follows: Shamila (Delara) Darabi Haghighi, an Iranian national born on 21 September 1986 and a high school student, addressed in the city of Rash, in the Northern Gilan Province, was arrested on 28 December 2003 at around 10.30 p.m. at her home by members of the police.

5. Ms. Darabi, who was 17-years old at the time, was arrested in connection with the murder of her elderly paternal cousin, Ms. Mahin Darabi Haghighi. While under the influence of sedatives given to her by Mr. Amir-Hossein Sotoudeh, she was severely interrogated and confessed to having participated in the murder of her cousin together with Mr. Sotoudeh. According to her statement, they had betaken themselves to the victim's house in order to steal her jewellery and money. Their idea was to steal money to be able to get married. In her confession, she did not admit any premeditation or deliberate intention to kill the victim.

6. The following day, the case was assigned to Branch 10 of the General Court of Rasht headed by Judge Mohammadpour, who was at the same time Investigator, Prosecutor and Judge, given that at that time, the Iranian criminal system lacked a separate Prosecution service. No consideration was given to the fact that Ms. Darabi was a minor and that, consequently, her case would have had to be assigned to a juvenile court.

7. Ms. Darabi repeated her declaration before an on-call criminal judge and subsequently before Judge Mohammadpour, who was in charge of the case. Neither a defence lawyer nor Ms. Darabi's parents were present when her statements were taken by the police or the judges. She was not informed about the real legal consequences of her confession, either.

8. Moreover, no consideration was given to the contradictions in Mr. Amir-Hossein Sotoudeh's statement or to the fact that the coroner's report had established that the killer must have been right-handed, whereas Ms. Darabi is left-handed. As Ms. Darabi is left-handed, the stab wounds would have had to be inflicted on the victim's left side of the body rather than on her right side as it was actually the case.

9. According to the source, Ms. Darabi's confessions were not consistent with the facts of the case. They were extracted while she was in deep shock, highly impressionable and under the influence of sedatives. In spite of all contradictions, discrepancies and lack of real evidence, on 29 December 2003, Judge Mohammadpour charged Ms. Darabi with intentional murder, burglary and illicit relationship, charges based exclusively on her initial confession. Mr. Amir-Hossein Sotoudeh was charged with complicity in murder. No criminal or forensic investigation of the crime scene or the murder weapons took place.

10. Despite the Judge's declared consent to conduct a crime scene re-enactment, this was never done. According to the source, a re-enactment of the crime scene would have clearly established that Ms. Darabi was not the killer.

11. After having been charged, Ms. Darabi was taken from the police station to the women's ward of Rasht Prison, where she is being kept together with adult convicts. Soon thereafter, Ms. Darabi recanted her initial confession and described what she could remember about the incident. She stated that her intention at the moment of confessing the murder was to save her boyfriend, Mr. Sotoudeh, from a possible death penalty. He had told her that it was easier for her to receive pardon from the victim's heirs since she was their relative. He had also told her that due to the fact that she was below 18, she would not receive a death sentence if she undertook responsibility for the murder.

12. The first hearing on Ms. Darabi and Mr. Sotoudeh's first trial took place on 6 December 2004, and the second session was conducted on 9 February 2005. Both sessions were closed to the public. During the first session, Ms. Darabi's parents were not present and she was not assisted by a defence counsel. Although Ms. Darabi told Judge Mohammadpour that she would not speak without her lawyer present, the trial was not adjourned. The victim's four children expressed their wish that Ms. Darabi receive the *qisas* death sentence. Several irregularities reportedly occurred in both sessions amounting to lack of defence.

13. On 26 February 2005, Judge Mohammadpour sentenced Ms. Darabi to the mandatory punishment of death or *qisas-e-nafs*. Ms. Darabi was condemned without the possibility to obtain a State pardon or the commutation of her sentence. The *Qisas* law does not allow any discretion on the part of the judge to evaluate possible mitigating circumstances and to reduce the sentence. Mr. Sotoudeh was sentenced to 10 years of imprisonment. Both were also convicted of burglary and illicit relationship other than fornication and each received an additional sentence of seven months of imprisonment and 63 strokes of lashes.

14. Ms. Darabi filed an appeal before Branch 33 of the Supreme Court. On 4 September 2005, the Supreme Court ordered to refer the file back to the lower court for amendments because it had found an investigatory deficiency concerning the sedative pills provided to and consumed by Ms. Darabi during the murder. However, the Supreme Court had held that despite the noted deficiency, the lower court's verdict was essentially correct, which shows that the trial conducted by the lower court was the decisive trial. The Supreme Court failed to note that Ms. Darabi should have been tried in a juvenile court.

15. Judge Yari, who was replacing Judge Mohammadpour at Branch 10 of the Rasht General Court, failed to order the Forensic Organization to conduct an investigation on the sedative pills that Ms. Darabi had consumed the day of the incident, as ordered by the Supreme Court, and instead ordered that Ms. Darabi's file be sent to a juvenile court.

16. On 29 December 2005, a new trial took place before Judge Javidnia of Branch 107 of the Juvenile's Court of Rasht which again convicted Ms. Darabi of intentional murder and sentenced her to the mandatory penalty of death.

17. Following a second review, on 15 February 2007, the Supreme Court, despite numerous flaws attached to the verdicts of the lower court, confirmed Ms. Darabi's

qisas-e-nafs death sentence. The Supreme Court failed to note that the Forensic Organization had not carried out the investigation on the sedative pills it had previously ordered.

18. Mr. Sotoudeh changed his initial statement and accused Ms. Darabi of having attempted to kill him, too. He lodged a complaint against Ms. Darabi for having been stabbed by her. According to his statement, he had stood behind the victim and grabbed her while Ms. Darabi had stood behind him and repeatedly stabbed the victim from that position. Ms. Darabi instead declared that, when Mr. Sotoudeh was stabbing the victim, she tried to stop him.

19. On 25 February 2007, Ms. Darabi's lawyer filed an appeal with the 7th Branch of the Discernments Branch of the Supreme Court, which speedily reviewed the appeal in a few weeks. It confirmed the verdict merely on the basis of the judgments of the lower court. Ms. Darabi's lawyer's writs were not at all considered. Mr. Sotoudeh did not object to his 10-year sentence of imprisonment.

20. On 9 May 2007, Ms. Darabi's lawyer wrote to the Head of the Judiciary requesting a stay of execution as well as another review of the case. On 17 May 2007, Ms. Darabi's lashing sentences for illicit relations was confirmed by the Appeal Court and were thus enforceable.

21. According to the source, if the Head of the Judiciary rejects Ms. Darabi's appeal, she could be executed swiftly or at any time.

22. Since Ms. Darabi's incarceration at Rasht Prison, her physical and mental health has continuously deteriorated due to overcrowded and unsanitary conditions, poor quality of food, limited and restricted visitation rights and tensions amongst inmates.

23. The source points out that the International Covenant on Civil and Political Rights, to which the Islamic Republic of Iran is a State party, establishes that all defendants facing execution must receive a trial that conforms to the highest standards of fairness. The Human Rights Committee has expressed that capital punishment must not be imposed in circumstances where there have been violations by the State party of any of its obligations under the Covenant.

24. In addition, the Convention on the Rights of Child, to which the Islamic Republic of Iran is also a State party, explicitly prohibits the imposition of capital punishment for offences committed by persons below 18 years of age.

25. The source further points out that the *qisas* laws define intentional murder in very broad terms. A murder can be categorized as intentional even if the elements of premeditation and deliberate intention to kill are missing. In Ms. Darabi's case, the mere use of a knife was considered sufficient to call the murder "intentional". Ms. Darabi's guilt was established solely on the basis of her confession, which had not only been obtained under coercion, but also while she was clearly sedated. Neither her parents nor her defence lawyer were present when she confessed. Ms. Darabi's confession was clearly incredible and implausible and was admitted despite her recantation shortly thereafter. The coroner's report was clearly in contradiction with Ms. Darabi's confession regarding the position, depth and multiplicity of the stab wounds.

26. In addition, the Judge excluded Mr. Sotoudeh from any serious investigation, which, according to the source, cannot be explained by anything other than gender-bias.

27. The source further argues that by empowering the victim's heirs to exclusively implement or pardon a *qisas* death sentence, the authorities have been subjecting Ms. Darabi to unnecessary suffering amounting to torture. If the victim's family is rich and not in need of financial compensation, they may become more inclined to refuse pardon. In this case, the victim's children are known to be extremely wealthy.

28. Ms. Darabi was arrested on pure suspicion for the sole purpose of her interrogation. Once she was charged with intentional murder, the law sanctioned her mandatory pretrial detention. She had no recourse to challenge the lawfulness of her detention. Although no meaningful or relevant investigation had ever been conducted, it took 38 months for her judgment to receive the confirmation of the Supreme Court. Her criminal proceedings took an excessively long period of time. In spite of that, the crime scene and the murder weapon were never examined. Her first trial and the second session of her second trial were entirely closed to the public and even Ms. Darabi's parents were not allowed to enter the court room. Their appeals did not include a hearing.

29. Ms. Darabi was not able to gain access a defence lawyer during the preliminary investigation stage of the proceedings, which is often the time when guilt or innocence of the suspect is established. During this crucial stage of the proceedings, she was held incommunicado. The first session of Ms. Darabi's first trial took place without the presence of her lawyer despite Ms. Darabi's express objection. At later stages, her lawyer was denied access to any evidence that could potentially exonerate her. Her lawyer was neither given the possibility to examine the witnesses and experts at trial, nor Mr. Sotoudeh, Ms. Darabi's co-defendant, who by all accounts was the primary suspect. Her lawyer was not even provided with copies of any part of the case-file and only was allowed to take some notes from it.

30. The source further adds that Ms. Darabi's Judge of first instance was at the same time Investigator, Prosecutor and Judge. It was the same person who charged her, indicted and tried her. According to the source, by issuing a guilty verdict, judges guarantee their protection from any eventual prosecution for illegal arrest or detention.

31. The source concludes that Ms. Darabi was wrongfully, discriminatorily and extra-legally charged and convicted of intentional murder. She was sentenced to death in a mandatory and indiscriminate way. Ms. Darabi was denied the right to seek clemency or commutation of sentence from the State.

32. Ms. Darabi was arrested and is being held in detention arbitrarily and extra-legally. She was tried in disregard of objectivity, impartiality, fairness and due process guarantees. In addition, she has been subjected to further cruelty due to the manner that the *qisas* death sentences have been interpreted. According to the source, the detention of Ms. Darabi is thus contrary to articles 9 and 10 of the Universal Declaration of Human Rights; and to articles 6, 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights and 37 of the Convention on the Rights of the Child. The criminal proceedings against Ms. Darabi have been marked by numerous violations of the International Covenant from the moment of

her arrest and throughout her pretrial, actual trial and post-trial stages. Her death sentence is also in clear violation of the Convention on the Rights of the Child.

33. The Government states in its response that "[i]n the Islamic Republic of Iran, the penalty for premeditated murder has two aspects: 1. private, 2. public. Since, the first one is in relation with denial and spoil of the rights of guardians of the murder victim, it is given priority and is of high importance. In the judicial system of Muslim countries, including I.R. Iran, "*Qesas*" (lex talionis – retribution in kind) is the verdict for premeditated murder. For that purpose, enforcement of *Qesas* depends upon the request to be made by guardians of the murder victim; and the Government is solely delegated to carry out the verdict, on behalf of the former. The second aspect, which deals with denial and spoil of public rights, is the responsibility of the Government for establishment and protection of security in the society. For realization of this responsibility, the lawmaker has anticipated five to fifteen years of imprisonment. In case of disclamation of *Qesas* by guardians of the murder victim, through remission or payment of *Diyeh* (blood money) to guardians of the murder victim by the convicted party, imprisonment, penalty shall be imposed. In other words, disclamation, on the side of guardians of the murder victim, puts an end to *Qesas*, but the penalty of imprisonment, still remains as the duty of Government. So, sentence of *Qesas* is not open to pardon or amnesty by the state, in absence of consent from guardians of the murder victim. Meanwhile, the Government of the Islamic Republic of Iran strives to apply mechanisms, such as provision of financial assistance to the guardians, which might result in receiving the required consent from them."

34. The Government further states that "Ms. Delara Darabi was sued on the basis of the complaint filed by guardians of the murder victim with the charge of premeditated murder. Following judicial procedures and investigations, at the presence of her lawyer, the court of first instance, ascertained her guilt and sentenced her to *Qesas*. Pursuant to appeal by the convict and her lawyer, Branch 33 of the State Supreme Court confirmed the earlier issued verdict. The state judicial system has been trying for resolution of the dispute through conciliation. Therefore, the case is in the conciliation procedure and enforcement of death penalty is not in the programme of work."

35. The Government finally informs "that since the case is one of murder under the age of 18, the pertinent authorities have been exerting their utmost effort to decrease carrying out verdicts to a level close to stop, with the hope of ultimate conciliation."

36. The Working Group has reviewed in depth the information received from the Government and the source. Ms. Darabi, who was 17 when the events occurred, has been sentenced to death for premeditated murder. Article 6, paragraph 2, of the International Covenant on Civil and political Rights, which was ratified by the Islamic Republic of Iran on 24 June 1975, stipulates that "in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

37. Similarly, its article 6, paragraph 4, states that “anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases”, and article 6, paragraph 5, establishes that “sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”.

38. The Government, which acknowledges in its response that Ms. Darabi committed the murder for which she has been condemned when she was under the age of 18, does not make any mention or include any reference to article 6, paragraph 5, of the International Covenant on Civil and Political Rights. Nor does the Government dispute the fact that she was not given the right to seek pardon or commutation of sentence in violation of article 6, paragraph 4, of the Covenant. The fact that the Government seeks conciliation with the victim’s family in order to avoid the execution of the mentioned death penalty according to internal law, does not exempt the State from its obligations to respect article 6 of the Covenant.

39. The source describes extensively in its communication transmitted to the Working Group a set of violations regarding due process, as protected by article 14 of the ICCPR. The source considers that Ms. Darabi: (a) was not duly informed of the charges against her at the time of her arrest and incommunicado detention or of her right to remain silent; (b) was not assisted by her family during her interrogation despite her age; (c) did not benefit from the assistance of a lawyer during the proceedings leading to the first trial; (d) the conduct of the defence at a later stage of the proceedings was impaired; and (e) she was tried in closed court during her first trial and the second session of her second trial without her parents present.

40. Ms. Darabi was not tried by a competent, independent and impartial court since the Judge of first instance was at the same time Investigator, Prosecutor and Judge, that is to say that it was the same person who charged her, indicted and tried her. The first session of the first trial took place in the absence of Ms. Darabi’s lawyer although she had expressly requested the suspension of that trial. Her lawyer was not granted direct access to the evidence presented by the State in support of the charges against her. The court of her first appeal found an investigatory deficiency attached to the first trial since no forensic investigation had been duly carried out. Although there was an attempt to conduct the investigation afterwards as ordered by the Supreme Court, the lower courts subsequently failed to obtain information on the possible psychic alterations of Ms. Darabi at the time of the crime. Hence, her sentence was essentially based on Ms. Darabi’s self-inculpation, when she confessed right after her arrest in the absence of her family and her lawyer, although Ms. Darabi later revoked her initial confession once she had a lawyer.

41. The Working Group notes that the Government has not refuted the serious irregularities of the proceedings as alleged by the source, which in view of the additional infringements of the guarantees afforded by article 6 of the International Covenant on Civil and Political Rights amount to violations of the right to fair trial of such gravity as to confer upon Ms. Darabi’s detention an arbitrary character.

42. The Working Group recalls that in its 2003 report on the country visit to the Islamic Republic of Iran,[25] it already elaborated on the lack of independent courts due to an unclear allocation of powers between judges who initiate proceedings and trial judges. In this report, the Working Group also expressed concern regarding the absence of an effective defence since those accused cannot rely on the assistance of lawyers during the proceedings, who most of the times do not have the chance to obtain access to the evidence which form the basis of the charges against the accused. The report recommended to the Government to guarantee due process rights from the very moment of the detention.

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

> The deprivation of liberty of Ms. Darabi is arbitrary, as being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

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

Adopted on 7 May 2008

OPINION No. 5/2008 (Syrian Arab Republic)

Communication addressed to the Government on 11 October 2007.

Concerning Mr. Anwar al-Bunni, Mr. Michel Kilo, and Mr. Mahmoud `Issa.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the cases of Mr. Anwar al-Bunni, Mr. Michel Kilo and Mr. Mahmoud ‘Issa.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

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. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:

[25] E/CN.4/2004/3/Add.2.

(a) Mr. Anwar al-Bunni, a human rights lawyer, and Head of the Syrian Centre for Legal Studies and Research, was appointed to head a human rights centre in Damascus funded by the European Union, which was, however, closed down by the authorities shortly after it had opened in March 2006. For many years, he has spoken out against human rights abuses. He has been subjected to various forms of harassment, including being physically ejected from the Supreme State Security Court (SSSC) by June 2002 for having requested an investigation into the alleged torture of his client, Mr. 'Aref Dalilah (whose detention was declared arbitrary by the Working Group in its Opinion 11/2002 (Syrian Arab Republic)). He has also faced disciplinary measures from the Damascus Bar Association, and has been prevented from travelling abroad. On 24 April 2007, Mr. Al-Bunni was sentenced to five years of imprisonment on the charge of "spreading false information harmful to the State" (article 286 of the Syrian Penal Code). He is imprisoned at 'Adra prison near Damascus.

(b) Mr. Michel Kilo, a writer and a journalist, was previously detained for two years and a half from 1980 until 1982. As a writer, he is well respected for his political analyses and humanist approach. He has written several articles for a range of Arab newspapers, including *An-Nahar*, *Al-Hayat*, *As-Safir*, *Al-Khaleej* and *Al Quds Al Arabi*. He was arrested on 14 May 2006 and charged on 17 May 2006. On 13 May 2007, he was sentenced to three years in jail on the charge of "weakening nationalist sentiments at times of war" (article 285 of the Penal Code) and also under the charge of "inciting sectarian strife" (article 307 of the Penal Code). He is imprisoned at 'Adra prison near Damascus.

(c) Mr. Mahmoud 'Issa, an English language teacher and translator, was previously detained between 1992 and 2000 for membership in the unauthorized Communist Labor Party. He was arrested in May 2006 and released on bail on 25 September of the same year. Re-arrested on 23 October 2006, he was sentenced on 13 May 2007 to three years in jail on the charge of "weakening nationalist sentiments at times of war" (article 285 of the Penal Code). He is imprisoned at 'Adra prison near Damascus.

7. According to the source, the three above-mentioned persons were arrested by officers of State Security services over their involvement in the "Beirut-Damascus Declaration", a petition signed by some 300 Syrian and Lebanese nationals calling for the normalization of relations between their two countries. In response to this Declaration, a wave of arrests of human rights defenders and civil society activists occurred. Initially, 10 signatories were arrested, but 4 of them, Mr. Nidal Darwish, Mr. Mahmoud Mer'i, Mr. Safwan Tayfour and Mr. Ghaleb 'Amr were released on bail on 17 July 2006, and Mr. Muhammas Mahfouz was released on bail on 25 September 2006. The charges against these five individuals appear to have been dropped. Another two co-signatories, Mr. Khalil Hussein and Mr. Suleiman Shummar, were also released on bail on 25 September 2006. They were also sentenced, in absentia, on 13 May 2007, by the Damascus Criminal Court to 10 years of imprisonment on charges of "weakening nationalist sentiments" (article 285 of the Penal Code) and "exposing Syria to hostile acts" (article 278 of the Penal Code).

8. The source considers that the three above-mentioned persons were sentenced following unfair trials. It alleges that procedures before the Damascus Criminal Court violate the right to a fair trial. The judges of the Court are widely perceived

not to be independent and subjected to strong influence from the executive and from the security services. Defendants have restricted access to their lawyers in pretrial detention and during trials. Reports of torture and ill-treatment are almost never investigated by the Court, including when defendants claim that confessions they made had been extracted under duress.

9. The charges themselves pursuant to which these three men were sentenced were vaguely worded and widely interpreted. In addition, scant information, if any, was presented to the Court to substantiate the charges. The conviction of Mr. Al-Bunni appears to be related to a statement he had made in April 2006 concerning the death in custody, apparently as a result of ill-treatment possibly amounting to torture, of Mr. Muhammad Shaher Haysa. No evidence was presented to the Court to substantiate the charge that, by disclosing the death of this person in custody, Mr. Al-Bunni had spread information "harmful to the State". No information was provided, either, to contest the allegation that the deceased had died as result of ill-treatment or torture. As for Mr. Kilo and Mr. 'Issa, no evidence was presented to the Court to substantiate the charges against them, especially concerning the charge "weakening nationalist sentiments in times of war" (article 285 of the Penal Code).

10. The three above-mentioned persons denied all charges. They were held in incommunicado detention during the initial phase of their detention and for more than two months. Their access to legal counsel and defence was restricted, being routinely violated due to the constant presence of security officials during the meetings with their lawyers.

11. At 'Adra prison, the three above-mentioned persons were imprisoned in cells with convicted common criminals. Mr. Al-Bunni and Mr. Kilo were not provided with adequate bedding or beds. On 29 August 2006, Mr. Kilo was prohibited from attending his mother's funeral, in contrast to established practice in Syria. On 12 August 2007, a security officer at 'Adra central prison confiscated all of Mr. Al-Bunni's belongings and threatened to put him in solitary confinement.

12. The source adds that Mr. Al-Bunni, Mr. Kilo and Mr. 'Issa were subjected to ill-treatment during pretrial detention. Mr. Al-Bunni was physically abused. On 31 December 2006, he was assaulted by a criminal detainee who pushed him down some stairs and then beat him on the head in the presence of prison guards, who failed to intervene. On 25 January 2007, prison guards severely beat Mr. Al-Bunni, made him crawl on all fours and forcible shaved his head. In spite of the fact that these acts of ill-treatment were denounced, they were neither investigated by the Damascus Criminal Court nor by the prison authorities.

13. In conclusion, the source considers that the above-mentioned persons have been detained and are held in detention solely for their peaceful expression of their conscientiously held beliefs.

14. In its response the Government provides the following information: Mr. Michel Kilo and Mr. Mahmoud 'Issa were arrested for spreading unrest, advocating sectarian strife and creating mayhem, which are all offences under Syrian law. They were referred to the Chief Public Prosecutor in Damascus on 17 May 2005 for prosecution in accordance with the law. This means that the detention of the two aforementioned persons had nothing to do with freedom of expression or opinion. Furthermore, the exercise of freedom of opinion and

expression in Syria is assured and safeguarded by the Permanent Constitution of the Syrian Arab Republic of 1973. The Government further confirms that their detention was not arbitrary and their full rights were protected at their trial, which was conducted in accordance with the laws and regulations in force in Syria.

15. With regard to Mr. Anwar Al-Bunni, the Government states that he established a civil society training centre and employed a group of Syrian employees without first obtaining proper authorization from the authorities. These acts are punishable by law, pursuant to article 263 of the Syrian Criminal Code, as they constitute a breach of Syrian law and regulations.

16. The Government adds that Mr. Al-Bunni broke the law by turning a rented home into an institute, in violation of the laws and regulations applicable in Syria, which consider this as change of use of a home for which authorization must be obtained from the relevant authorities, subject to a penalty of eviction, in conformity with article 8 (b) of the Syrian Rentals Act No. 6.

17. With regard to public access to the Internet, any citizen can play a positive and significant role in the dissemination and advocacy of the rule of law, provided that he does not incite others to commit unlawful acts. Mr. Al-Bunni participated in the dissemination of a statement via the Internet that tarnished the good name of the State at home and abroad and incited others to endorse and sign the statement. This is punishable under articles 286 and 287 of the Syrian Criminal Code.

18. Mr. Al-Bunni received support from foreign governments and entities without obtaining official permission to do so. This is punishable under article 264 of the Syrian Criminal Code. Mr. Al-Bunni's detention is not arbitrary and was not due to the exercise of freedom of opinion, but rather to flagrant violations of Syrian laws. He was tried in accordance with Syrian law.

19. The Government concludes by expressing its hopes that its replies are sufficient to answer the requests for clarification; by reiterating its commitment to ensuring that all the rights of its citizens, both individuals and the society as a whole, since these rights are guaranteed by the Syrian Constitution, and by stating that Syria abides by all the treaties and covenants to which it is a party, including the International Covenant on Civil and Political Rights.

20. In its comments to the observations of Government, the source provides the following information: With regard to the Syrian authorities' comments on Mr. Michel Kilo and Mr. Mahmoud 'Issa, no information was presented to the court to substantiate how the petition they had signed might in any way spread unrest, advocate sectarian strife or create mayhem. As is often the case in trials of advocates of peaceful reform in Syria, the charges themselves under which these two men were sentenced are vaguely worded and widely interpreted and appear to relate solely to their peaceful expression of opinions that differ from those of the authorities.

21. With regard to Mr. Anwar al-Bunni, the information from the Syrian authorities refers to a number of laws that it claims Mr. Al-Bunni broke (articles 263, 264, 286 and 287 of the Syrian Penal Code and article 8 (b) of the Syrian Rentals Act No. 6) while according to source's information, he was found guilty of only one of them, namely article 286, "spreading false information harmful

to the State". The source states that it will therefore comment only on the information that relates to the actual charge Mr. Anwar al-Bunni was convicted of.

22. The conviction of Mr. Al-Bunni was based not on any role relating to the "Beirut-Damascus Declaration", but rather on a statement he made in April 2006 concerning the death in custody, apparently as a result of ill-treatment possibly amounting to torture, of Mr. Muhammad Shaher Haysa. The source asserts that no evidence was presented to the court to substantiate the charge that, by disclosing Mr. Muhammad Shaher Haysa's death in custody, Mr. Al-Bunni had spread information "harmful to the State". No information to contest the allegation that the deceased had died as a result of ill-treatment possibly amounting to torture was provided, either.

23. The source puts forward that article 286 of the Penal Code is vaguely worded and continues to be interpreted extremely broad by the authorities and is a common charge against advocates of reform.

24. In the light of the foregoing, the Working Group considers that the information provided by the Government concerning Mr. Anwar al-Bunni, Mr. Michel Kilo and Mr. Mahmoud 'Issa is not sufficient to answer its requests for clarification and to rebut all allegations provided by the source.

25. As far as the case of Mr. Anwar al-Bunni is concerned, the Working Group firstly notes discrepancies with respect to the factual information provided by the source and the Government as to whether he was a co-signatory of the "Beirut-Damascus Declaration" or in any other way involved in its publication. However, in view of the response of the Government and the source's comments on it, it is established that he was not. This leaves the Working Group with two sets of charges for which Mr. Al-Bunni has been convicted and is currently serving a five years term of imprisonment.

26. It transpires from the information provided by the Government that the first set relates to the establishment of a human rights centre in Damascus, funded by the European Union, Mr. Al-Bunni's appointment as head of this centre and the subsequent closure of this centre by the authorities. The charges laid against him provide clear indication to that effect, since Mr. Al-Bunni was convicted for the establishment of a civil society training centre without prior authorization in terms of article 263 of the Penal Code; and for the acceptance of (financial) support from foreign Governments and entities without permission pursuant to article 264 of the Penal Code (the transformation of a private dwelling into an institute in violation of Section 8 (b) of the Rentals Act No. 6 apparently does not carry any criminal penalty).

27. Such activities, however, fall squarely within the ambit of the right to freedom of opinion and expression of conscientiously held beliefs as a human rights defender under article 19 of the International Covenant on Civil and Political Rights. In view of a lack of information provided by the Government on the actual wording or contents of the invoked articles of the Penal Code for the sentencing of Mr. Al-Bunni and especially a justification as to why criminal punishment for the these acts was necessary under all circumstances in terms of article 19, paragraph 3, of the Covenant, the Working Group can only conclude that Mr. Al-Bunni's detention is arbitrary pursuant to Category II. The Working Group has in the past already expressed its concern with vaguely worded criminal provisions in the Penal

Code, which unjustifiably violate the right to freedom of opinion and expression and declared detention as a result of the exercise of this right invoking such criminal provisions to be arbitrary in terms of Category II.[26]

28. Similarly, the denouncement of the death in custody of a detainee, possibly as a result of torture or other forms of ill-treatment, in a statement on the Internet, might be unwelcome by the Government. However, such action by Mr. Al-Bunni is nonetheless clearly protected by the said right to freedom of expression. The Government has failed to address the question almost in its entirety, albeit prompted by the information of the source transmitted to it. The Government did not provide information on the crucial and serious question as to whether the statement was true or false. It did not give an account of why and in what way such actions must be criminally punished in terms of articles 286 of the Penal Code as "spreading false information harmful to the State", especially in what way the making of such statement could "incite others to commit unlawful acts", as put forward by the Government. Since the Government further omitted to elaborate on article 287 of the Penal Code, which was allegedly also violated, the Working Group is lead to conclude that Mr. Al-Bunni acted in full conformity with article 19 of the International Covenant on Civil and Political Rights.

29. Turning to the case of Mr. Michel Kilo and Mr. Mahmoud 'Issa, the Working Group considers it as proven that they were merely peacefully exercising their right to freedom of expression when calling for a normalization between two countries in the "Beirut-Damascus Declaration". The Working Group fails to comprehend how such actions by citizens of both the Syrian Arab Republic and the Republic of Lebanon can "weaken national sentiments" in Syria and in the case of Mr. Kilo, can "incite to sectarian strife". The Working Group recalls that the holding and expression of all opinions, including those which are not in line with official government policy, are protected by article 19 of the International Covenant on Civil and Political Rights.

30. What remains are the allegations that Mr. Al-Bunni, Mr. Michel Kilo and Mr. Mahmoud 'Issa did not receive a fair trial. The source did not only express its concerns about the lack of independence of the judges of the Damascus Court, the restricted access to lawyers while in detention or the unwillingness of the Court to investigate into allegations of confessions obtained under duress, but also individualized their allegations: They were held incommunicado for more than two months. Their access to legal counsel and defence was restricted, and when it was granted, security officials were constantly present. The source further substantiated allegations of ill-treatment of Mr. Al-Bunni by prison guards directly or with their consent while in pretrial detention. The Government did not substantially comment on the above. The Working Group, therefore, considers that the Mr. Al-Bunni, Mr. Kilo, and Mr. 'Issa did not enjoy due process and were sentenced following trials falling far short of international standards of fair trial, rendering their detention arbitrary pursuant to Category III.

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[26] Opinion No. 7/2005 (Syrian Arab Republic), E/CN.4/2006/7/Add.1, page 31.

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

> The deprivation of liberty of Mr. Anwar al-Bunni, Mr. Michel Kilo and Mr. Mahmoud 'Issa is arbitrary, being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights and falls under categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

32. Consequent upon the Opinion rendered, the Working Group requests the Government of the Syrian Arab Republic to take necessary steps to bring their situation 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 8 May 2008

OPINION No. 6/2008 (Saudi Arabia)

Communication addressed to the Government on 26 June 2007.

Concerning Mr. Abdul Rahman b. Abdelaziz al Sudays.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto as well as the observations by the source.

5. According to the source, Mr. Abdul Rahman b. Abdelaziz al Sudays, (hereinafter Mr. Al Sudays), aged 47, married, Professor at Umm Al-Qura University at Mecca, was arrested on 16 May 2003 at his home in Jeddah by agents of the Security Services who neither informed him of the reasons for his arrest, nor produced an arrest warrant. His home was searched without a search warrant. Mr. Al Sudays was taken to a detention centre in Jeddah depending on the Ministry of the Interior, where he was allegedly tortured.

6. His family was not informed of Mr. Al Sudays's place of detention until several weeks after his arrest. It was not authorized to visit him or to appoint a defence lawyer on his behalf.

7. The source points out that more than four years after his arrest, Mr. Al Sudays does not know whether there has been any course of action taken in his case, or whether he has been formally charged with any offence and, if so, with which.

8. According to the source, Mr. Al Sudays does not have access to a procedure to challenge the legality of his detention before a judicial authority. Notwithstanding his repeated requests to that effect, he has not been granted access to legal counsel.

9. The source alleges that since his arrest on 16 May 2003, Mr. Al Sudays has been detained without any legal basis. Article 2 of Royal Decree No. M.39 on the conduct of criminal proceedings provides that all detention must take place pursuant to legal norms and that the competent authority must establish the duration of detention. In Mr. Al Sudays's case, from the moment of his arrest until present, no legal procedure has been followed and no legal basis for his detention is discernible.

10. Article 2 of Royal Decree No.° M.39 also establishes that an arrested person shall not be subjected to any bodily or moral harm. No one shall be subjected to any form of torture or degrading treatment. Its article 4 establishes that any accused person shall have the right to seek the assistance of a lawyer or a representative to defend him during the investigation and trial stages.

11. The source further argues that Mr. Al Sudays has been completely deprived of the right to challenge the legality of his detention. Should Mr. Al Sudays have been accused of a criminal offence, during the more than four years since his arrest, he has not been informed of the charges against him. The authorities do not appear intending him to grant a "fair and public hearing by an independent and impartial tribunal, in the determination […] of any criminal charge against him" as required by article 10 of the Universal Declaration of Human Rights.

12. In its reply, the Government states that Mr. Al Sudays was arrested in the region of Mecca, together with members of his cell, in connection with a security case in that region. He was permitted to appoint a lawyer and to receive visits from his family.

13. The Government notes that following a fair and independent trial, Mr. Al Sudays was convicted of the charges brought against him and was sentenced to a term of ten years' imprisonment from the date of his arrest. He was also convicted on a charge of possessing weapons, in respect of which he was sentenced to the maximum penalty provided for in the Firearms Regulations, namely 30 years of imprisonment. His total sentence therefore amounted to 40 years of imprisonment. The Government considered it noteworthy that he is enjoying all his legally guaranteed rights. Finally, it wishes to reaffirm its willingness to cooperate with the Working Group by providing requisite information on such cases, while, at the same time, trusting that the Working Group understands the high priority that the Government must currently accord to the campaign against terrorism.

14. In its observations to the reply of Government, the source confirms that Mr. Al Sudays received two separate and consecutive sentences of 10 and 30 years of imprisonment, respectively, following an expedited trial behind closed doors in the office of the judge. It reaffirms that Mr. Al Sudays did not have access to a lawyer during the whole proceedings, and that he could not even properly prepare his defence on his own, since he has never been provided with the opportunity to learn about the charges against him or to access his criminal files.

15. The source further notes that the Government does not contest the following: (a) that Mr. Al Sudays was arrested without warrant by agents of the Security Services, was not given the reasons for his arrest, and that his home was searched

without a warrant; (b) that he was secretly detained at a detention centre of the Security Services, where he was subjected to ill-treatment during several weeks; (c) that he remained in detention for more than two years without charge, without access to judicial proceedings, and without having been brought before a judicial authority to be formally charged; and (d) that no legal procedure was put at his disposal in order to enable him to challenge the legality of his detention.

16. The source also points out that the Government does not indicate in its response when Mr. Al Sudays was presented to a judge for the first time. It argues that Mr. Al Sudays was sentenced to two separate terms of imprisonment on the basis of the same facts, in violation of the principle of *ne bis in idem*.

17. The Working Group welcomes the cooperation of the Government. However, it believes that the silence of the Government concerning the source's assertions regarding Mr. Al Sudays's long term detention of more than four years by the Security Services, without warrant, and his secret detention without charge, cannot be just and plausible. In this regard, equitable justice implies that there is authentic proof of accusation and legal argumentation for conviction, whereas the response of the Government does not show this judicial logic well.

18. Despite having been invited to do so, considering the allegations of the source, the Government merely cited broad terrorism-related charges against Mr. Al Sudays without specifying exactly the crime for which he was sentenced to 10 years of imprisonment. This omission confers credibility on the consistent assertion of the source that Mr. Al Sudays has not had the opportunity to learn about the charges brought against him, and further that he was not given the possibility to appoint a lawyer to act in his defence or at least to study his criminal files. It would thus appear that Mr. Al Sudays was not able to defend himself properly against charges, which remain vague, albeit serious since they carry long prison terms.

19. Moreover, in variance of the detailed allegations by the source that Mr. Al Sudays has suffered from further procedural irregularities, such as being arrested without warrant or reasons given; subsequent incommunicado detention for several weeks, and without being provided a chance to challenge the legality of his detention before a judicial authority within a period of time as required by international human rights law, the Government merely maintains that Mr. Al Sudays trial was fair and independent and that he enjoyed all legally guaranteed rights. The Working Group has not benefited from a more detailed account by the Government of how the trial was conducted; it has especially not been dealt with whether Mr. Al Sudays was tried in camera rather than in open court, as submitted by the source.

20. The Working Group concludes that all these contraventions of the right to fair trial as guaranteed by article 10 of the Universal Declaration of Human Rights (and also of national laws of Saudi Arabia) are of such gravity as to confer upon the continued detention of Mr. Al Sudays an arbitrary character.

21. The Working Group recalls that the fight against terrorist threats cannot justify undermining due process rights afforded to all accused and corresponding international human rights obligations of the State concerned.

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

> The deprivation of liberty of Mr. Abdul Rahman b. Abdelaziz al Sudays is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and falling into category III of the categories applicable to the cases submitted for consideration of the Working Group.

23. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Abdul Rahman b. Abdelaziz al Sudays, in order to bring it in line with the standards and principles set forth in the Universal Declaration of Human Rights. The Working Group invites the Government to consider becoming a State party to the International Covenant on Civil and Political Rights, as soon as is practicable.

Adopted on 8 May 2008

OPINION No. 7/2008 (Myanmar)

Communication addressed to the Government on 10 May 2007.

Concerning Mr. Ko Than Htun and Mr. Ko Tin Htay.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. The cases were reported to the Working Group as follows: Mr. Ko Than Htun is a citizen of Myanmar, resident of Nyaungdone, in the delta region west of Rangoon. On the night of 20 March 2007, a group of police officers and local officials came to his house. They searched the premises and found a parcel containing videos and other items. The videos contained footage of the wedding of the daughter of Senior General Than Shwe, the Chairman of the State Peace and Development Council and commander-in-chief of the Myanmar armed forces. The video had been edited to contrast the, according to the source, “opulent lifestyle of the military elite” with images of poverty among other parts of the population, such as begging children. Different versions of the wedding video have reportedly been widely distributed throughout Myanmar.

6. The following day the police returned to Mr. Ko Than Htun’s home and confiscated all the CDs on the ground that they did not comply with censorship regulations. Mr. Ko Than Htun was taken to the police station and charged with possessing illegal videos. He successfully applied for bail and was allowed to return home. During the evening of the same day the police returned to his home, searched it again and took Mr. Ko Than Htun into custody, again only for a few hours. In the morning of 22 March 2007, however, the police came a third time and again took

Mr. Ko Than Htun to the police station. This time he remained in detention and was charged with violation of the video censorship regulation.

7. Mr. Ko Tin Htay is a citizen of Myanmar. He is the former chairman of the Democratic Party for a New Society, which supported the National League for Democracy in the 1990 general elections. On 22 May 2007, around noon, a police deputy superintendent entered the house of Mr. Ko Tin Htay and searched it for videos. The police officer did not show a search warrant. He stated that the search was carried out on the basis of information obtained in the case of Mr. Ko Than Htun. The police viewed all the CDs found in Mr. Ko Tin Htay's house, which turned out to be all karaoke CDs. In the afternoon Mr. Ko Tin Htay was called to the police station. There the police accused him of being involved in politics and, in violation of criminal procedure law, took down a signed statement from him. He was taken into custody and charged with violation of the video censorship regulation. His application for bail was refused.

8. On 23 March 2007 the local council, which is a local government body, but also has the authority to give orders concerning criminal cases, met and decided that Mr. Ko Than Htun and Mr. Ko Tin Htay should be charged with seeking to incite unrest under the penal code. The local council requested the local police chief to take the case to court.

9. The first hearing was held on 29 March 2007. The statement obtained from Mr. Ko Tin Htay at the police station on 22 March 2007 was used as evidence against him. The prosecution also produced a photograph of General Aung San, the leader of the independence struggle of Myanmar and father of Daw Aung San Suu Kyi, to show that Mr. Ko Tin Htay is politically active.

10. Hearings continued on 6, 9 and 10 April. The defendants' lawyers applied for bail, which was not granted as inciting fear among the public is a non-bailable offence.

11. On 25 April 2007, Mr. Ko Than Htun and Mr. Ko Tin Htay were found guilty of inciting public fear and of violations of video censorship regulations. Mr. Ko Than Htun was sentenced to four and a half years of imprisonment, Mr. Tin Htay to two years imprisonment, both with hard labour.

12. The source alleges that Mr. Ko Than Htun and Mr. Ko Tin Htay have been sentenced to terms of two and four-and-a-half years of imprisonment respectively for possessing videos showing the wedding of the daughter of the government leader. These videos did have a political message, as they denounced the allegedly "opulent lifestyle of the military elite" by comparing it to the poverty of other parts of the population. The videos cannot, however, be said to have in any way incited violent unrest or intended to "incite public fear". The conviction and detention of Mr. Ko Than Htun and Mr. Ko Tin Htay is therefore – according to the source – in retaliation for the peaceful exercise of their right to freedom of expression (protected by article 19 of the Universal Declaration of Human Rights), which includes the "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

13. In its reply, the Government informs that: On 20 March 2007 at 10.30 p.m., the police officials entered and searched Mr. Ko Than Htun's house and discovered a DVD whose contents aim to discredit the Government based on the wedding and

seized the said DVD; the police officials searched again Mr. Ko Than Htun's house on 21 March 2007 at 10.30 p.m. and discovered VCDs and videos which have been produced without license and they were seized accordingly.

14. The Governments indicates that according to the statement made by Mr. Ko Than Htun, the police officials entered and searched Mr. Ko Tin Htay's house on 22 March 2007 at 10:30 p.m. and found several VCDs. While the police tried to check these VCDs with the VCD player, he destroyed one of them, which was presumed to contain a film to discredit and impair the dignity of the Government. Therefore the police officers seized the VCD before the witnesses.

15. It was also indicated by the Government that the searches at Mr. Ko Than Htun's and Mr. Ko Tin Htay's houses by police officials were authorized by search warrants issued by the authorities concerned and also accompanied by witnesses. Thereafter, the authorities concerned filed the cases against Mr. Ko Than Htun and Mr. Ko Tin Htay with the Nyaungdone Township Court under sections 32 (b) and 36 of the Television and Video Law and section 505 (b) of the Penal Code.

16. On 25 April 2007, after hearing the witnesses and the defendants, the Court sentenced Mr. Ko Than Htun to two years of imprisonment under section 32 (b), six months of imprisonment under section 36 of Television and Video Law and two years of imprisonment under section 505 (b) of the Penal Code. The Court also sentenced Mr. Ko Tin Htay to two years of imprisonment under section 505 (b) of the Penal Code. The Government acknowledges that the advocates of Mr. Ko Than Htun and Mr. Ko Tin Htay lodged appeals with the Maubin District Court on 1 June 2007 and that these applications have been rejected.

17. The Working Group observes that it has been confirmed both by the source and by the Government that Mr. Ko Than Htun and Mr. Ko Tin Htay were arrested because of the possession of DVDs and VCDs which were considered as intending to discredit the Government and that they have been sentenced on the basis of these facts in applying provisions of the Penal Code of Myanmar and of the Television and Video Law.

18. The Working Group considers, that although the publication and distribution of discrediting or uncomforting film footage of this type might turn out to be disagreeable to the Government, the peaceful exercise of the right to freedom of opinion and expression of ideas is protected by human rights norms of international law, namely article 19 of the Universal Declaration of Human Rights. This right does not only guarantee the unimpeded dissemination of ideas and opinions by any means of communication, which will be favourably received or considered unobjectionable by the Government concerned, but also of opinions and ideas that criticize, challenge, or even upset public figures, especially when put in a political context.

19. The Government has argued that, because the film is presumed to discredit and impair the dignity of the Government, Mr. Ko Than Htun and Mr. Ko Tin Htay were criminally punished for seeking to incite unrest by disseminating it. In the view of the Working Group, it is difficult to understand how the peaceful exercise of the right afforded by article 19 of the Universal Declaration of Human Rights could at all induce or provoke violence, which could be attributed to them, or how such conduct could amount to a criminal offence.

20. The Government has not argued that the unauthorized distribution of footage showing the daughter of a senior Government member during her wedding violates her right to privacy or that of other persons featured in picture. The Working Group holds the view that there is no indication that the competing right to privacy is capable of limiting the non-violent exercise of the right afforded by article 19 of the Universal Declaration of Human Rights in the present case, given that the publication of the video by Mr. Ko Than Htun and Mr. Ko Tin Htay contained a political statement by contrasting the life style of a family member of Senior General Than Shwe with images of poverty prevailing in the country.

21. For all these reasons, the Working Group renders the following Opinion:

> The deprivation of liberty of Mr. Ko Than Htun and Mr. Ko Tin Htay is arbitrary, being in contravention of article 19 of the Universal Declaration of Human Rights, and falls within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

22. The Working Group, having rendered this Opinion, requests the Government to take the necessary steps to rectify the situation, in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights, and encourages the Government to take the necessary measures to accede to the International Covenant on Civil and Political Rights.

Adopted on 8 May 2008

OPINION No. 8/2008 (Colombia)

Communication addressed to the Government on 5 October 2007.

Concerning Mr. Frank Yair Estrada Marin, Mr. Carlos Andrés Giraldo Hincapié and Mr. Alejandro de Jesús González Duque.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group expresses its appreciation to the Government for having provided the requested information in a timely manner.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. In the light of the claims made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments. 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. According to the information received, Mr. Frank Yair Estrada Marín was arrested in May 2007 by members of the army, who took him to a barracks for the purpose of conducting medical examinations to determine his fitness for military service. Immediately following those examinations, he was forcibly enrolled into military service despite his express assertion that he was a conscientious objector and was opposed to wearing military uniform and to fighting alongside the armed forces or any other party to a conflict. He is currently serving in the Pedro Justo Berrio Battalion.

6. Mr. Carlos Andrés Giraldo Hincapié was arrested in August 2006 and forcibly recruited into the army. No heed was paid to his assertion that he was a conscientious objector and he was obliged to take part in military action in Puerto Cayumba, including counter-guerrilla operations. He is stationed at the Casabe military base, which is attached to the No. 7 Plan Energético y Vial Battalion of Barrancabermeja.

7. Mr. Alejandro de Jesús González Duque was arrested on 8 April 2007 when on his way to the city of Medellín. Soldiers from the Puerto Erró Battalion made him get out of the vehicle in which he was travelling and asked him to show his military service certificate. Mr. González Duque explained to them that he did not possess such a document since his military status would shortly be determined, in December 2007, when the army called up young men completing their secondary-school studies. However, he was apprehended, taken to the Pedro Justo Berrio Battalion and forcibly recruited, being obliged to abandon his employment and studies.

8. In its response of 26 February 2008, the Government stated that Mr. Frank Yair Estrada Marín commenced his enrolment process with Military District No. 24 as a member of the fourth enlistment quota for 2007. He was called to the recruitment rally on 7 May 2007. On undergoing the standard examinations, he was found to be fit for military service and was accordingly enrolled into the Pedro Justo Berrio No. 32 Infantry Battalion of the National Army. Before joining that Battalion, Mr. Estrada Marín voluntarily signed a document of commitment, in which he declared under oath that he did not qualify for exemption from military service on any of the grounds provided for in article 28 of Law No. 48 of 1993, which regulates the recruitment and mobilization of Colombian citizens. With regard to Mr. Estrada's assertion that he was a conscientious objector, the Directorate for Recruitment and Control of Reserves of the National Army points out that it is constitutionally impossible to apply that concept since such status is not formally established within Colombia's legal system.

9. The Government adds that the Constitutional Court of Colombia, in its rulings T-409 of 8 June 1992 and C-511 of 16 November 1994, stated that the obligation to perform military service was based on the premise that collective interests took precedence over individual interests. Conscientious objection cannot be invoked unless it is expressly established within the legal system. In other words, since the possibility of its application is not provided for in law and the circumstances under which it has to be recognized are not laid down in current legislation, the authorities cannot acknowledge or apply it. To do so would be to exceed their powers and would constitute a clear breach of the principle of equality, in addition to causing uncertainty among the population.

10. The Government affirms that the call-up for compulsory military service of males has as its basis the constitutional principle whereby the general interest prevails over private interests and is lawfully established by Law No. 48 of 1993 and Regulatory Decree No. 2048 of 1993. This principle is in turn linked to two constitutional precepts relating to the commitment of all men to effectively defend their native land and, in the area of rights, to the application of the principle of equality of civic duty.

11. With reference to Mr. Alejandro de Jesús González Duque, the Government denies that he commenced his military service on 18 April 2007. He was found to

have been called by Military District No. 26 to the secondary-school graduate recruitment rally held on 4 December 2007; thus the formalities provided for in Law No. 48 of 1993 for the purpose of defining his military status began recently.

12. With reference to Mr. Carlos Andrés Giraldo Hincapié, the Government states that the Directorate for Recruitment and Control of Reserves of the National Army has found no records relating to him.

13. The Government concludes, in the light of the foregoing facts and the information provided, that the Working Group may declare that the above-mentioned young men are not subjected to arbitrary detention and may accordingly order that these cases be filed.

14. In its comments on the Government's response, the source acknowledges that Mr. Estrada Marín signed documents on the date of his recruitment but points out that he did so without being given a opportunity to read them. As regards the Government's remarks concerning conscientious objection in Colombia, the source cites the jurisprudence of the Human Rights Committee. With reference to Mr. González Duque, it affirms that he was forcibly recruited under the Democratic Security Programme. He was personally ordered to enlist and to defend the nation. However, on 12 April 2007, he was released thanks to the filing of a petition with the Fourth Army Brigade in Medellín. With regard to the situation of Mr. Giraldo Hincapié, the source confirms that he was arrested on 4 August 2007 at the Casabe military base, where he was obliged to sign three documents with no opportunity to read them. One of the documents indicated that he had voluntarily enrolled in the army despite his having expressly declared his conscientious objection. Mr. Giraldo Hincapié opposes the use of weapons, is unwilling to fight alongside any party to a conflict and does not wish to have to kill anyone.

15. The Working Group considers that, although the situation of the three young men to which the claims relate may have elements in common, it is necessary to treat them individually. With reference to Mr. Estrada Marín, it is not denied in the information provided by the Government that he was detained by the military authorities for the purpose of determining his medical fitness for military service or that he signed a document, without having read it, in which he declared under oath that he did not qualify for exemption from military service on any of the grounds provided for in article 28 of Law No. 48 of 1993. The Working Group may thus conclude that this person was deprived of liberty against his will, detained and enrolled into No. 32 Infantry Battalion of the National Army despite having expressly stated that he was a conscientious objector.

16. With reference to Mr. González Duque, both the Government and the source agree that he was arrested and deprived of his liberty on 8 April 2007, released on 12 April and summoned for the purpose of determining his military status on 4 December 2007.

17. With reference to Mr. Giraldo Hincapié, the Working Group regards as conclusive the particulars provided by the source regarding his arrest in August 2006 and his forced enrolment into the army at the Casabe military base. Although the Government states, in its response, that it possesses no information whatsoever on this person, the source submits concrete details concerning the date of his arrest and forced recruitment into the army, the battalion in which he is serving and his conscientious objection declaration and the reasons adduced.

18. The Working Group considers that these persons were detained and deprived of their liberty against their will for the purpose of being enrolled in the army. Although the Working Group cannot establish the duration of their confinement or when it ended, since, once their military service in the army began, these persons could not be regarded as detainees, it is nevertheless clear that they were enlisted into the armed forces by means of a violent act of deprivation of their liberty.

19. The Working Group thus concludes that Mr. Estrada Marín and Mr. Giraldo Hincapié were detained and deprived of their liberty against their will for the purpose of their forcible recruitment into the armed forces. Although Mr. González Duque was released four days after his arrest, that was done solely as a result of the exercise of his right to petition the military authorities. In none of the three cases could the detention be effectively contested before the relevant judicial authority. Once deprived of liberty, none of the three persons could in any way appeal to a court in order that it might rule on the lawfulness of their detention and order their release.

20. Already in its Opinion No. 24/2003 (Israel), adopted on 28 November 2003, the Working Group had stated that the situation of conscientious objectors gave cause for concern and had pointed out that international law was evolving towards full recognition of the right of all individuals to refuse to bear arms or to serve in the armed forces, in the exercise of their right to freedom of thought, conscience or religion (para. 27). The Human Rights Committee, in its general comment No. 22, states that, while the International Covenant on Civil and Political Rights does not explicitly refer to the right to conscientious objection, that right can be derived from article 18 "inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief" (para. 11). Freedom of thought and conscience and the freedom to have a religion or belief of one's choice are protected unconditionally (para. 3).

21. In the views adopted by the Human Rights Committee on Communications Nos. 1321/2004 and 1322/2004 (Republic of Korea) under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, the Committee notes that article 8 of the Covenant neither recognizes nor excludes a right of conscientious objection. The Committee observes that, in setting forth the right to manifest one's religion or beliefs, article 18, paragraph 3, of the Covenant provides certain protection against being forced to act against genuinely held religious beliefs. While it is possible to allow restrictions necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, such restrictions must not impair the essence of that right (paragraphs 8.2 and 8.3).

22. The Working Group considers that, although Law No. 48 of 1993, which regulates recruitment and mobilization, lays down in its article 42 penalties for persons who fail to enrol or comply with the enlistment ballot or call-up and generally for those who, having been duly summoned for military service, do not report, such penalties are exclusively of a pecuniary nature or take the form of fines. In no case are arrest, detainment and enrolment in the army against one's expressly declared will authorized.

23. The detention of individuals who expressly declare that they are conscientious objectors has no juridical foundation or legal basis and their enrolment in the army against their will is in clear contradiction with the promptings of their conscience

and can be in violation of article 18 of the International Covenant on Civil and Political Rights. Failure to make provision for the right to conscientious objection may violate that article. Also, the practice of *batidas* or recruitment round-ups, whereby young men who cannot provide proof of their military status are apprehended on the streets or in public places, has no juridical foundation or legal basis.

24. In the light of the foregoing, the Working Group, in accordance with paragraph 17 (a) of its methods of work, renders the following Opinion:

> The deprivation of liberty of Mr. Estrada Marín, Mr. Giraldo Hincapié and Mr. González Duque was arbitrary, being in contravention of article 9 of the International Covenant on Civil and Political Rights and, in the case of Mr. Estrada Marín and Mr. Giraldo Hincapié, also in contravention of article 18 of the International Covenant on Civil and Political Rights, and falls under category I of the categories applied by 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 these persons, in order to bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights, and to examine the possibility of amending its legislation with regard to conscientious objection in order to adapt it to the contents thereof.

Adopted on 8 May 2008.

OPINION No. 9/2008 (Yemen)

Communication addressed to the Government on 18 June 2007.

Concerning Mr. Saqar Abdelkader Al Chouitier.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

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

5. According to the source, Mr. Saqar Abdelkader al Chouitier (hereinafter Mr. al Chouitier), a citizen of Jordan born in 1972, is a resident of Ibb, a town 200 kilometres south of Sanaa. He is a teacher at the “Ennahda” school of Ibb.

6. During the 19th Arab League Summit in the Kingdom of Saudi Arabia on 28 and 29 March 2007, a group of activists of the Attahrir party, to which Mr. al Chouitier belongs, published a document alleging corruption of, and

maladministration and human rights violations by allegedly authoritarian governments of Arab countries.

7. On 7 April 2007, Mr. al Chouitier was arrested by agents of the "Political Security Organisation" of Yemen (al Amn Assiyassi) and taken to an undisclosed location. No arrest warrant was shown to him, nor was he informed of the reasons and legal basis for his arrest.

8. Two months later, Mr. al Chouitier remained in detention without having been formally charged with an offence, without having received any information on the proceedings initiated against him or on the legal basis of his detention, without access to a lawyer, and without having had the possibility to challenge the legality of his detention before a judicial or other authority. Mr. al Chouitier's parents have appealed to the Minister of the Interior for their son's release but have not received any reply.

9. The source argues that since his arrest on 7 April 2007, Mr. al Chouitier has been detained without any legal basis. The Constitution of Yemen stipulates that any person accused of a penal offence must be brought before a judge within 24 hours of his arrest. Articles 73 and 269 of the Criminal Procedure Code of Yemen (Law no. 31 of 1994) establishes that everyone who is arrested must be immediately informed of the reasons for his arrest, must be shown the arrest warrant, must be allowed to contact any person he wishes to inform of the arrest and must be allowed to contact a lawyer. According to the source, none of these guarantees has been respected in Mr. al Chouitier's case, his detention thus being devoid of any justification in Yemeni law. Article 9 (1) of the International Covenant on Civil and Political Rights, to which Yemen is a party, establishes that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

10. The source further states that Mr. al Chouitier's detention results from the publication of documents peacefully expressing a political opinion on a current political event, the Summit Meeting of the Arab League. The source concludes that the deprivation of freedom is thus due to the expression of his political views, which constituted exercise of the freedom of expression protected by article 19 of the international Covenant on Civil and Political Rights.

11. The source also argues that Mr. al Chouitier has been completely deprived of the right to challenge the legality of his detention enshrined in article 9, paragraph 4 of the international Covenant with regard to all forms of detention, whether administrative or in the framework of judicial proceedings.

12. Insofar as Mr. al Chouitier is accused of a criminal offence, he has not been "promptly informed of the charges against him", as required by article 9, paragraph 2 of the International Covenant on Civil and Political Rights, nor been "brought promptly before a judge or other officer authorized by law to exercise judicial power" (article 9, paragraph 3, of the Covenant). The source adds that he has not been allowed to contact a lawyer and has been denied the right to "adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" (article 14, paragraph 3 (b) of the Covenant).

13. By its communication dated 11 June 2007, the source informs the Working Group that Mr. al Chouitier was released on 29 May 2007, after 52 days of detention.

14. In its submission, the Government of Yemen makes reference to a person named Sager Abdulgader al Chouitier and informs that this person was questioned for a short while and released immediately.

15. The source replies in commenting on the response from the Government by arguing that a 52 days detention cannot be considered as a "short while". Furthermore, the source emphasizes that the government reply does not contest the allegations previously made.

16. The Working Group recalls that paragraph 17 (a) of its methods of work provides: "If the person has been released, for whatever reason, following the reference of the case to the Working Group, the case is filed; the Group, however, reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned."

17. In this special case, although the person has been released, it is not contested that Mr. al Chouitier was detained for 52 days. In addition, the Working Group has not been provided with any information on the reasons for his arrest, on the legal basis invoked for his arrest, on the legal reasons for his detention, or on why he was released and by whom. Has Mr. al Chouitier enjoyed the assistance of legal counsel or visits by his next-of-kin?

18. The Government of Yemen, which is State party to the International Covenant on Civil and Political Rights, should have replied to all these questions put to it out of respect for its international obligations and also for the Working Group. In view of its silence the Working Group considers that the allegations put forward by the source have not been repudiated or contested by the Government. In the absence of any indication to the contrary they are to be considered as well-founded.

19. Consequently, the Working Group notes that it is established that Mr. al Chouitier was arrested at his place of work on 7 April 2007 without a warrant and without being informed of the reasons for and legal basis of his arrest, that he was taken to an undisclosed place of detention, where he was detained incommunicado for 52 days without having been informed about any charges laid against him and without having had the possibility to challenge the legality of his detention before a court.

20. Given the fact that the rights afforded to Mr. al Chouitier under the Yemeni Constitution and articles 73 and 269 of the Criminal Procedure Code have been violated in the absence of any information or argument shared by the Government as to the reasons and legal basis for his arrest and detention, the Working Group is led to the conclusion that his taking into custody did not find any justification in Yemeni law. Hence, it did not follow a procedure established by law as envisaged by article 9, paragraph 1 of the international Covenant on Civil and Political Rights and is as such devoid of any legal basis.

21. Furthermore, it is the view of the Working Group that there seems to be a causal link between Mr. al Chouitier's participation in the publication of a document criticizing corruption, mismanagement and human rights violations allegedly

conducted by, in his view, authoritarian governments in the Arab region during the 19th Summit of the Arab League, as alleged by the source and not refuted by the Government. Public criticism of policies and conduct of Government, foreign or one's own, falls, however, squarely within the scope of the right to freedom of opinion and expression as protected by article 19 of the International Covenant, provided that it is done in a peaceful manner, as in the present case. Mr. al Chouitier was therefore also arbitrarily arrested and detained as a result of the peaceful exercise of his right to freedom of opinion and expression.

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

> The detention of Mr. al Chouitier was arbitrary, being in contravention of articles 9 and 19 of the Universal Declaration of Human Rights and articles 9 and 19 of the International Covenant on Civil and Political Rights and falls under categories I and II of the categories applicable to the consideration of cases submitted to the Working Group.

23. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to prevent similar situations from occurring in the future in order to be in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 8 May 2008

OPINION No. 10/2008 (Syrian Arab Republic)

Communication addressed to the Government on 18 October 2007.

Concerning Mr. Husam 'Ali Mulhim, Mr. Tareq al-Ghorani, Mr. Omar 'Ali al-Abdullah, Mr. Diab Siriyeh, Mr. Maher Isber Ibrahim, Mr. Ayham Saqr and Mr. Allam Fakhour.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the communication sent on 18 October 2007.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

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. 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, the response of the Government thereto, and the observations by the source.

5. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Mr. Husam 'Ali Mulhim, law student; Mr. Tareq al-Ghorani, engineer assistant and student; Mr. 'Omar 'Ali al-'Abdullah, philosophy student; Mr. Diab Siriyeh, part-time student, all aged 22; Mr. Maher Isber Ibrahim, aged 26, shop owner; Mr. Ayham Saqr, aged 31, employee at a beauty salon, and Mr. Allam

Fakhour, aged 29, arts student, were arrested in Damascus and Harasta by officials of the Syrian Air Force Intelligence (AFI) on 26 January, 20 and 23 February, and 18 March 2006, respectively. Mr. ‘Omar ‘Ali al-’Abdullah and Mr. Diab Siriyeh had been briefly arrested before on 14 February 2006 and held for several hours. After their release they were required to present themselves twice a day at the AFI Branch in Harasta before they were finally detained on 18 March 2006. In detention all seven were held incommunicado in solitary confinement at the AFI detention centre in Harasta, near Damascus, until the end of April 2006. Thereafter, they were transferred to Sednaya prison in the outskirts of Damascus, where they were held in total incommunicado detention until 26 November 2006.

6. The seven men were initially scheduled to appear before the Supreme State Security Court (SSSC) on 26 September 2006. However, the commencement of their trial was postponed until 26 November 2006, when they were presented before the SSSC for the first time, and learned about the charges against them. Then, they were allowed to briefly meet with their defence counsel; however, only in the presence of guards. One of the defendants was allowed to meet with his parents on this day in court for about three minutes and only with a guard present. All seven defendants were denied to receive warm clothing from their families in order to protect them from the cold weather conditions dominating in the mountainous area of Sednaya.

7. At the trial, Mr. Husam ‘Ali Mulhim, Mr. Tareq al-Ghorani, Mr. Maher Isber Ibrahim, Mr. Ayham Saqr, Mr. ‘Allam Fakhour, Mr. ‘Omar ‘Ali al-’Abdullah and Mr. Diab Siriyeh denied the charges and each of them stated having been ill-treated in order to obtain false confessions while held in incommunicado detention. The SSSC did not consider these allegations and accepted the confessions of the seven defendants as evidence. Furthermore, during the hearing, the judge accused the defendants of having established links with an opposition party based outside Syria.

8. The second trial hearing was set for 14 January 2007. The defendants were able to meet with their lawyers in a room inside the court but only in the presence of a guard. They were also allowed a visit from their families each for about two minutes. On 15 April 2007, the seven defendants had to appear before the SSSC again; however, the majority of defence counsel was not permitted to have a meeting with their clients prior to the hearing. All of them were prevented from meeting with their relatives.

9. On 17 June 2007, the seven men were convicted of “taking action or making a written statement or speech which could endanger the State or harm its relationship with a foreign country, or expose it to the risk of hostile action” pursuant to article 278 of the Syrian Penal Code. Mr. Maher Isber Ibrahim and Mr. Tareq al-Ghorani were also convicted of “broadcasting of false news” pursuant to article 287 of the Penal Code. They received seven years’ sentences of imprisonment. Mr. Husam ‘Ali Mulhim, Mr. Ayham Saqr, Mr. ‘Allam Fakhour, Mr. ‘Omar ‘Ali al-’Abdullah, and Mr. Diab Siriyeh were sentenced to five years. There is no appeal to the decision of the SSSC.

10. The source alleges that the seven men have been arrested, detained and tried solely in connection with their involvement in establishing a youth discussion group and for publishing articles, poetry and cartoons on the Internet supporting the democratization of the country. Consequently, they have been charged with offences in violation of their rights to freedom of thought, conscience, opinion, expression,

peaceful assembly and association. The source further argues that trials before the Syrian SSSC are generally known to fall short of international standards for fair trial, because the defendants do not enjoy the right of appeal; access to lawyers is restricted; and widespread practices of forced confessions extracted under ill-treatment or duress are admitted as evidence.

11. The Government explained that the eighth co-defendant of the concerned persons, Mr. ‘Ali Nizar ‘Ali, was released on 28 December 2006 pursuant to a Presidential amnesty issued on the occasion of Id al-Adha. He had been convicted with “broadcasting false information regarded as damaging to the State” pursuant to article 287 of the Penal Code. As for the remaining persons, it was stated that they were referred to the competent court after a public prosecution case was brought against them. The Government confirmed that they were charged under article 287 of the Syrian Penal Code and were on trial at the time of the reply for committing criminal offences involving acts that are prohibited by the Government, since such acts could expose the Syrian Arab Republic to the threat of hostilities and damage its relations with foreign States.

12. The Government further reported that Mr. Husam ‘Ali Mulhim and Mr. ‘Ali Nizar ‘Ali had taken part in activities hostile to the State and had incited public unrest using the Internet and that such acts were punishable under article 307 of the Penal Code. This provision makes “any act writing or correspondence aimed at, or resulting in, the creation of confessional or racial strife or encouragement of conflict between the confessional groups and different ethnic communities of the nation” a criminal offence punishable by a term ranging from six months to two years of imprisonment and a fine between 100 and 200 Syrian pounds, together with the deprivation of rights as enumerated in article 65, paragraphs 2 and 4 of the Penal Code. The two men had also established a cell of an organization that advocates acts of terrorism against the society and the State and solicits support from abroad. Such acts were punishable under articles 306, paragraph 10, and 364 of the Penal Code. Accordingly, Mr. Husam ‘Ali Mulhim and Mr. ‘Ali Nizar ‘Ali had been arraigned before the SSSC for trial pursuant to order No. 2/9/100 of 4 April 2006.

13. The Government informed that the practice in the Syrian Arab Republic, based on the Constitution and the Criminal Code No. 148 of 1949, precludes physical or mental torture or degrading treatment of any person. Anyone who uses unlawful force in order to obtain a confession to, or information about, a crime is liable to a term of from three months to three years in prison. It goes without saying that a number of persons who have committed such offences have been prosecuted either on the basis of a complaint from the injured party or proceedings brought by the Department of Public Prosecutions.

14. The persons mentioned above formed a group that was illegal and acted in disregard for the law. They initiated contacts with foreign official entities that seek to create unrest and internal discord, spread confusion and change the existing system of government. Their objective was to take the money provided to them by those entities, using human rights and freedoms as a cover for the unlawful acts that they committed. The preliminary investigations found evidence to substantiate the charges against them. They had gone so far as to fabricate claims about there being chemical and biological weapons in the Syrian Arab Republic in exchange for money, which they received from entities hostile to the Syria. These claims harmed relations between Syria and a number of States and provided an opportunity for

further international pressure to be brought to bear on the Syrian Arab Republic in the pursuit of political aims.

15. The Government argues that the arrest of these persons was not arbitrary and their detention was not unjustified. Not only was it a question of the preliminary investigation that was carried out; these persons admitted to the charges before the competent courts.

16. The Court delivered its verdict, which was supported by the evidence and the facts, based on proceedings brought by the Department of Public Prosecutions and conducted in the presence of several defence lawyers for the accused, all citizens who wished to attend, a number of representatives of embassies and international organizations, and members of the press who covered all the trial hearings.

17. Mr. Tariq al-Ghawrani and Mr. Mahir Ibrahim were sentenced to seven years of imprisonment, and five-year prison sentences were handed down to Mr. Husam Mulhim, Mr. Ayham Saqr, Mr. Allam Fakhur, Mr. Omar Ali al-Abdullah and Mr. Diyab Siriyah, in case No. 58 of 2007, pursuant to ruling No. 42 of 17 June 2007.

18. The Government states that there is no truth whatsoever to the information contained in the allegations concerning ill-treatment of these persons and their placement in isolation cells between the beginning of April and the end of November 2006, since there is no solitary confinement in the Syrian Arab Republic. The courts do not rely on confessions extracted by means of physical or mental coercion. The courts do not regard such interrogations as proof and take no account of them whatsoever. The Department of Public Prosecutions is the authority responsible for gathering evidence which the courts may accept or reject, based purely on whether or not they find it convincing.

19. The Government has taken a full range of measures, within the limits set by law and sanctioned by the Constitution, to improve conditions for prisoners awaiting trial or the execution of their sentence. A number of prisons have been shut down because of objections raised by the Prisoners' Welfare Association in the Syrian Arab Republic regarding non-compliance with health regulations.

20. The laws in force do not punish individuals for exercising their right to liberty. The Constitution guarantees the rights and freedoms of all citizens. Furthermore, article 352 of the Criminal Code states that anyone who arrests or detains a person under conditions other than those stipulated by law shall be subject to a term of imprisonment with hard labour. Article 358 states that any warden or guard of a prison or disciplinary or correctional facility and any official vested with their functions who admits a person without a court order or decision or keeps him at a facility for longer than the legally prescribed term shall be subject to a penalty of from one year to three years in prison.

21. The Government takes every care to assure the safety of its citizens and their enjoyment of their constitutional rights and freedoms. It does not imprison people merely for peacefully expressing their political views, even if they differ from those of the Government. Article 286, paragraph 2, of the General Criminal Code grants the courts discretionary power to reduce the sentence of a person who disseminates ideas or publicizes views that weaken national sentiment, sap national morale or

damage the reputation of the State. By virtue of this discretionary power, a sentence can be reduced by up to three months.

22. The persons mentioned above were prosecuted by the Department of Public Prosecutions for acting outside and in breach of the law, and the Court delivered its verdict on them. Consequently, they are not being held in arbitrary detention. They are being well treated, under the protection of the law, and are allowed to receive visits from their family and relatives in appropriate facilities. They are provided with newspapers, magazines and books and are given regular and free medical checks by competent physicians. They are just like all other prisoners, and they are all in good health and have not complained of any ailments.

23. In its comments to the observations of the Government, the source provided the following information: Regarding the statement by the authorities that the detention of the members of this group was based, at least partly, on their own confessions, the source emphasized that all the defendants denied the charges and told the Supreme State Security Court (SSSC) in November 2006 that they had been tortured while detained. As with all other such allegations of torture made over the years before the SSSC, the source is not aware of any action being taken by the Court or by the authorities to investigate the allegations.

24. Regarding the contention by the authorities that the men could not have been ill-treated in solitary confinement since "solitary imprisonment is not allowed in Syria", the source stated that, in fact, solitary confinement continues to be employed in Syrian detention centres as it has been for many years.; the most famous current example being Dr. 'Aref Dalilah who continues to serve in an isolated, solitary cell in 'Adra prison the 10-year sentence that he was convicted of in 2002, also after an unfair trial before the SSSC and during which his lawyer was thrown out of the court for claiming that his client had been tortured and ill-treated in detention.

25. Hundreds of individuals have been detained for peacefully expressing their views. For example, in one of the most recent cases, on 23 April 2008, Dr. Kamal al-Labwani was sentenced to a further three-year sentence on top of the 12-year one he is already serving. On account of remarks he reportedly made in his cell after returning from a session of his trial, the First Criminal Military Court in Damascus found him guilty of "broadcasting false or exaggerated news which would affect the morale of the country" under article 286 of the Penal Code. Article 286 is vaguely worded and interpreted extremely broadly by the authorities and is a common charge against advocates of reform.

26. In the light of the foregoing, the Working Group considers that the information from the competent authorities concerning the above-mentioned seven persons is not sufficient to fully answer the requests of the Working Group for clarification on the given situation.

27. The source has alleged that all seven defendants denied the charges brought against them during their trial before the SSSC and reported that they had been ill-treated with the aim of obtaining confessions. The source has further asserted that all of them were held incommunicado for prolonged periods of time of more than eight months, about six weeks of which in addition in solitary confinement. It was further alleged that the SSSC did not investigate into the allegations of torture and accepted the false confessions so obtained as evidence.

28. The Government roundly rejected the allegations concerning ill-treatment, however, did so solely in general terms. It referred to the laws making physical or mental torture or degrading treatment a criminal offence and confirmed that a number of persons have been prosecuted under these laws, which the Working Group welcomes. The Government further made reference to courts in general without, however, addressing the specific cases at hand.

29. The Working Group considers that the Government did not deny the source's claim that allegations of ill-treatment were indeed made by the defendants during this particular trial before the SSSC. The Government then, however, did not entertain the crucial questions in what way the SSSC reacted, whether it investigated into these allegations, what the outcome of this investigation was, and whether the allegations could be confirmed. In such event the SSSC would have had to exclude the forced confessions as evidence as it is obliged to by international human rights law and also by domestic Syrian legislation.

30. Moreover, the fact that the defendants were held incommunicado without access to their families and lawyers for some months (the Government only denied that they were held in solitary confinement) increased the probability of ill-treatment. The Working Group recalls that prolonged incommunicado detention or detention in secret places may facilitate the perpetration of torture and other cruel, inhuman or degrading treatment or punishment and can in itself constitute a form of such treatment.[27]

31. The Government further informed that the SSSC delivered its verdict based on proceedings conducted in the presence of several defence lawyers, without addressing the specific and detailed allegations by the source, namely that on 14 January 2007, the defendants were able to meet with their lawyers in a room inside the court only in the presence of a guard and that, on 15 April 2007, the majority of defence counsel was not allowed to meet with their lawyers at all prior to the hearing. The Working Group recalls that it is imperative for the exercise of the right to defence that the accused be provided with adequate time and facilities for the preparation of their defence and to communicate with counsel, which includes being able to meet with their lawyers in private before the trial. It is not sufficient that defence lawyers are present during the hearings themselves to comply with the requirements of the right to fair trial.

32. In view of the additional fact that the seven defendants were not afforded the right to appeal, an allegation that was not challenged by the Government, the Working Group concludes that the above-mentioned persons' right to a fair trial were violated in terms of article 14, paragraphs. 3 (b) and (g), and 5 of the International Covenant on Civil and Political Rights, and that the violations are of such gravity as to confer upon their deprivation of liberty an arbitrary character.

33. The Working Group further considers that, according to the source, all seven defendants were charged, tried and convicted pursuant to article 278 of the Syrian Penal Code in connection with their involvement in establishing a youth discussion group and in publishing articles, poetry and cartoons on the Internet promoting the democratization of the country. In addition, Mr. Maher Isber Ibrahim and Mr. Tareq al-Ghorani were convicted pursuant to article 287 of the Penal Code.

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[27] See paragraph 12 of General Assembly resolution 61/153.

34. The Government, in its reply concerning Mr. Husam ‘Ali Mulhim, referred to charges pursuant to articles 306, 307, and 364 of the Penal Code. The Government informed that all seven defendants had been charged for “broadcasting of false news” (article 287 of the Penal Code). It did not specify the criminal provisions invoked by the SSSC and forming the basis of the verdicts against the seven above-mentioned persons. The Government referred the Working Group to the possibility of a reduction of sentence in terms of article 286, paragraph 2, of the Penal Code, but does not explain whether it has been made use of this provision in the present case.

35. The information provided by the Government on the actual incriminated activities is scarce. It asserts that the seven defendants received money from foreign official entities, which are hostile to the Syrian Arab Republic, but does not identify them. It further informs that the defendants fabricated claims that Syria is in the possession of chemical and biological weapons, but does not further elaborate on these allegations. In view of the lack of comprehensive information provided by the Government, the discrepancies and the fact that the Working Group has on earlier occasions taken issue with vague worded criminal provisions impeding the right to freedom of opinion and expression,[28] it can only conclude that the seven defendants were basically advocating peacefully for the democratization of the country. Such activities fall, however, squarely within the ambit of the right to freedom of opinion and expression.

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

> The deprivation of liberty of Mr. Husam ‘Ali Mulhim, Mr. Tareq al-Ahorani, Mr. Omar ‘Ali al-Abdullah, Mr. Diab Siriyeh, Mr. Maher Isber Ibrahim, Mr. Ayham Saqr, and Mr. Allam Fakhour is arbitrary being in contravention of articles 9, 10, 11, 19 of the Universal Declaration of Human Rights and articles 9, 14, and 19 of the International Covenant on Civil and Political Rights and falls under Categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

37. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Husam ‘Ali Mulhim, Mr. Tareq al-Ahorani, Mr. Omar ‘Ali al-Abdullah, Mr. Diab Siriyeh, Mr. Maher Isber Ibrahim, Mr. Ayham Saqr, and Mr. Allam Fakhour and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 9 May 2008

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[28] Opinion No. 7/2005 (Syrian Arab Republic), E/CN.4/2006/7/Add.1, page 31.

OPINION No. 11/2008 (Saudi Arabia)

Communications addressed to the Government on 7 December 2006 and 29 May 2007.

Concerning Mr. Amer Saïd b. Muhammad Al-Thaqfan Al-Qahtani.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

4. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the replies provided by the Government to the source and received its respective comments. 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 responses of the Government thereto, as well as the observations by the source.

5. According to the source, Mr. Amer b. Saïd b. Mohamed al Qahtani, 37-years-old, school teacher, addressed at Haï Dar El Beïda, Riyadh, with Identity Card N° 1055 954 2161, issued on 3 March 1988 at Al Nufus, was arrested on 2 April 1998 at Riyadh by members of the General Intelligence Services headquarters in Riyadh, where he was interrogated during several days and allegedly tortured. Later, he was transferred to Al Mahabit Al Aama, a detention centre of the General Intelligence Services located at Al Hayr Prison in Riyadh, where he was kept in incommunicado detention during several months. Visits by his close relatives were not authorized.

6. According to the information received, Mr. Al Qahtani has been kept in solitary confinement during more than eight and a half years without charge or trial. He was not given the opportunity to contact a defence lawyer or to be heard by a judicial authority. During this long period he has not been presented before a judge or charged. The source further alleges that Mr. Al Qahtani has had no recourse to contest the lawfulness of detention.

7. In its reply to the allegations, the Government of Saudi Arabia indicates that no person of this name is currently detained in the Kingdom; however, that the person forming the subject of this case of alleged arbitrary deprivation of liberty is possibly Mr. Amer Saïd Muhammad Al-Thaqfan Al-Qahtani. The latter has been detained since 24 March 1998 at a General Intelligence Services prison where he is serving a 10-year sentence, imposed on that date, for acting as leader and figurehead of a group of people following the “Takfir” fundamentalist ideology which he has been instrumental in propagating in society.

8. The Government adds that his guilt and his persistence in his tendencies were proven and he showed no intention of desisting therefrom. The Government further informed that the term of his sentence was to end on 5 December 2007 and that, in view of the danger that he poses to security, his influence on people around him and

his continued advocacy of the "Takfiri" ideology, it has been deemed advisable for him to remain in prison until he has served his full sentence.

9. The source, having taken note of this information, reiterates the identity of the concerned person and confirms his full name given by the Government. It also clarifies that Mr. Al-Qahtani was first arrested on 24 March 1998, released and re-arrested on 2 April 1998. The source further notes that the Government does not contest that Mr. Al- Qahtani has been imprisoned for 10 years because of his ideology, that is to say his opinions, which he has no desire to change. The source notes that the Government fails to explain the authority or jurisdiction, and the imputed facts pursuant to which Mr. Al- Qahtani has been convicted. The source further argues that Mr. Al Qahtani's conviction must have followed an expedited summary trial since he was sentenced already on the day of his arrest. It further notes that the Government does not attribute to Mr. Al-Qahtani any act of violence. Finally, the source notes that all other allegations of violations of applicable international human rights norms have not been disputed by the Government.

10. During its forty-eighth session held in May 2007, the Working Group decided to request from the Government of Saudi Arabia a copy of the final judgement against Mr. Al- Qahtani and any other pertinent information. It also asked the Government to verify the identity of the person concerned. Following two reminders the Government replied on 10 April 2008 by stating that Mr. Al-Qahtani was sentenced under the terms of court judgement No. 4/22/S/KH of 3/12/1419 AH (21 March 1999), which was reviewed on cassation, on the following charges:

(a) Accusing the State of having renounced its Islamic principles by signing the Charter of the United Nations. He was found to be in possession of documents proving his extremist ideology in this regard.

(b) Inciting young persons to question and disavow their national allegiance, combat unbelievers and ostracize all those who associate with the latter.

(c) Encouraging young persons to rent a farmhouse for the purposes of physical training to oppose reprehensible behaviour.

(d) Travelling within the Kingdom and abroad on forged documents in flagrant violation of the regulations in force.

(e) Travelling to Kuwait, Qatar and the Philippines on a passport in the name of Salih Al-Duraibi, and twice to Yemen on a forged passport in the name of his brother Turki for the ostensible purpose of travelling to Eritrea and the Sudan to engage in "Jihad" there and meeting with other dubious characters following the same ideology.

(f) He is considered to be the ring leader, motivator and ideological mentor of a group of similarly-minded young persons, since they all mentioned his name in their confessions.

Finally, the Government wishes to reaffirm its willingness to cooperate with the Working Group by providing requisite information on such cases, while, at the same time, trusting that the Working Group understands the high priority that the Government must currently accord to the campaign against terrorism.

11. In its comments to the second response of the Government the source notes that the Government has advanced new grounds for the condemnation of

Mr. Al-Qahtani. However, the initial reasons given are related to the expression of opinions and that none of them amount to the infraction of penal laws. The source further states that the reasons initially invoked are particularly vague and are advanced by the Government in numerous other cases to justify the arrest and detention of persons opposed, in a peaceful manner, to the ideology of Government.

12. In the light of the foregoing, the Working Group notes that the Government of Saudi Arabia, in its two replies, has not provided clarifying information despite explicit requests transmitted on 7 December 2006 and 29 May 2007. The Working Group requested the Government to provide clarifying information as to the facts, the applicable legislation, the concerned person's proof of identity, a copy of the decision of the sentencing of Mr. Al Qahtani, and any other pertinent information.

13. In its second reply, the Government made no reference to these matters and merely confirmed its initial observations. The submissions of the Government may be construed as not contesting the allegations made by the source as to the lack of a warrant or legal provisions justifying the arrest of Mr. Al-Qahtani, as to his incommunicado detention for several months, as well as to the failure of affording him the right to challenge the legality of his detention before a judicial body. The Government also failed to respond to the assertion of the source that Mr. Al Qahtani did not enjoy his right to a fair trial, in particular his right to conduct his defence properly in full knowledge of the charges brought against him, and that he did not benefit from the assistance of a lawyer. It did not put forward any indication, either, as to which court sentenced Mr. Al-Qahtani and whether the judgement referred to by the Government in its observations, but not provided in full text, was handed down by a competent and independent body.

14. The Working Group regrets, that neither the Government nor the source in their submissions received after the initially envisaged date of the release of Mr. Al-Qahtani after having served his prison term in full – i.e., according to the Government in its first reply, 5 December 2007 – provided any indication whether he was indeed set free on that day. Given that the Government corrected its initial information that Mr. Al-Qahtani was sentenced on 24 March 1998, and stated in its second submission that he was rather convicted about a year later to 10 years of imprisonment on 21 March 1999, and in the absence of any indication to the contrary, the Working Group adopts this opinion on the basis of the assumption that Mr. Al-Qahtani remains in detention at the time of its adoption.

15. For all these reasons, the Working Group the Working Group renders the following Opinion:

> The deprivation of liberty of Mr. Amer Saïd b. Muhammad Al-Thaqfan Al-Qahtani is arbitrary, being in contravention of articles 9, 10, and 11 of the Universal Declaration of Human Rights, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

16. The Working Group, having rendered this Opinion, requests the Government to take the necessary steps to rectify the situation of Mr. Al-Qahtani, in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights, and to consider to take the necessary measures to accede to the International Covenant on Civil and Political Rights.

Adopted on 9 May 2008.

OPINION No. 12/2008 (Myanmar)

Communication addressed to the Government on 18 October 2007.

Concerning Ms. Mie Mie (Thin Thin Aye), Mr. Htay Kywe and Mr. Ko Aung Thu.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

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. 15/2007.)

4. In light of the allegations, the Working Group appreciates the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case.

(a) Mr. Htay Kywe, aged 39, a former leader of the pro-democracy student protests in 1988; reportedly in poor health, was sentenced to 15 years of imprisonment in 1991 under national security provisions, including the 1950 Emergency Provisions Act. His sentence was later commuted to 10 years of imprisonment, but he continued to be held for more than three years beyond the expiry of his sentence in 2001, under the 1975 State Protection Law.

(b) Ms. Mie Mie (also known as Thin Thin Aye), aged 35, was also a leader in the 1988 protests when she was still a high school student. She was a member of the Burma Federation of Student Unions and the Democratic Party for a New Society. In 1989, she was detained for four months because of her political activities. She was again arrested during the large student demonstrations in 1996 and sentenced to seven years of imprisonment.

(c) Mr. Ko Aung Thu, aged 43, was arrested for the first time in March 1988. In 1990, he was arrested again and sentenced to five years' imprisonment.

(d) According to the information received, these three prominent activists were involved in the early protest marches in August 2007 and went into hiding as the authorities launched a manhunt for those they perceived as the movement's leaders, in particular Htay Kywe. On 21 August 2007, 13 key activists of the 1988 Generation Students Group were arrested. Shortly before his arrest, Htay Kywe said that "the international community must stand clearly to prevent further human rights violations".

5. The three above-mentioned persons were arrested in the early hours of 13 October 2007 in the city of Yangon by a group of approximately 70 members of the security forces, who raided the house where they all were in hiding. They were arrested together with other two other members of the 1988 Generation Students Group and the owner of the house. Concern was expressed for the risk of torture and ill-treatment of these people.

6. Mr. Htay Kywe, Ms. Mie Mie and Mr. Aung Thu are believed to be the last high-profile members of the 1988 Generation Students Group who were still at large. Their arrests are part of a continuing crackdown by the authorities who have continued to arrest activists even after the United Nations Security Council's statement of 11 October 2007, deploring the violent crackdown and stressing the importance of the early release of all political prisoners. They had been in hiding since the nationwide demonstrations, which began on 19 August 2007, prompted the repression against those perceived to be the leaders of the protest movement.

7. According to the source, these persons have been arrested for their peaceful activism for human rights and democracy, particularly for taking part in peaceful demonstrations calling for a reduction in commodity prices, the release of political prisoners and a process of national reconciliation. It is feared that they were arrested without a judicial warrant and are being held in incommunicado detention. They have not been granted access to lawyers, their families or to medical treatment.

8. Following such allegations, the Government replied on 14 April 2008, stating that the three concerned persons were indeed detained following a regular judicial procedure based on Section 4 of the Law on the production and distribution of tracts aimed at inciting to undermine national unity. The Government further stated that regular medical and family visits were authorized; that medication is procured at the charge of the detention facility authorities, and that all three are detained in separate cells with shower and latrines.

9. Having taken note of Government comments, the source confirmed its prior allegations, while informing that the concerned persons were being held in incommunicado detention, and that they should all be considered political prisoners. The source furthermore requested for their immediate and unconditional release.

10. In addition, the source maintains that, contrary to the statement of the Government, all the concerned persons are deprived of medical attention and care. The families of the detained persons attempt to purchase the necessary medications. The director of the detention centre, during a press conference, labelled the concerned persons as « terrorists ». The detainees do not have access to a lawyer, and it is envisaged that they will be judged in secrecy, or closed doors, inside the prison.

11. The Working Group considers that the Government, in its reply, has not provided concrete responses to the allegations from the source, nor adequate information on the cases and on the eventual administrative or judicial proceedings. The Working Group notes that, in its reply, the Government simply puts forward that the concerned persons were arrested because the production of distribution of tracks aimed to undermining the national unity and that they are currently being held in good detention conditions. The Government does not contest the reason for their arrest as being related to their political activities; nor that the detainees were and are still kept in secrecy and incommunicado detention.

12. The Working Group considers that these three persons were detained simply for their peaceful expression of their ideas and political beliefs. Their detention is contrary to their rights to freedom of opinion and expression and peaceful assembly, recognized in the Universal Declaration of Human Rights. The Working Group calls the Government to provide them with immediate medical treatment, access to lawyers and to their relatives.

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

> The deprivation of liberty of Ms. Mie Mie, Mr. Htay Kywe and Mr. Ko Aung Thu, is arbitrary, being in contravention of articles 9, 10, 11, 18 and 19 of the Universal Declaration of Human Rights and falls within category II of the applicable categories to the consideration of the cases submitted to the Working Group.

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

15. The Working Group calls the Government to consider the possibility to take adequate initiatives with a view to becoming a State Party to the International Covenant on Civil and Political Rights.

Adopted on 9 May 2008

OPINION No. 13/2008 (Saudi Arabia)

Communication addressed to the Government on 25 June 2007.

Concerning Mr. Ali Chafi Ali Al-Chahri.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto.

5. According to the source, Mr. Ali Chafi Ali Al-Chahri, who is 35 years old, married, lives with his wife and children in Riyadh. He was employed by the Telecommunications National Company, where he worked as a technician until the date of his arrest at his workplace by Intelligence Service agents on 23 August 2006. Neither a judicial detention warrant nor the reasons for his arrest were provided at the moment of his arrest. He was taken to his home, where a search was done without a judicial warrant and his personal computer was confiscated. Afterwards,

he was taken to a secret place which was later revealed to be the detention centre of the Intelligence Services in Al Alicha in Riyadh, where he was allegedly tortured for one week. Mr. Al-Chahri was transferred to Al Rouis prison in Jeddah, where he was detained for four months, three of which in secret and complete isolation. Mr. Al-Chahri was not informed at the time of his arrest of the reason of his detention. He was not heard by a judicial authority until 16 months after his arrest, and he never had the opportunity to choose a lawyer.

6. In its response, the Government informed that Mr. Ali Chafi Ali Al-Chahri was arrested on 23 August 2006, in the light of his contacts with persons suspected of pursuing objectives prejudicial to public security; his attempts to help persons wanted in security cases to leave the Kingdom illegally; and his violation of an undertaking given by him in a previous security case in connection with which he was detained.

7. In its comments on the response from the Government, the source expressed that the Government, in its reply, did not contest the information that:

(a) Mr. Al-Chahri was arrested by Intelligence Service agents at his workplace without being informed of the reasons for his detention; and that his home was searched without a judicial warrant;

(b) Mr. Al-Chahri was held in secret detention in the Intelligence Service centre of Al Alicha in Riyadh, where he was tortured during one week; and after being transferred to Al Rouis prison in Jedda he was subjected to the same conditions of detention for three months in complete isolation;

(c) Mr. Al-Chahri was detained without legal charges and without a judicial procedure, being under detention during more than 20 months until date;

(d) Mr. Al- Chahri did not have the possibility to benefit from an effective recourse regarding the lawfulness of his detention;

(e) Mr. Al -Chahri did not have a lawyer or any judicial assistance.

8. The Working Group takes note with satisfaction of the cooperation from the Government of the Kingdom of Saudi Arabia. However, the Working Group observes:

(a) The silence of the Government regarding the length of Mr. Al-Chahri's detention (more than 20 months) by the Intelligence Services without a judicial detention warrant;

(b) His secret detention without legal charges;

(c) The fact that Mr. Al-Chahri has not been informed of the charges brought against him and the fact that it does not know whether there are any judicial proceedings in course on his case;

(d) The ill-treatment and torture that he has suffered; which the Government has not denied;

(e) The fact that his treatment in detention has neither been fair nor just;

(f) The fact that the response of the Government does not indicate that Mr. Al-Chahri has had a trial.

9. Mr. Al-Chahri has been detained during more than 20 months without any legal basis. No legal proceedings have been followed. He has been denied his right to have a fair and public hearing by an independent and impartial tribunal, with assistance of a defence lawyer of his choice.

10. This is contrary to articles 5, 7, 9 and 10 of the Universal Declaration of Human Rights and to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

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

> The deprivation of liberty of Mr. Ali Charif Ali Al-Chahri is arbitrary, being in contravention of articles 5, 7, 9 and 10 of the Universal Declaration of Human Rights, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

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

13. The Working Group wishes to encourage the Government of the Kingdom of Saudi Arabia to consider the possibility to accede to the International Covenant on Civil and Political Rights.

Adopted on 9 May 2008

OPINION No. 14/2008 (Uzbekistan)

Communication addressed to the Government on 26 July 2007.

Concerning Mr. Erkin Musaev.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group conveys its appreciation to the Government for having forwarded the requested information in good time.

3. (Same text as paragraph 3 of Opinion No. 15/2007.)

4. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comment. 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 on Arbitrary Detention as follows: Mr. Erkin Musaev, an Uzbek national, born 9 May 1967, titular of passport No. CA 1848854 issued by the Ministry of the Interior, usually residing at Lashkarlar 8A apt # 22 in Tashkent, was arrested on 31 January 2006 at Tashkent airport at around 4.50 p.m. by officers of the customs office and of the National Security Service (NSS). Mr. Musaev was heading for Bishkek to attend a regional seminar for the Border Management for Central Asia Programme

(BOMCA). He was the country manager for BOMCA, a joint programme of the United Nations Development Programme (UNDP) and of the European Union. At the time of the arrest Mr. Musaev was the holder of a UNDP 'Special Service Agreement' contract, which was terminated by the UNDP as of 1 April 2006. The authorities did not produce a warrant at the time of his arrest.

6. Upon arrival at the airport Mr. Musaev was approached by two customs officers, who checked his luggage and documents. Thereafter, a third customs officer appeared claiming that sniffer dogs had detected smells of narcotics in his luggage. At the luggage department Mr. Musaev was approached by two other customs officer and three civilians. One officer searched Mr. Musaev's suitcase, but did not find anything suspicious. This officer then retrieved a computer disc allegedly containing secret information from the side pocket of his suitcase, which had been unattended for a while. Mr. Musaev denies ownership of this disc and knowledge about its content. Mr. Musaev was requested to document the incident at a separate room, where two plain clothes officers from the NSS were waiting. He was briefly detained at Tashkent airport before being transferred on the same day by these officers to the detention facilities of the NSS in Tashkent. While in detention the authorities produced a search warrant for his residence signed by the NSS investigator. The warrant read that a search would be conducted in relation to secret materials, narcotics, weapons, and religious material.

7. Following his arrest on 31 January 2006, Mr. Erkin Musaev's family was not informed by the Uzbek authorities about his whereabouts for more than 10 days. Mr. Musaev was not allowed to see a lawyer of his choice during this period, either. During more than four months of detention at a detention facility of the National Security Service (NSS) he was not allowed to see his family.

8. During this period he was subjected to various forms of pressure, including threats by the interrogators who tried to force him to sign a confession. He was also subjected to beatings by fellow inmates at the instigation of the interrogators. Furthermore, he was beaten on his chest three nights in a row, which inflicted pain on his inner organs. Drugs were forcibly administered on him. Mr. Musaev was further tied up with his hands to a bed and hit on his heels, where after he was unable to walk for several days. He was also subjected to a method called "Northern Aurora", which means hitting somebody hard on his head for a prolonged period. The beatings and other ill-treatment resulted in a broken jaw. First aid was provided by other inmates.

9. Because of the ill-treatment Mr. Musaev signed a confession document regarding the accusations made against him in his first trial on charges pursuant to articles 157, 162, 301 and 302 of the Uzbek Penal Code. Despite the repeated ill-treatment he, however, refused to sign a confession statement regarding those charges brought against him, which related to the second and third trial. Furthermore, Mr. Musaev was given accusative conclusion No. 20/79-2006, approved by Vice-General Prosecutor B. Nurmuhamedov, only one day before the commencement of the first trial on 30 May 2006, whereas article 434 of the Penal Code of Uzbekistan requires the observance of a period of at least three days.

10. Mr. Musaev was sentenced by the Uzbek Military Court of Tashkent to 15 years of imprisonment pursuant to article 157 of the Criminal Code on charges of high treason, article 162 for disclosure of state secrets, article 301 for abuse of

office and article 302 for negligence. Mr. Musaev's verdict reads, inter alia, that the information he provided was being utilized by unfriendly forces in order to organize disturbances in the city of Andijan in May 2005. No family members or independent observers were permitted to be present at the trial. Mr. Musaev's first lawyer was a former NSS official and, although paid by his family, did not act in Mr. Musaev's defence.

11. Despite the fact that the United States embassy in Uzbekistan later confirmed, by a letter dated 20 February 2007, that a United States Air Force Attaché had arrived in Tashkent for the first time on 6 June 2004, had been accredited on 1 November 2004, and had departed Uzbekistan on 19 July 2006, the trial court held that Mr. Musaev had met him in the beginning of the year 2004. The court largely relied on these allegations and based the first verdict against Mr. Musaev mainly on them.

12. The source alleges that Mr. Musaev was not provided with a lawyer at the beginning. His testimonies were forged. The initial testimonies were contained on three pages all carrying his signature. During the criminal investigation it appeared, however, that the first two pages were taken off and another page not carrying his signature was attached instead. Therefore, the case had to be returned to the prosecution for additional investigation. Mr. Musaev was not furnished with the investigation file, which infringes article 46 of the Criminal Procedure Code.

13. After his second trial before the Tashkent City Court, Mr. Musaev, on 14 July 2006, was found guilty of fraud to the detriment of United Nations funds and sentenced to six years of imprisonment pursuant to article 168 of the Criminal Code, in spite of the absence of a confession and an internal investigation conducted by UNDP office in Tashkent, which "found no basis for the accusations" against Mr. Musaev, according to a UNDP document dated 4 July 2006. The sentences under the first and the second convictions were partially combined to a total of 16 years of imprisonment. The trial was open to the public and his relatives were able to attend the proceedings.

14. During his second trial, no evidence was produced against Mr. Musaev. Four witnesses did not testify against him. Two other witnesses' testimonies were not considered by the court. As a manager of the programme in question, Mr. Musaev was not involved in financial matters at all, hence, he could not have embezzled any funds. The source alleges that the trial court violated the right to be presumed innocent.

15. Thereafter, third parties compensated for the alleged damages. Although, this means under Uzbek law, according to a resolution of the plenary of the Supreme Court from 2004, that the prison sentence cannot be implemented irrespective of whether the convict or a third party pays, Mr. Musaev's sentence was nonetheless enforced.

16. After the conclusion of the first two trials Mr. Musaev was transferred to the detention facility of Colony 64/21 in Bekabad city, which is run by the Ministry of the Interior. The source alleges that Mr. Musaev was not allowed to meet with his lawyer, so that he was unable to file his first petition of appeal against his first conviction within the prescribed time limits. Two of his letters, No. M-191 of 19 July 2006 and No. M-204 from 27 July 2006, requesting to see his lawyer to file the first appeal remained without a response from the authorities.

17. On 7 March 2007 he was transferred from Colony 64/21 to the NSS premises in Tashkent for further interrogation. There were no facilities at the NSS premises to work on the appeal and he was not given an opportunity to consult his criminal file and appeal related documents that remained at Bekabad prison. The deadline for filing an appeal established by Uzbek criminal procedure law had already expired.

18. On 21 October 2007 Mr. Musaev was able to file a second appeal petition for cassation. In his written petition he indicated that during the investigation physical and mental measures were used against him and that he was forced to testify against himself. The cassation appeal was considered by the Military Court on 10 November 2007 within the hour of receipt and dismissed without entertaining the allegations of ill-treatment and forced confessions. Neither Mr. Musaev nor his lawyer has been furnished with a written judgement by the Court alleging that it is confidential. The source alleges that this is in violation of applicable Uzbek law.

19. Regarding the third trial on charges of treason pursuant to article 157 of the Penal Code, which commenced on 11 September 2007, the source informs that Mr. Musaev was transferred to a NSS detention facility in February 2007 as a witness in the case of two customs officers. Officials of the NSS were pressing him to provide false evidence against these customs officers. When Mr. Musaev refused to comply with this request, NSS officials put pressure on Mr. Musaev's father, Mr. Aidjan Musaev, to exercise influence over his son. Reportedly, the family hired another lawyer for Mr. Musaev who had access to him, but was dealing only with the third set of charges put against Mr. Musaev. On 7 March 2007, at about 7 p.m., Mr. Musaev suffered from a traumatic brain injury following interrogation at the NSS facility and had to undergo surgery at the GlavTashkentStroy hospital. The two customs officers were then forced to provide false testimonies against Mr. Musaev.

20. The charges against Mr. Musaev were based on allegations of having been recruited by a United States citizen as an agent for foreign powers, of having recruited the two customs officers as spies, and of having used the premises of UNDP office in Tashkent for conspiratorial meetings. However, according to a confirmation letter from UNDP, none of the three persons entered UNDP premises during the relevant period of time corresponding to the charges brought against Mr. Musaev.

21. According to the source, despite his eligibility for release as a candidate falling within group 2 of two amnesty resolutions by the Uzbek Senate from 2005 and 2006, Mr. Musaev remains in detention.

22. The Government states, in its first response of 11 September 2007, that the Uzbek citizen Erkin Aidzhanovich Musaev was detained at Tashkent airport on 31 January 2006, while attempting to fly to Bishkek, when officials of the State Customs Committee discovered in his luggage a diskette containing secret information. This was officially recorded by the customs representatives, where after Mr. Musaev and the material evidence were handed over for investigation to the National Security Service, which initiated criminal proceedings against him under article 162 (Divulgence of State secrets) of the Criminal Code.

23. In accordance with the provisions of articles 242, 243 and 245 of the Code of Criminal Procedure and with the approval of the Military Prosecutor, it was decided to apply in respect of Mr. Musaev the preventive measure of remand in custody. In

addition, Mr. Musaev was acquainted with all the procedural documents against signature.

24. The Government further states that during the investigation, Mr. Musaev confirmed that the diskette discovered in his luggage belonged to him and that it contained secret information. He stated that he had obtained the diskette during his service with the Ministry of Defence, where he had occupied the post of Chief of the Department for International Military Cooperation. According to his testimony, he showed the information on the diskette to the air force attaché of a foreign embassy, who paid Mr. Musaev sums totalling approximately US$ 15,000 in exchange for secret information concerning the defence capability of Uzbekistan. Mr. Musaev subsequently confirmed this testimony at trial.

25. On 31 May 2006, the Tashkent Military Court began to hear the criminal case against Mr. Musaev, who was charged under articles 157 (Treason), 162 (Divulgence of State secrets), 301 (Forgery by an official) and 302 (Dereliction of duty) of the Criminal Code. In court, Mr. Musaev frankly confessed to committing these offences, stating that he was recruited by a foreign diplomat, on whose instructions he gathered information on military issues, including secret information, for money. The trial took place in camera, since the materials in the criminal case contained secret information. By judgement of the court, Mr. Musaev was sentenced to 15 years' deprivation of liberty, to be served in ordinary-regime colony No. 64/21 in Bekabada.

26. It must be noted that the court judgement against Mr. Musaev made no mention of accusations that he had supplied information used in organizing terrorist acts in Andijan in May 2005.

27. On 20 July 2006, another hearing took place, against Mr. Musaev and two representatives of the American firm FDN LLC Holding, Mr. B. Inoyatov and Mr. A. Kuldashev, at the Tashkent City Court. By judgement of the court, they were found guilty of committing offences under articles 168 (Obtaining property by deception), 189 (Violating the regulations on trade and provision of services), 190 (Performing an activity without a licence) and 228 (Forgery of documents, stamps, seals and forms, etc.) of the Criminal Code.

28. The Government stated that, in March 2007, new instances of illegal activity by Mr. Musaev, linked to his collaboration with representatives of foreign special services, came to light. He was therefore taken under guard to the National Security Service remand prison, in conformity with articles 244 and 538 of the Code of Criminal Procedure, and on 15 June 2007, he was again charged under article 57 (Treason) of the Criminal Code. All investigative actions in respect of Mr. Musaev were being conducted in strict compliance with legislative requirements. Moreover, under article 497 of the Code of Criminal Procedure, he could have lodged an appeal or a protest against court judgements that had not yet entered into force. However, at the time Mr. Musaev was taken to the National Security Service remand prison, the court judgements against him had already entered into force. Under article 498 of the Code of Criminal Procedure, judgements that have entered into force may be appealed by way of cassation. There is no deadline for the lodging of a cassational appeal.

29. While in the National Security Service remand prison, Mr. Musaev made no request to be provided with any documents or materials pertaining to the criminal

case in order to familiarize himself with them. No mental, still less any physical, pressure was brought to bear on Mr. Musaev or his close relatives.

30. Article 9, paragraph 3, of the International Covenant on Civil and Political Rights, stipulates that anyone detained must be brought promptly before a judge or other officer obliged by law to exercise judicial power and is entitled to trial within a reasonable time or to release. Under Uzbek legislation, this power is assigned to the prosecutor. The right of Uzbek citizens to appeal against actions of officials is set out in article 35 of the Constitution and article 241 of the Code of Criminal Procedure, under which Mr. Musaev was entitled to appeal to a higher body, including a judicial body, the decision to apply to him the preventive measure of remand in custody. However, he lodged no appeal.

31. In conformity with article 242 of the Code of Criminal Procedure, remand in custody is applied as a preventive measure in cases of premeditated offences the penalty for which, under the Criminal Code, is more than three years of deprivation of liberty. The acts committed by Mr. Musaev involved offences under article 157 (Treason) of the Criminal Code, which are categorized as especially serious and are punishable by deprivation of liberty for up to 20 years.

32. During the pretrial investigation and in court, Mr. Musaev fully admitted his guilt of the offences imputed to him and lodged no complaint about the illegality of his detention.

33. In reply to the transmission of additional information that had been received from the source as summarized above, the Government, on 25 April 2008, sent to the Working Group a further communication, which has not been transmitted to the source since the content of the mentioned communication does not provide any new information.

34. In the light of the foregoing, the Working Group notes that in the response of the Government, which refers to the three different trials against Mr. Erkin Musaev, there is no specific mention made of the allegations of irregularities, which occurred during the trials according the source. The Government, in its response dated 11 September 2007, satisfies itself with the remark that the conviction of Mr. Musaev following his first trial, when he was charged under articles 157 (treason), 162 (divulgence of State secrets), 301 (forgery by an official) and 302 (dereliction of duty) of the Uzbek Criminal Code, was based on the confession of Mr. Musaev to committing these offences. The Government adds that the trial took place in camera.

35. Regarding the other two trials, the Government only explains that the first of them was conducted on 20 July 2006 against Mr. Musaev and his two co-defendants, both representatives of the United States company FDN LLC Holding. By judgement of the court they were found guilty of having committed offences under articles 168 (obtaining property by deception), 189 (violating the regulations on trade and provision of services), 190 (performing an activity without a licence) and 228 (forgery of documents, stamps, seals and forms…) of the Uzbek Criminal Code. The Government further stated that the third trial in March 2007 incriminated Mr. Musaev of collaboration with representatives of foreign special services.

36. Therefore, the Government not only fails to deal with the allegations of irregularities of the trials according to the source (such as denial of access to and absence of a lawyer, the absence of compelling evidence and insufficient time for the preparation of a proper defence because of belated receipt of the indictment by the prosecution), but also fails to substantively address the specified claim of the source that Mr. Musaev was subject to torture in order to obtain a confession. This is of particular relevance given that the trial court essentially relies on Mr. Musaev's confession as a decisive element upon which the first verdict against him is based.

37. The Working Group has no reason to question the credibility of these allegations of the source, also in the light of the failure of the Government to substantially address further assertions, described in some detail as to the means applied and the point of time, that Mr. Musaev was ill-treated around 7 March 2007 in the NSS detention facility when forced to provide false testimony as a witness against two customs officers.

38. The reporting of the Government of the Republic of Uzbekistan to the Committee against Torture as well as the conclusions and recommendations, adopted by the Committee at its thirty-ninth session in November 2007,[29] have been brought to the attention of the Working Group. The Committee reveals that State representatives frankly acknowledged that confessions under torture have been used as a form of evidence in some proceedings, notwithstanding the actions of the Uzbek Supreme Court to prohibit the admissibility of such evidence. The Committee against Torture recommends that the State party should review cases of convictions based solely on confessions, recognizing that many of these may have been based upon evidence obtained through torture or ill-treatment, and, as appropriate, provide prompt and impartial investigations and take appropriate remedial measures.[30]

39. The Working Group has stated in previous Opinions that the use of torture to obtain a confession and admit such evidence in criminal proceedings amounts to a serious violation of the right to fair trial as it infringes the right not to be compelled to testify against oneself or to confess guilt (article 14, paragraph 3 (g) of the International Covenant on Civil and Political Rights). Subsequent convictions can never be considered as having been handed down following due process rules. For this reason, and taking into account the lack of a response from the Government on the repeated and detailed allegations of torture reportedly suffered by Mr. Musaev, the Working Group considers that Mr. Musaev's confession, which has informed the verdicts, cannot be admitted as valid evidence. There is a manifest suspicion that Mr. Musaev's confession was obtained under torture, and there is no further evidence provided on the facts of the charges against him, which could be considered as objective.

40. Furthermore, and according to the source, Mr. Musaev (a) had no possibility to communicate with a lawyer for more than 10 days following his arrest; (b) was not allowed to meet with his family for four months while in detention; (c) became aware of the accusations only one day before the first trial, which took place in camera as acknowledged by the Government; (d) suffered from objective limitations in the development of the evidence in respect of witnesses proposed by his defence;

[29] CAT/C/UZB/CO/3.

[30] Ibid. para. 20.

and (e) was factually constrained from preparing and filing an appeal against the first verdict within the applicable deadlines, since he could not meet with his lawyer for lack of response by the authorities to his according request letters from 19 and 27 July 2006. Instead, he had to resort to an appeal of cassation.

41. These facts amount to serious irregularities of the trials and violate Mr. Musaev's rights as protected by article 14 of the International Covenant on Civil and Political Rights, more particularly the rights to a fair and public hearing by a competent, independent and impartial tribunal established by law; to be informed promptly and in detail of the nature and the cause of the charge against him; to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; and to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him. Consequently, Mr. Musaev's detention is arbitrary in terms of category III.

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

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

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

Adopted on 9 May 2008.

OPINION No. 15/2008 (The Gambia)

Communication addressed to the Government on 15 October 2007.

Concerning Ms. Tania Bernath, Mr. Ayodele Ameen and Mr. Yaya Dampha.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. The Working Group regrets that the Government has not replied within the 90-days deadline.

3. On 7 May 2008, the source informed the Working Group that the three above-mentioned persons had been unconditionally released.

4. Consequently, the Working Group, acting on the basis of paragraph 17 (a) of its methods of work, decides to file the case.

Adopted on 9 May 2008

OPINION No. 16/2008 (Turkey)

Communication addressed to the Government on 20 July 2007.

Concerning Mr. Halil Savda.

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

1. (Same text as paragraph 1 of Opinion No. 14/2007.)

2. (Same text as paragraph 3 of Opinion No. 15/2007.)

3. In the light of the allegations made, the Working Group welcomes the cooperation of the Government for having provided detailed information on the case concerned. The Working Group transmitted the reply provided by the Government to the source and received its comments.

4. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto, as well as by the observations of the source.

5. The case summarized below was reported to the Working Group as follows: Mr. Halil Savda, a Turkish citizen, addressed in Kocapinar Koyu, Sirnak/Cizre, was born in that city on 12 October 1974. He graduated from primary school. In 1993, he was arrested for a first time and held for a month in Sirnak/Cizre. During that month, he was repeatedly tortured. The State Security Court charged him with "supporting an illegal organization" and sent him to prison. He was released in 1996.

6. Upon release from prison, he was called up for military service. He first went to his military unit for basic training, but he did not report to his unit at the end of the training. In 1997, he was again arrested and charged again with "membership in an illegal organization". He was then sentenced to 15 years of imprisonment by the Adana State Security Court.

7. On 18 November 2004, following a change in the Penal Code, Mr. Savda was released and sent handcuffed from prison to Antep Gendarmerie Station. He was considered to be a deserter from military service and was held incommunicado in a cell without a bed for six days. On 25 November 2004, he was transferred to a military unit in Çorlu-Tekirdag. Thereafter, he declared that because the torture he had to endure in 1993, he could not serve as a soldier. In a letter to the Commander of the Unit, he declared himself a conscientious objector.

8. On 16 December 2004, Mr. Savda was again arrested and questioned by the Çorlu Military Court. He was then formally charged with "insistence on disobedience to orders with intention of avoiding military duty" and transferred from the military unit to Çorlu Military prison. The Çorlu Military Court sentenced him to three months and 15 days of imprisonment in accordance with article 87 of the Military Penal Code (Case No. 2004/1601). Mr. Savda was released on 28 December 2004, while his trial on the charge of desertion was still pending. Later, on 13 August 2006, the Third Military Appeals Court annulled the verdict of the local Court based on procedural deficiencies and ruled in favour of a re-trial. The case was then referred back to the Çorlu Military Court.

9. Mr. Savda was again arrested on 7 December 2006 when he had voluntarily gone to attend his trial. The justification for his arrest was the suspicion that he

would escape. According to the source, this can technically be seen as a re-arrest in the same case of 16 December 2004. On 25 January 2007, he was released to be tried without custody. However, instead of being released, Mr. Savda was sent to the Tekirdag Besiktepe 8th Mechanized Brigade. There, despite of the fact that he was being tried because he had declared himself to be a conscientious objector, he was again asked to wear a military uniform. After he had reiterated that he was a conscientious objector another case was opened. On 5 February 2007, he was charged of "insistent insubordination" by the Military Prosecutor and sent before the Çorlu Military Court. The Military Court decided that Mr. Savda would be tried without custody and he was sent back to the military unit again.

10. It was alleged that on 26 January 2007, Mr. Savda was subjected to ill-treatment at the disciplinary ward of the Tekirdag Besiktepe 8th Mechanized Brigade, which resulted in his face being swollen and his lips cracked and bleeding. The disciplinary officer, who was a sergeant major, together with two guardians and an officer, pushed Mr. Savda to the wall face-on, kicked his legs apart and began hitting him. While yelling "you are a traitor, you are a terrorist", they tried to silence Mr. Savda by shoving a dirty gap in his mouth. Later, Mr. Savda was kept naked during three days in a room without chairs or a bed. He was forced to sleep on the cement and was not even given a blanket.

11. On 15 March 2007, Mr. Savda was sentenced by the Çorlu Military Court to 12 months of imprisonment for desertion and three and a half months for insubordination. These sentences were based on his charges of disobedience and desertion in 2004.

12. On 12 April 2007, the Çorlu Military Court sentenced Mr. Savda to a further six months of imprisonment on the same charge of insubordination, based on his disobedience as of 25 January 2007, bringing his total prison term up to 21 and a half months. The Military Court did not go into the reasoning for the sentence. The source concludes that even after his eventual release from prison, Mr. Savda will not be free: He will be send back to his military unit.

13. In its response, the Government notes at the outset that article 72 of the Constitution of Turkey provides that "patriotic service is a right and a duty for every Turkish citizen. The conditions in which that service shall be performed or deemed to have been performed in the armed forces or public service shall be prescribed by law". Section 1 of the Military Service Act reads: "… every man of Turkish nationality shall be obliged to perform military service." The Military Penal Code stipulates that once conscripts have been placed on the muster rolls for military service, they are required to report to the designated military unit. Failing to do so is considered as unlawful absence and entails criminal liability under article 63 of the Military Penal Code.

14. Any further acts of disobedience fall under article 87 of the Military Penal Code and constitute the crime of "persistent disobedience/insubordination". Disobedience carries a penalty of one month to one year of imprisonment. Those who explicitly disobey an order or those who do not carry it out even though it has been repeated are liable to imprisonment between three months and two years. Acts of persistent disobedience carried out with the intention of evading military service fall under article 88 of the Military Penal Code, which reads in part: "Whoever commits the insubordination offences laid down in article 87, … with the intention

of evading military service partially or fully, shall be punished with six months to five years of imprisonment." Finally, the offence of desertion is punished by article 66 of the Military Penal Code. According to its paragraph 1 (a), whoever deserts his unit, regiment or duty post for more than six days without permission is sentenced to one to three years of imprisonment.

15. The Government confirms that it is not possible to be exempted from military service on grounds of conscientious objection under Turkish legislation in force and that there is no alternative civil service scheme provided for by law. The Government asserts that conscientious objection has not been recognized as a right under international law, neither by the European Convention on Human Rights and Fundamental Freedoms nor by the International Convention on Civil and Political Rights, and makes extensive reference to the jurisprudence of the European Court of Human Rights.

16. Turning to the case of Mr. Halil Savda, the Government informs that a case was initiated against him following indictment No. 2004/1488/897, issued by the Office of the Military Prosecutor of the 5th Army Corps Command Headquarters on 17 December 2004, on the charge of persistent disobedience for his successive refusal to enforce the orders of his superior officers on 6 and 7 December 2004. He was arrested on 16 December 2004 by the Military Court of the 5th Army Corps Command Headquarters in Çorlu and later released on 28 December 2004. After his trial, Mr. Halil Savda was sentenced to three months and 15 days of imprisonment for persistent disobedience under article 87 of the Military Penal Code by decision of the Court No. 2005/640-1 E.K., dated 4 January 2007.

17. Upon his appeal, the Military Court of Cassation, in its judgment of 13 June 2006, reversed the decision of the Military Court on procedural grounds since a psychiatric examination had not been conducted, and referred the case back to the Military Court of first instance.

18. After his release on 28 December 2004, Mr. Halil Savda was instructed to join his military unit no later than 31 December 2004, failing which an arrest warrant was issued against him. He attended the hearing before the Military Court on 7 December 2006, where the Court decided to arrest him pursuant to article 71 of the Law on the Establishment and Trial Procedure of Military Courts No. 353 for the purposes of military discipline and to prevent his escape, pursuant to article 100, paragraph 2 (a) of the Criminal Procedure Code No. 5271. The Court further decided that the necessary documents for the psychiatric examination be submitted to the Court and that a psychiatrist be present at the next hearing. The warrants that had previously been issued for his apprehension were withdrawn.

19. The Government further informs that Mr. Halil Savda was charged for the crime of desertion by the Office of the Military Prosecutor of the 5th Army Corps Command Headquarters pursuant to indictment No. 2006/1974-1359 E.K., dated 11 December 2006, for his absence between 30 December 2004 and 7 December 2006. This case was merged with the other case initiated on the charges of persistent disobedience. Mr. Halil Savda was therefore tried under two separate charges registered in a joint case file.

20. During the period of 7 December 2006 and 25 January 2007 Mr. Halil Savda remained in detention. The status of his detention was examined by the Court in hearings held every 30 days as prescribed by law. On 18 January 2007, the

proceedings concerning the judicial observation were completed and Mr. Halil Savda was released at the next hearing, held on 25 January 2007, as the judge concluded that the grounds for his arrest and detention no longer existed. His trial was conducted without holding Mr. Halil Savda in custody.

21. On 15 March 2007, the Military Court of the 5th Army Corps Command Headquarters rendered a motivated judgement in the joint case No. 2007/331-254, according to which Mr. Halil Savda was sentenced to imprisonment on accounts of persistent disobedience with the intention of fully evading military service in December 2004, according to article 88 of the Military Penal Code, and of desertion from 30 December 2004 until 7 December 2006, according to article 66, paragraph 1 (a) of the said Code. The Court sentenced him to three months and 15 days of imprisonment for persistent disobedience with the intention of fully evading military service and for one year of imprisonment for desertion, and ruled that the imprisonment could not be converted into alternative penalties. The time spent in detention between 16 and 28 December 2004 and 7 December 2006 and 25 January 2007 and a further seven day disciplinary penalty imposed upon Mr. Halil Savda, were reduced from the overall sentence. The judgment was upheld by the Military Court of Cassation.

22. Mr. Halil Savda was transferred to his military unit upon his release on 25 January 2007, where he refused to wear a uniform, to shave and to join military assemblies. Therefore, a further investigation was initiated and, on 15 February 2007, he was brought before the Military Court of the 5th Army Corps Command Headquarters and arrested pursuant to article 71/1 of the Law on the Establishment and Trial Procedure of Military Courts No. 353 for the purpose of military discipline. Subsequently, a case was initiated against Mr. Halil Savda by the Office of the Military Prosecutor of the 5th Army Corps Command Headquarters by indictment No. 2007/250-203 E.K., dated 13 February 2007, on the charge of persistent disobedience with the intention of fully evading military service for his conduct between 25 January and 5 February 2007.

23. Mr. Halil Savda was tried again and the Military Court rendered a motivated judgement on 12 April 2007 (No. 2007/742-396) according to which he was sentenced to six months of imprisonment under article 88 of the Military Penal Code. The Court decided that the prison term could not be converted into alternative penalties. The period he had spent in custody between 26 January 2007 and 2 February 2007 as well as the period of detention beginning 5 February 2007, were deducted from the overall sentence. The Military Court of Cassation upheld the judgment on 19 June 2007 in its decision No. 2007/1531-1523, which became final on 26 June 2007.

24. Mr. Halil Savda was released on 28 July 2007 pursuant to a decision of the Military Court dated 23 July 2007 and was transferred to his military unit in order to complete his remaining service. However, Mr. Halil Savda has not yet joined his unit and the Government informed that he is still being considered a deserter.

25. The Government upholds that, contrary to the allegations reported by the source, the detention proceedings against Mr. Halil Savda have been carried out in accordance with the existing legislation, and that he had not been convicted or detained twice for the same offence in particular.

26. As regards the allegations of ill-treatment of Mr. Halil Savda made by the source, the Government informed that he complained to the Military Court during a hearing held on 5 February 2007 considering the application for an arrest warrant by the military prosecution, that he had been subjected to ill-treatment during the period of detention of seven days imposed upon him as a disciplinary measure. Subsequently, an investigation was initiated by the Military Prosecution Office of Çorlu in connection with his complaint. In the course of this investigation, the statement of the complainant was taken by the Military Prosecutor along with 12 other witnesses' statements. An in-situ examination was conducted in the disciplinary ward where Mr. Halil Savda was held. According to the Government, it was established that he had been allowed to contact his lawyer in prison and that he had rejected any food and medical assistance offered to him. The medical examination carried out before his transfer to military prison on 5 February 2007, did not indicate any pathological findings to suggest that he had sustained physical injuries, contrary to his allegations. On the basis of the evidence obtained during the investigation the Military Prosecution Office concluded that there was no ground to proceed with the prosecution concerning the allegations of ill-treatment.

27. In its observations to the response of the Government, the source points out that the Government does not challenge the allegation that Mr. Halil Savda has been tried and sentenced three times on charges based on his conscientious objection and that he is indeed a conscientious objector.

28. On 21 April 2008, the source provided an update on the case of Mr. Savda, according to which he was re-arrested on 27 March 2008 by police forces on the basis of an arrest warrant that was issued against him on charges of desertion. The arrest warrant was issued after he had failed to report to his military unit within 48 hours following his release on 28 July 2007. He is currently being detained at Çorlu Military Prison.

29. The source finally confirms that his appeal against the sentence of 15 and a half months of imprisonment by the Çorlu Military Court dated 15 March 2007 on charges of insubordination and desertion occurring in 2004, has been rejected.

30. In the light of the foregoing, the Working Group observes at the outset that the facts of this case, with the exception of the allegations of ill-treatment allegedly sustained by Mr. Halil Savda on 26 January 2007 at the Tekirdag Besiktepe 8th Mechanized Brigade, have been confirmed by the Government (as far as it has commented on the allegations of the source, namely concerning the period starting with Mr. Savda's arrest on 16 December 2004 and ending with his release on 28 July 2007, and leaving aside the slight discrepancy regarding the date of the judgment of the Military Court of Cassation, which was indicated by the source as being 13 August 2006 rather than 13 June 2006 as stated by the Government).

31. It is therefore established that Mr. Savda has already been sentenced twice in two separate judgments, one of which concerning a joint file, on accounts of persistent disobedience in terms of article 88 of the Military Penal Code and of desertion pursuant to article 66, paragraph 1 (a) of this Code. He was sentenced to total of 21 and a half months of imprisonment, whereby the time he had spent in pretrial detention before the judgments became final and binding after his appeals, as well as one week of disciplinary detention were credited to the respective overall

sentence. He has served a prison term and his disciplinary penalty of about seven months in total during three different periods until he was released on 28 July 2007.

32. In the absence of any reason to question the credibility of the information received by the source and in the light of the confirmation of the Government in its reply that Mr. Savda has still been considered a deserter after his release from prison on 28 July 2007 for having failed to report to his military unit, it has also been established, in the view of the Working Group, that Mr. Savda was re-arrested on 27 March 2008 and is currently being held in detention at Çorlu Military Prison.

33. All criminal sentences relate to Mr. Savda's conviction as conscientious objector, meaning his refusal for reasons of his conscience, to serve in the armed forces, including in units which would not be directly engaged in combat such as, assumingly, the Tekirdag Besiktepe 8th Mechanized Brigade, where he was sent on 25 January 2007.

34. In its response to the source's assertions, the Government did not challenge the fact that Mr. Savda is indeed a genuine conscientious objector. The Government further confirms that military service is compulsory for every Turkish citizen; that there is no possibility for exemption from military service on grounds of conscientious objection; that there is no alternative scheme for community service in place and that acts of conscientious objection are tantamount to criminal prosecution as acts of insubordination, disobedience or desertion and that, accordingly, every single of such acts entails criminal liability.

35. The Government, however, errs when it claims that a right to conscientious objection has not yet been recognized as a human right under international law. It has to be recalled that the Human Rights Committee, in its Communications 1321/2004 and 1322/2004, unequivocally stated the following:

> "The Committee recalls its previous jurisprudence on the assessment of a claim of conscientious objection to military service as a protected form of manifestation of religious belief under article 18, paragraph 1 [of the International Covenant on Civil and Political Rights]. It observes that **while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief**. The Committee also recalls its general view expressed in general comment 22 that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief…." (emphasis added)[31]

36. The Working Group concurs with the Views of the Human Rights Committee that genuinely held beliefs of conscientious objection fall within the ambit of

[31] Communication No. 1321/2004, *Yoon v. Republic of Korea*, Communication No. 1322/2004, *Cho v. Republic of Korea* (Views adopted on 3 November 2006), para. 8.3. (footnotes omitted) (A/62/40, Vol. II, p. 202).

article 18, paragraph 1 of the International Covenant on Civil and Political Rights as manifestations of one's religion, The Working Group, in addition, qualifies them as manifestations of conscience as protected by the same article. In as far as the Opinion No. 24/2003[32] of the Working Group could be interpreted as holding that the evolution towards recognition of a right of an individual to refuse, on grounds of religious beliefs or conscience, to serve in the military, has not reached a stage where the rejection by a State of the right to conscientious objection is incompatible with international law, the Working Group clarifies that this statement was related to the necessary balancing act, which an assessment of the limitation clause of article 18, paragraph 3, of the International Covenant, involves. The outcome of the application of this test might be that in some States in general, or in individual cases in particular, restrictions on the exercise of the right to freedom of religion or belief in the context of conscientious objection might be justified, in other situations it might not.

37. As pointed out by the Human Rights Committee in its Views referred to above, restrictions on the right to freedom of religion or belief must be prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, within the meaning of article 18, paragraph 3 of the International Covenant:

> "Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question."(par. 8.3)

38. The Government of Turkey has not put forward any arguments justifying the absence of any legislation accommodating conscientious objectors, possibly allowing for alternative services as a substitute for military service, as is the case in many other States, and for the necessity of criminal prosecution of conscientious objectors, which might potentially provide justification for a limitation on the right to freedom of religion or belief in terms of article 18, paragraph 3 of the International Covenant on Civil and Political Rights for the purpose of protecting public safety, order, health, or morals or the fundamental rights and freedoms of others. In the view of the Working Group, it has been established that the limitations on Mr. Savda's right to freedom of religion or belief as a genuine conscientious objector is not justified in the present case, and is, thus, in violation of article 18 of the Universal Declaration of Human Rights and of article 18, paragraph 1 of the International Covenant. Accordingly, the criminal prosecution, sentencing and deprivation of liberty of Mr. Savda for holding and manifesting his belief and conscience are arbitrary in terms of category II of the Working Group's categories.

39. The Working Group, on previous occasions,[33] has already declared arbitrary the detention of conscientious objectors following a second conviction on the

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[32] Opinion No. 24/2003 (Israel), adopted 28 November 2003, E/CN.4/2005/6/Add.1, p. 18, 21, para. 27. See also Opinion 36/1999 (Turkey), adopted on 2 December 1999, E/CN.4/2001/14/add.1, p. 53.

[33] See note 32 above. See also general comment No. 32 (2007) of the Human Rights Committee, para. 55, endorsing the Opinions of the Working Group and the Views of the Committee in the case of *Mr. Yeo-Bum and Mr. Myung Chin Choi v Republic of Korea* (note 31 above).

grounds that this would be tantamount to compelling a person to change his or her convictions and beliefs for fear of not being subjected to criminal prosecution for the rest of one's life, being incompatible with the principle of double jeopardy or *ne bis in idem*, thus violating article 14, paragraph 7, of the International Covenant on Civil and Political Rights, and falling into category III. Consequently, under the circumstances of this case, also Mr. Savda's second conviction to a prison term of six months by the Military Court on 12 April 2007 for insubordination since 25 November 2007, as upheld by the Military Court of Cassation, violates his right to fair trial. However, it does not transpire, from the information before the Working Group, whether Mr. Savda has already served this sentence, or parts thereof; if he had to it would be tantamount to arbitrary deprivation of liberty.

40. Turning to the allegations of ill-treatment Mr. Savda has reportedly suffered from on and after 26 January 2007, when he was serving his disciplinary penalty, the Working Group observes that they are described by the source in much detail with respect to the date, the duration and the modes of ill-treatment allegedly applied to Mr. Savda, the persons reportedly involved, and the injuries sustained. On the other hand, the Government has provided equally detailed information on the measures taken following the allegations put forward by Mr. Savda during the court hearing on 5 February 2007, namely the investigation opened by the Military Prosecution Office; the number of witnesses heard; the in situ examination conducted and the medical examination carried out, which led to the conclusion that there were no sufficient reasons to proceed with any prosecution.

41. The Working Group has repeatedly held that investigation of allegations of ill-treatment inflicted upon detainees in violation of the prohibition of torture and the right to physical integrity generally falls within the scope of its mandate only in so far as it is used in order to obtain a confession of guilt of the pretrial detainee or otherwise impairs his or her exercise of the right to a proper defence. Albeit serious and not to be taken lightly, the Working Group concludes that it is not necessary to further examine the allegations of ill-treatment as they do not seem to relate to any of the situations just described and have not been argued by the source accordingly.

42. Having found a violation of the right not to be arbitrarily deprived of liberty, it is not necessary to examine whether Mr. Savda could have been tried before a civilian rather than a military court.

43. In accordance with paragraph 17 (a) of its methods of work,[34] the Working Group considers that the case in question warrants the rendering of an Opinion also regarding the periods Mr. Savda spent in detention between 16 and 28 December 2004, between 7 December 2006 and 2 February 2007, as well as between 5 February 2007 and 28 July 2007. The reasons for this position are the Group's wish to develop its jurisprudence on a matter of principle and particular importance. It is very likely that Mr. Savda will be arrested, detained and imprisoned time and again and may spent years after years in prison for failing to serve in the Army at least until he has reached the age limit, if any, after which Turkish citizens are not more obliged to perform their military service. Such

[34] Paragraph 17 (a) of the methods of work reads as follows: "If the person has been released, for whatever, reason, following the reference of the case to the Working Group, the case is filed; the Group, however, reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the persons."

scenario is real, taking into account the provisions of the Military Penal Code as it is in force at present, unless the country changes its laws, including possibly its Constitution, in order to provide for an alternative to military service for conscientious objectors or implements any other measure to bring the situation into conformity with the international human rights instruments accepted by the Republic of Turkey, or seizes to make it a crime or a disciplinary offence to refuse performing such service. Moreover importance is attached to the matter beyond Mr. Savda's individual fate.

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

> The deprivation of liberty of Mr. Halil Savda during the periods between 16 and 28 December 2004, between 7 December 2006 and 2 February 2007, as well as between 5 February and 28 July 2007 was arbitrary. His deprivation of liberty since 27 March 2008 is also arbitrary, being in contravention of articles 9 and 18 of the Universal Declaration of Human Rights and of articles 9 and 18 of the International Covenant on Civil and Political Rights from which the Republic of Turkey is a State Party, falling under category II of the categories applicable to the consideration of cases submitted to the Working Group. In addition, it also falls under category III of the categories applied by the Working Group, as far as Mr. Savda would have to serve his prison term following his conviction by judgement No. 2007/742-396.

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

Adopted on 9 May 2008.