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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-seventh and forty-eighth sessions, held in November 2006 and May 2007, 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 seventh session (A/HRC/7/4).

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CONTENTS

Opinion *Page*

No. 32/2006 (Qatar) 3
No. 33/2006 (Iraq and United States of America) 4
No. 34/2006 (Qatar) 9
No. 35/2006 (Syrian Arab Republic) 9
No. 36/2006 (Saudi Arabia) 10
No. 37/2006 (Saudi Arabia) 12
No. 38/2006 (Algeria) 14
No. 39/2006 (Tajikistan) 18
No. 40/2006 (Algeria) 21
No. 41/2006 (People's Republic of China) 24
No. 42/2006 (Japan) 24
No. 43/2006 (United States of America) 29
No. 44/2006 (Saudi Arabia) 38
No. 45/2006 (United Kingdom of Great Britain and Northern Ireland) 40
No. 46/2006 (Democratic Republic of the Congo) 46
No. 47/2006 (People's Republic of China) 49
No. 1/2007 (Canada) 56
No. 2/2007 (Myanmar) 56
No. 3/2007 (Egypt) 59
No. 4/2007 (Saudi Arabia) 64
No. 5/2007 (Qatar) 66
No. 6/2007 (Mauritania) 66
No. 7/2007 (Australia) 69
No. 8/2007 (Syrian Arab Republic) 74
No. 9/2007 (Saudi Arabia) 78
No. 10/2007 (Lebanon) 81
No. 11/2007 (Afghanistan and United States of America) 85
No. 12 /2007 (Ecuador) 88
No. 13/2007 (Viet Nam) 92

OPINION No. 32/2006 (QATAR)

Communication: addressed to the Government on 10 March 2006.

Concerning: Mr. Amar Ali Ahmed Al Kurdi.

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

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. The mandate of the Working Group was clarified and extended by the Commission in resolution 1997/50. It was reconfirmed by the Commission in resolution 2003/31, by the General Assembly in resolution 60/251 and the Human Rights Council in decision 1/102. Acting in accordance with its methods of work, the Working Group forwarded the above-mentioned communication to the Government.

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

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

I. When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (Category I);

II. When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);

III. When the complete or partial non-observance of the relevant international standards set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned relating to the right to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (Category III).

4. The Working Group already considered the case of Mr. Amar Ali Ahmed Al Kurdi during its forty-sixth session. However, it did not take into account the information received from the Government. During its forty-seventh session the Working Group took knowledge of the Government's response to the allegations submitted by the source.

5. The Working Group further notes that the Government concerned has informed the Working Group that Mr. Al Kurdi was released on 2 January 2006 and is, therefore, no longer in detention. This fact has been confirmed by the source.

6. 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 16 November 2006.

OPINION No. 33/2006 (IRAQ and UNITED STATES OF AMERICA)

Communication: addressed to the Governments on 17 January 2005.

Concerning: Mr. Tariq Aziz.

Both States are parties to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. On 30 November 2005, the Working Group adopted Opinion No. 45/2005 concerning the communication addressed to the Governments of Iraq and the United States of America on behalf of Mr. Tariq Aziz. The Working Group stated its views on certain legal questions raised by the source and the Governments, in particular with regard to its mandate and the principles governing the responsibility of the Iraqi and United States Governments for the facts alleged by the source.

3. Firstly, the Working Group decided that in accordance with paragraphs 16 of its methods of work and 14 of its revised methods of work,[1] it will not assess the lawfulness of Mr. Tariq Aziz's detention for the period from 24 April 2003 to 30 June 2004, as it occurred during an ongoing international armed conflict and the United States Government recognized that the Geneva Conventions applied to individuals captured in the conflict in Iraq. According to the source, the International Committee of the Red Cross (ICRC) was allowed to visit Tariq Aziz and communicate two letters to his family.

4. Secondly, the Working Group decided that until 1 July 2004 Tariq Aziz was detained under the sole responsibility of the Coalition members as occupying powers or, to be more precise, under the responsibility of the United States Government. Since then, as Mr. Aziz appeared on 1 July 2004 before the Supreme Iraqi Criminal Tribunal ("the Tribunal"), a court of the sovereign State of Iraq, in order to enter a plea, his pretrial detention on charges pending before the Tribunal is within the responsibility of Iraq. The Working Group also found that, considering that Tariq Aziz is in the physical custody of the United States authorities, any possible conclusion as to the arbitrary nature of his deprivation of liberty may involve the international responsibility of the United States Government as well.

5. Finally, with regard to the alleged violations affecting the right to a fair trial, the Working Group considered that it was premature to take a stance on the allegations of arbitrary deprivation of liberty, because the procedural flaws amounting to the violation of the right to a fair trial could, in principle, be redressed during the subsequent stages of the ongoing criminal proceedings. Therefore, the Working Group decided that it would follow the development of the

[1] "The Working Group will not deal with situations of international armed conflict insofar as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence."

process and would request more information from both Governments concerned and from the source. In the meantime, the Working Group decided to keep the case pending until further information was received, as provided in paragraph 17 (c) of its methods of work.

6. On 14 December 2005 the Working Group notified its opinion to the two Governments and on 12 January 2006 to the source. The Working Group subsequently received new allegations from the source. On 3 May 2006, the Chairperson-Rapporteur of the Working Group transmitted them to the Governments of Iraq and of the United States of America through their respective Permanent Representatives in Geneva and requested their comments and observations. Since no reply was received, on 28 June 2006 the Chairperson-Rapporteur of the Working Group sent a letter informing the Permanent Representatives of the two Governments that the Working Group will consider the case during its forthcoming forty-sixth session from 28 August to 1 September 2006. While no reply was received from the Government of the United States, the Iraqi Government sent a reply on 14 July 2006. At its forty-sixth session the Working Group decided to write again to the Government of Iraq seeking clarification of its reply of 14 July 2006. No reply to this request was received. The Working Group also transmitted the Iraqi Government's reply of 14 July 2006 to the source, which on 11 August 2006 sent its observations. On 12 November 2006, the source informed the Working Group that there were no further developments in the case.

7. The source alleges multiple violations of Tariq Aziz's right to a fair trial. According to the source, Tariq Aziz was taken into custody by United States military forces on 24 April 2003. On 1 July 2004, he was taken to a military prison in Baghdad where he appeared at a hearing in his case. He had not been previously informed of the charges brought against him and was not assisted by a lawyer.

8. Since then, Tariq Aziz has had sporadic meetings with his defence counsel, Mr. Badie Arief Izzat. These meetings take place under circumstances which render the effective preparation of a defence case very difficult. The defence counsel is not allowed to see his client at dates he requests. Instead, he is informed at very short notice (never more than a day) by the United States authorities of a meeting date. A United States official always remains present during the meetings between Tariq Aziz and his lawyer who are not allowed to exchange any written documents. This not only seriously hampers their ability to prepare a defence case, it also makes it impossible to give formal power of attorney to the additional lawyers his family has retained for him.

9. Moreover, according to the source neither Tariq Aziz nor his counsel have ever received any formal act about the charges or any official communication from the Public Prosecutor's office or from the Tribunal. The few times Tariq Aziz was interrogated in presence of his lawyer, this was carried out by officers of the United States administration, instead of the prosecutor or judges of the Tribunal.

10. In its submission of 14 July 2006, the Iraqi Government states that Tariq Aziz was detained on 1 July 2004 to be brought to justice with regard to four criminal cases in which he is a defendant and that are currently being investigated and prepared for trial before the Tribunal. The four cases are (1) the events of 1991, (2) Kuwait, (3) human rights violations and (4) waste of national wealth. The Government adds that Tariq Aziz has been interrogated and witnesses and co-defendants have been heard. As far as the Kuwait case is concerned, the Government

states that the Government of Kuwait has submitted a complaint against Tariq Aziz on the basis of which the Tribunal has opened a case. It is being investigated and prepared for trial as provided for by law. With regard to the charges of human rights violations and criminal waste of national wealth, the Government states that Tariq Aziz and his co-defendants as well as the witnesses have been heard, but the outcome of the case (in the words of the Government "his fate") has not been determined yet. Finally, the Government states that Tariq Aziz is enjoying all his rights and that he is being questioned in the presence of his lawyer Badia Aref Izzat.

11. In reply to the Government's observations, the source reiterates its allegations. It stresses particularly that Tariq Aziz and his lawyers are not aware of the official complaint presented by the Kuwaiti Government before the Tribunal and that they have never received any formal act about the charges or any official communication from the Public Prosecutor's office or from the Tribunal.

12. The Working Group notes with appreciation the cooperation of the Iraqi Government. It regrets, however, that neither the Government of Iraq nor the Government of the United States have submitted observations specifically addressing the allegations of the source. Nonetheless, the Working Group believes that it is in a position to consider the case again and render an opinion.

13. The Working Group also considered whether, in view of the fact that the trial against Tariq Aziz has not begun, it should again postpone stating its opinion on the case. However, already in its Opinion of 30 November 2005 (paragraph 30), the Working Group had expressed its concern about the violation of Tariq Aziz's rights as a defendant when it stated that: "[a]lready at the preparatory stage of the trial against him, some serious procedural flaws can be identified, above all in respect of his full and unlimited access to his defence counsel to prepare his defence out of the hearing distance of the prison staff and any other officials". Nearly two years have elapsed since the case was presented to the Working Group and more than a year since the Working Group decided to "keep the case pending". As found below, during these two years, Tariq Aziz has not been presented to a judge, or even been heard a single time by the prosecution which is allegedly investigating the charges against him. The Working Group therefore considers that it cannot further delay issuing its opinion.

14. The Working Group observes that the United States Government has not submitted any reply on the merits of the allegations of the source, while the Government of Iraq has not in fact challenged the serious allegations of the source, particularly those regarding the right to be assisted by defence counsel in the preparation of his defence. The Working Group therefore considers it to be established that Tariq Aziz can only meet with his lawyer at the whim of the United States authorities; that a United States official always remains present during the meetings between Tariq Aziz and his lawyer; that the frequency and time allocated to these meetings make the adequate preparation of a defence utterly impossible; that the prohibition on the exchange of written documents further impedes the preparation of a defence case and the appointment of lawyers of the defendant's own choosing; that the only hearing Tariq Aziz has had in connection with his case took place on 1 July 2004; that he was neither given an opportunity to prepare for that hearing nor assisted by a lawyer; and that in the two years and five months since then Tariq Aziz has not been brought before a judge.

15. As for the information provided by the Government of Iraq with regard to the criminal charges against Tariq Aziz and the proceedings based on them, the Working Group notes that two years and five months have passed since the initial hearing at which Tariq Aziz was asked to enter a plea with regard to some charges. The Government has not challenged the source's assertion that, whatever charges are being investigated and prepared for trial and whatever evidence is being collected, not a single document concerning these proceedings has been notified to Tariq Aziz or to his lawyers. The Government states that Tariq Aziz has been interrogated, but it does not dispute that he was interrogated by United States officials and not prosecutors or judges of the Tribunal. The Working Group finds the charges against Tariq Aziz as set forth in the Government's observations (e.g. "the events of 1991", "Kuwait" or "human rights violations") rather vague. In any event, as long as they are not brought to the attention of the defendant and his lawyers, it is irrelevant whether the charges are clearly defined or not. The Government has not submitted any document which would show that formal procedural steps have been taken and that the defendant has been informed of them.

16. Two years and five months after his status changed, at least in theory, from prisoner of war to criminal defendant, Tariq Aziz has only had one perfunctory hearing. He may have been informed at the time of some charges against him (no details have been brought to the Working Group's attention), as required by article 9 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), but the 14 July 2006 submission of the Government of Iraq does not suggest that the charges which the Government now mentions to the Working Group were brought to his attention on that day. Those charges have never been notified to the defendant, who in fact has no tangible indication of the fact that he is detained in the context of criminal proceedings (except for the Government's statements to the Working Group). While Tariq Aziz was "brought promptly before a judge" once responsibility for his detention was transferred from the United States to Iraq on 1 July 2004, since then there does not appear to have been any judicial review of his detention. Under the circumstances of the case, also his right to take proceedings before a court to have that court rule on the lawfulness of his detention, as enshrined in article 9 (4) ICCPR, appears purely hypothetical.

17. The Working Group is fully aware that the investigation of cases against senior political and military leaders for war crimes or crimes against humanity, committed in the context of a major military campaign or over an extended period of time, is extremely complex and time-consuming. The experience of international tribunals established by the United Nations shows that in many instances years pass between the arrest of the defendant and the actual start of his trial. What is extraordinary and unacceptable about the case of Tariq Aziz, however, is that during the two years and five months elapsed since 1 July 2004 there has not been any procedural step marking progress in his case of which he has been made aware. The right to "trial within a reasonable time or to release" (article 9 (3) ICCPR), a centrepiece of the protection against arbitrary detention, is therefore violated.

18. Insofar as important procedural steps have taken place, such as the questioning of witnesses and co-defendants mentioned by the Government, they remain shrouded in mystery for the defendant and his lawyer. Who are these witnesses and co-defendants? In relation to which of the four cases allegedly being investigated were they heard? Who questioned them? What did

they say? Article 7 (f) of the Statute of the Tribunal provides that "the Chief Tribunal Investigative Judge shall assign cases to individual tribunal investigative judges", but Tariq Aziz has not been informed of the assignation of the cases concerning him. Under article 18 (d) of the Statute "the Tribunal Investigative Judge shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute". No such indictment has ever been notified to Tariq Aziz. On the other hand, article 21 (a) of the Statute, providing that "[a] person against whom an indictment has been issued shall, pursuant to an order or an arrest warrant of the Tribunal Investigative Judge, be taken into custody", would appear to suggest that indeed such an indictment exists, as Tariq Aziz has been in custody for 29 months. To sum up, if there are indeed criminal proceedings under the Statute of the Tribunal in course against Tariq Aziz, they are being kept completely secret to the defendant and his lawyer. This secrecy over such an extended period of time is incompatible with the right to a fair trial, particularly when the defendant is detained.

19. The Working Group further considers that insofar as Tariq Aziz is currently subjected to "the determination of a criminal charge against him" (article 14 (1) ICCPR), irrespective of whether the trial against him has begun or not, he is entitled to the minimum guarantees afforded by article 14 (3) ICCPR. These include "to be tried without undue delay" (article 14 (3) (c) ICCPR). Also the right to "communicate with counsel of his own choosing" enshrined in article 14 (3) (b) ICCPR is seriously undermined, as the meetings take place at unforeseeable intervals as dictated by the United States authorities, no documents can be exchanged between the lawyer and his client and a United States official always remains present, denying the privacy which is essential between a defendant and his counsel. Moreover, article 18 (c) of the Statute dictates that "[t]he suspect is entitled to have non-Iraqi legal representation", but for Tariq Aziz exercise of this right is made impossible in practice.

20. As to the right to be tried by an "independent and impartial tribunal", the Working Group has expressed its grave misgivings about the current situation of the Tribunal in its Opinion No. 31/2006, paragraph 22.

21. The Government of Iraq, as the Government asserting legal responsibility for the detention and trial of Tariq Aziz, and the Government of the United States, as his de facto custodian and the power whose officials are currently interrogating him, are both responsible for this situation.

22. As the Working Group stated in its Opinion No. 31/2006, paragraph 26, it is firmly convinced that "also from the perspective of the victims, who under international law enjoy the right to reparation, truth and justice, it is particularly important that the investigation of the gross violation of human rights and the trial of their alleged perpetrators are conducted in a legitimate and transparent legal process. For them as well, it is essential that justice is not only fair but also be seen to be fair".

23. It would not appear that it is too late to remedy the ongoing violations of Tariq Aziz's rights as a criminal defendant. The Working Group expresses its hope that the Government of Iraq, if it indeed intends to pursue criminal charges against Tariq Aziz, will take the steps necessary to afford him a fair trial.

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

The deprivation of liberty of Mr. Tariq Aziz is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights to which Iraq and the United States are parties, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

As a consequence of the opinion rendered, the Working Group requests the Governments of Iraq and the United States to take the necessary steps to remedy the situation of Mr. Tariq Aziz, and bring it into conformity with the principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 17 November 2006.

OPINION No. 34/2006 (QATAR)

Communication: addressed to the Government on 21 June 2006.

Concerning: Mr. Naïf Salem Mohamed Adjim Al Ahbabi.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. The Working Group further notes that the Government concerned has informed the Group that Mr. Al Ahbabi was released and is, therefore, no longer in detention. This information has not been contradicted by the source.

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 16 November 2006.

OPINION No. 35/2006 (SYRIAN ARAB REPUBLIC)

Communication: addressed to the Government on 22 September 2005.

Concerning: Mr. Nezar Rastanawi.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. The Working Group notes with appreciation the information forwarded by the Government concerned in respect of the case in question.

3. The Working Group further notes that the Government of the Syrian Arab Republic has informed the Group that the above-named person was released. This information has not been contradicted by the source.

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 16 November 2006.

OPINION No. 36/2006 (SAUDI ARABIA)

Communication: addressed to the Government on 19 June 2006.

Concerning: Mr. Abdelmohsen Abdelkhaleq Hamed Al-Hindi.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

4. In the light of the allegations made, the Working Group believes that it is in a position to render an opinion, notwithstanding that the Government has failed to offer its version of facts and explanation on the circumstances of the case.

5. According to the source Mr. Abdelmohsen Abdelkhaleq Hamed Al-Hindi, a citizen of Saudi Arabia, is a professor in a public institution of Al Qasim, Al Bureida, currently detained in Ras Tenoura prison (Al Manteqa Acharquia).

6. It is contended that on 6 July 2003, members of the intelligence services arrested Mr. Al-Hindi at his home. No arrest warrant was shown at the moment of his arrest. He was ill-treated while he was interrogated by intelligence officers, who reproached him to have expressed “subversive ideas”. No precision was given to him about the time or the circumstances in which he would have expressed such opinions.

7. For more than three years now, Mr. Al-Hindi has neither been formally charged with any offence, nor been informed of the duration of his custodial order. He has not been brought before a judicial officer, nor been allowed to name a defence lawyer on his behalf, nor otherwise been provided the possibility to challenge the legality of his detention.

8. The source alleges that the detention of Mr. Al-Hindi is arbitrary because it is devoid of any legal basis. The authorities have so far failed to provide any decision justifying his arrest and detention.

9. According to the source, the alleged reason for detention: "the diffusion of subversive ideas" is without any merit. His detention would be seen as a reprisal for the exercise of his right to freedom of opinion and expression, guaranteed by article 19 of the Universal Declaration of Human Rights.

10. The source further argues that Mr. Al-Hindi has been denied the right to an effective remedy by the competent national tribunals for his arbitrary detention and the right to a fair and public hearing by an independent and impartial tribunal. Mr. Al-Hindi has not been informed of the charges against him, has been denied access to a lawyer, and has not been brought before a judge.

11. Lastly, the source argues that the detention of Mr. Al-Hindi is also in violation of Saudi domestic law, in particular articles 2 and 4 of the Royal Decree No. M.39. These articles provide that persons shall only be deprived of their liberty in cases provided for by law, shall be detained only for the duration decided by the authorities, shall not be subjected to ill-treatment, and shall have the right to seek the assistance of a lawyer during the investigation phase and at trial.

12. The Chairperson-Rapporteur brought the allegations of the source to the attention of the Government on 9 June 2006, in which she requested the Government to provide the Working Group not later than within 90 days with its explanation on the facts alleged as well as concerning the applicable legislation. Since no reply was received within the imparted deadline, the secretariat of the Working Group informed the Government, in a letter dated 23 October 2006, that the Working Group would consider this communication at its forthcoming forty-seventh session, held from 15 to 24 November 2006. No reaction has been received to this reminder, either.

13. The Working Group had to start from the hypothesis that the lack of any comment from the Government cannot be interpreted otherwise than as the factual acknowledgment of the allegations of the source concerning the arrest and detention of Mr. Al-Hindi. This means that Mr. Al-Hindi was taken into custody in July 2003, that he is in detention ever since, and that no legal ground or judicial order has been put forward to justify his deprivation of liberty. Therefore the Working Group concludes that his deprivation of liberty is arbitrary.

14. The source also argued that in addition the detention of Mr. Al-Hindi was a reprisal for the exercise of his right to freedom of opinion and expression; the authorities allegedly qualified his activities as imparting subversive ideas. It was also contended that he was denied due process of law. Since however these latter allegations are not sufficiently substantiated and supported by reliable arguments, the Working Group founded its opinion on the sole and not refuted allegation that the detention of Mr. Al-Hindi was and is devoid of any legal basis.

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

> The deprivation of liberty of Mr. Abdelmohsen Abdelkhaleq Hamed Al-Hindi is arbitrary being in contravention of article 9 of the Universal Declaration of Human Rights and falls under category I of the categories applicable to the consideration of cases submitted to the Working Group.

16. Consequent upon the opinion rendered, the Working Group requests the Government to remedy the situation and to bring it into conformity with the provisions of the Universal Declaration of Human Rights. The Working Group believes that under the circumstances and bearing in mind the long period of time spent in detention the adequate remedy would be the immediate release of Mr. Al-Hindi.

Adopted on 17 November 2006.

OPINION No. 37/2006 (SAUDI ARABIA)

Communication: addressed to the Government on 22 June 2006.

Concerning: Mr. Chalaane bin Saïd Saoud Al-Chahrani Al-Khodri.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. The Working Group welcomes the cooperation of the Government in having provided it with the requested information.

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

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

5. According to the information submitted by the source, Mr. Chaalane bin Saïd Saoud Al-Chahrani Al-Khodri, a citizen of the Kingdom of Saudi Arabia, born on 27 May 1979 and resident in Iskane Al-Azizia, Al-Khobar, is currently held in detention at Dammam in a detention centre under the authority of the Saudi Intelligence Services.

6. It was reported that Mr. Al-Khodri went to Iraq in 2003. In June 2003, he was arrested by United States military forces reportedly because of his Saudi nationality and under suspicion of trying to contact armed opposition forces. He was allegedly tortured during his interrogation. Later he was transferred to Abu Ghraib prison in Baghdad. In April 2004, after 10 months in detention, he was released and immediately returned to his country.

7. Upon his return, Mr. Al-Khodri learnt that all persons who had been in Iraq and then returned to Saudi Arabia were systematically arrested. After a Royal Amnesty Decree had been issued, on 18 June 2004, Mr. Al-Khodri, who was living at liberty, decided to present himself to a police station, being immediately arrested. No reason was given to him for his arrest and no arrest warrant was shown. He was interrogated about his stay in Iraq and suffered from acts of ill-treatment. Later, he was transferred to Dammam detention centre, run under the authority of the Intelligence Services.

8. According to the source, for more than two years at present, Mr. Al-Khodri has neither been formally charged with any offence, nor informed of the eventual duration of his detention. He has not been brought before a judicial officer, nor has he been provided the possibility to challenge the legality of his detention.

9. The source alleges that the detention of Mr. Al-Khodri is arbitrary because it is devoid of any legal basis. The authorities have so far failed to provide any decision justifying his arrest and detention, which constitutes a violation not only of international norms but also of Saudi domestic law, in particular articles 2 and 4 of the Royal Decree No. M.39 of 19 October 2001. According to the source, these norms establish that a person shall only be deprived of his liberty in cases provided for by law, shall be detained only for the duration decided by the authorities, shall not be subjected to ill-treatment, and shall have the right to seek the assistance of a lawyer during the investigation phase and at trial.

10. Mr. Al-Khodri has also been denied the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law and the right to a fair and public hearing by an independent and impartial tribunal.

11. In its reply, the Government alleges that Mr. Al-Khodri was detained on 30 June 2004 for illegally entering Saudi Arabia across Iraqi borders. After interrogation he has been accused of illegally entering Iraq with the intention to engage in fighting there and convicted accordingly. According to the Government Mr. Al-Khodri is now being imprisoned as a result of his trial and verdict.

12. The Government further referred the Working Group to the fact that the Kingdom of Saudi Arabia, in its endeavour to combat terror and secure its border, is, like other members of the international community, determined to fight all forms of terror in a manner consistent with its obligations pursuant to international conventions.

13. According to the comments of source, the Saudi Government’s response is merely restricted to confirming that Mr. Al-Khodri was arrested for illegally entering Saudi Arabia on 30 June 2004, that during his interrogation he confessed to having illegally adjourned to Iraq with the intention to engage in fighting, and that he is being detained in conformity with legal procedures. However, the response of the Government does not explain which judicial authority convicted Mr. Al-Khodri, by virtue of what kind of legal procedure he is currently detained, subject to which jurisdiction he was judged, and what kind of punishment was announced pursuant to which legal provision.

14. The Working Group starts to point out that the presentation of the facts and the explanation of the source and the Government are on major points contradictory. Yet, the allegations of the

parties coincide in that Mr Al-Khodri was detained in June 2004 and that since then he is in detention. The Government contended, and the source admitted - at least impliedly - that the deprivation of liberty of Mr Al-Khodri is linked to his alleged involvement in the hostilities in Iraq. It is also admitted that the Saudi authorities, in their legitimate attempt to fight against international terrorism, detain anyone who returns from Iraq by illegally crossing the border.

15. According to the opinion of the Working Group, the Government did not put forward convincing arguments justifying the holding in detention of Mr Al-Khodri for almost two and a half years. It does not transpire from the information of the Government either, whether the criminal proceeding is ongoing, and if so, it is in the investigation or trial against him phase, already convicted. The Government did not contest either the allegation of the source that the proceedings were unfair, in particular that Mr Al-Khodri was not given the opportunity to have, and to consult with, defence counsels.

16. Assessing all the information before it the Working Group renders the following opinion:

> The deprivation of liberty of Mr Chalaane bin Saïd Saoud Al-Chahrani Al-Khodri is arbitrary being in contravention of article 9 of the Universal Declaration of Human Rights and falls under category III of the categories applicable to the consideration of cases submitted to the Working Group.

17. Consequent upon the opinion rendered the Working Group requests the Government to remedy the situation of Mr Al-Khodri and to bring it into conformity with the provisions of the Universal Declaration of Human Rights.

Adopted on 17 November 2006.

OPINION No. 38/2006 (ALGERIA)

Communication: addressed to the Government on 29 September 2005.

Concerning: Mr. M'hamed Benyamina and Mr. Mourad Ikhlef.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. It has transmitted the reply provided by the Government to the source, which provided the Working Group with 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 context of the allegations made and the response of the Government thereto.

5. According to the information from the source: M'hamed Benyamina is an Algerian national domiciled in France since 1997 and married to a French national since 1999. They have two children, and his wife is now pregnant with twins. He works as a butcher in the town of Trappes, in France.

6. Mr. Benyamina and his nephew, Madjid Benyamina, were arrested on 9 September 2005 at Oran airport in Algeria, by plain-clothes policemen. The two men were about to leave their country of origin after a family visit. They were immediately separated once their identities were confirmed.

7. Madjid Benyamina was released after four days of detention, and returned to France. He claims that the Algerian security forces informed him that his uncle had been arrested at the request of the French Government, and that the French Department for the Supervision of Alien Activity in France had provided the information on his presence in Algeria. During his four days in detention, officers reportedly questioned Madjid Benyamina about his uncle's activities in France, as his uncle was suspected of belonging to a terrorist organization.

8. Neither the family of M'hamed Benyamina nor his lawyer received any information on his status or his place of detention. According to the judicial register, he was not brought before any Algerian court. Six months after his arrest, his place of detention was still unknown. Mr. Benyamina was released in March 2006 following a presidential amnesty decree concerning the implementation of the Charter for Peace and National Reconciliation of 27 February 2006.

9. At 6 p.m. on 2 April 2006, he was again arrested by plain-clothes policemen from the Department of Intelligence and Security (*Département du Renseignement et de la Sécurité* (DRS)) while he was staying with his family at their house in Tiaret, in western Algeria. He was brought to DRS premises in Tiaret, where he was detained all night. On the morning of 3 April, his brother attempted to obtain information from officers at those premises, and was informed that M'hamed Benyamina had been interrogated and released the following morning. However, in reality, instead of being released, M'hamed Benyamina was transferred on 3 April to the capital, Algiers, probably to other DRS premises, before being transferred again, on 5 April, to Serkadj prison in Algiers. He reportedly never had the opportunity to see a lawyer, nor was he informed of the reasons for his rearrest. Furthermore, it is unclear whether he was formally charged.

10. Mourad Ikhlef was arrested on 28 February 2003 after being extradited from Canada to Algeria. He had been detained in Canada for alleged ties with Ahmed Ressam, suspected of having attempted to enter the United States of America in 1999 with explosives. Mr. Ikhlef was held incommunicado for 10 days by DRS and was subsequently sentenced, during a trial that was qualified as unfair, to seven years' imprisonment for membership of a terrorist group operating abroad and for acting against the interests of Algeria. Mr. Ikhlef was released on 26 March 2006 under the presidential decree implementing the Charter for Peace and National Reconciliation of 27 February 2006, and prosecution for the other crimes of which he was suspected was terminated.

11. On 3 April 2006 at 1 a.m., Mr. Mourad Ikhlef was again arrested at his home in Algiers, in the El Harrach district, by 10 plain-clothes DRS officers, accompanied by uniformed policemen.

The officers presented no warrant or other legal document justifying the arrest, nor did they even state the reasons for the arrest. Mr. Ikhlef's family is still unaware of the grounds for the arrest.

12. According to the Government's observations, on 6 February 2006 Mr. M'hamed Benyamina was placed in pretrial detention by the examining magistrate of the second chamber of the Sidi M'hamed court in Aligers; he was charged with membership of a terrorist organization active in Algeria and abroad.

13. On 7 March 2006, the indictment division of the Algiers court issued a decision terminating criminal proceedings against Mr. Benyamina and ordering his release, in application of articles 4 to 11 of Order No. 06/01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation.

14. In reality, Mr. Benyamina, who had been implicated in extremely serious acts of terrorism, could not benefit from the termination of criminal proceedings but only from a commutation or remission of the sentence after the verdict, in application of articles 18 to 20 of the aforementioned Order.

15. After bringing the case before the indictment division, the Procurator-General once again placed Mr. Benyamina in detention, in application of article 3 of Order No. 06-01 implementing the Charter for Peace and National Reconciliation. The article stipulates that "the indictment division shall be competent to rule on incidental matters that may arise in the application of the provisions of this chapter" of the Order in question.

16. It should be noted that Mr. Benyamina was the subject of an international letter rogatory issued by the Italian judicial authorities on 18 April 2006, relating to two investigations under way in Italy involving charges of membership of a terrorist organization; Mr. Benyamina is implicated in those investigations.

17. Mr. Benyamina is also the subject of an international letter rogatory issued by the French authorities in a case involving Mr. Benyamina that is being investigated by the examining magistrate of the Paris court. Mr. Benyamina is accused of criminal association with the intention of preparing terrorist acts, financing terrorism, extortion, possession of false documents and possession of illegal weapons.

18. Mr. Yekhlef Mourad [*sic*], the subject of an international arrest warrant issued on 7 March 1993 by the examining magistrate of the Sidi M'hamed court in Algiers, was arrested on 1 March 2003 by the Oran airport police while entering Algeria from Canada.

19. He was transferred to Algiers and brought before the judge who had issued the arrest warrant. He was charged by the judge with membership of a terrorist organization operating abroad.

20. On 7 March 2006, the indictment division of the Algiers court issued a decision terminating criminal proceedings against Yekhlef Mourad [*sic*] and ordering his release, in application of articles 4 to 11 of Order No. 06/01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation.

21. In reality, Mr. Mourad, who had been implicated in extremely serious acts of terrorism, could not benefit from the termination of criminal proceedings but only from a commutation or a remission of the sentence after the verdict, in application of articles 18 to 20 of the aforementioned Order.

22. After bringing the case before the indictment division, the Procurator-General once again placed Mr. Mourad in detention, in application of article 3 of Order No. 06-01 implementing the Charter for Peace and National Reconciliation. The article stipulates that "the indictment division shall be competent to rule on incidental matters that may arise in the application of the provisions of this chapter" of the Order in question.

23. In response to the communication sent by the Government on 15 August 2006, the source raised two important points: first, the Government failed to address the question of the legality of Mr. Benyamina's detention during his five months of imprisonment, which was not authorized by a court decision, on DRS premises. What is more, according to the source, the procedures for reviewing the improper application of the amnesty law in respect of the aforementioned detainees - which subsequently led to their rearrest - were unlawful. Specifically, the adversarial principle was not respected, insofar as the defendants did not have an opportunity to challenge the warrant for their rearrest.

24. According to the Government's observations, Mr. Benyamina and Mr. Ikhlef were arrested in accordance with two arrest warrants issued by the competent judicial authorities. They were tried in two separate proceedings for their respective implication in terrorist activities. The criminal proceedings brought against them were under way when the two detainees were released under the amnesty law proclaimed by the Charter for Peace and National Reconciliation. However, following the release of Mr. Benyamina and Mr. Ikhlef, the authorities concluded that the release had been the result of a misapplication of that amnesty law. In fact, for similar cases, the law provided that, on the contrary, criminal proceedings, once begun, should not be terminated. On the other hand, it they had been convicted, Mr. Benyamina and Mr. Ikhlef would have benefited from the application of article 18 of the Charter, which deals with the commutation or remission of the sentences of persons not covered by measures to terminate criminal proceedings, and with pardons. Consequently, two arrest warrants were reissued.

25. While welcoming the steps taken by Algeria for national reconciliation, the Working Group considers that the procedures established for the application of the amnesty law should also respect the principles and requirements of a fair and equitable trial, in particular the adversarial principle, which is fundamental to criminal procedure. The Government contends that the termination of criminal proceedings against Mr. Benyamina and Mr. Ikhlef was decided by the indictment division. In other words, that means that the competent judicial body handed down a decision that terminated criminal proceedings against these persons.

26. The Working Group is by no means challenging the fact that any misapplication of the amnesty law should be corrected. It regrets, however, that the Procurator-General's application, which called into question the initial decision of the indictment division, was not considered in an adversarial procedure that would have allowed the defence to contest it by presenting its own

arguments. Furthermore, and bearing in mind that the Procurator-General's application was prejudicial to Mr. Benyamina and Mr. Ikhlef, the principle of equality of arms between the prosecution and the defence was seriously undermined. This constitutes a violation of article 14 of the International Covenant on Civil and Political Rights, to which Algeria is a party.

27. Having concluded that such a violation took place, the Working Group did not deem it necessary to consider the other allegations put forward by the source, in particular those relating to the illegality of Mr. Benyamina's five months of detention by DRS.

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

> The deprivation of liberty of Mr. M'hamed Benyamina and Mr. Mourad Ikhlef is arbitrary, being in contravention of article 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.

29. The Working Group requests the Government of the People's Democratic Republic of Algeria to take the necessary steps to remedy the situation and bring it into conformity with the principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 21 November 2006.

OPINION No. 39/2006 (TAJIKISTAN)

Communication: addressed to the Government on 3 August 2004.

Concerning: Mr Mahmadruzi Iskandarov.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

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.

5. The allegation of the source that Mr. Iskandarov was and is being the victim of arbitrary detention can be summarized as follows.

6. Mr. Mahmadruzi Iskandarov, born on 3 May 1954, of Tajik nationality, temporarily living in Moscow, taken away in Korolyov district in Moscow on 15 April 2005 by unidentified forces and brought back to Tajikistan by force, currently detained in the pretrial detention centre of the Ministry of Security of Tajikistan in Dushanbe.

7. It is reported that Mr. Iskandarov is the general director of the State unitary company Tadjikgaz as well as being the Chairman of the Democratic Party of Tajikistan, one of the main opposition parties. Mr. Iskandarov had left Tajikistan and was living in Moscow, where he had applied for refugee status.

8. It is further reported that Mr. Iskandarov was accused by the Tajik authorities of embezzlement in his capacity as the general director of the State company Tadjikgaz, and also of terrorism, illegal use of personal bodyguards as well as illegal possession of firearms and ammunitions.

9. The source mentions that in 2004 the Tajik authorities applied to the Russian Federation to extradite Mr. Iskandarov for the above-mentioned accusations on the basis of an existing arrest order. The Russian police arrested Mr. Iskandarov in December 2004 and requested the Tajik authorities to provide supporting documents in order to decide the issue of extradition. It is alleged that the Russian Prosecutor in charge of this matter concluded that Mr. Iskandarov was not guilty of the accusations presented against him, and in April 2005, he was released.

10. The source reports that on 15 April 2005, Mr. Iskandarov was apprehended in the Korolyov district in Moscow by unknown persons who did not identify themselves nor show him an arrest warrant or any other judicial order. From 15 April to the evening of 16 April, he was kept incommunicado in a bathhouse and later in a forest. He was then brought to Dushanbe, Tajikistan, by plane against his will and without his identity documents since these had been left in Moscow.

11. It is alleged that Mr. Iskandarov's whereabouts were found when he was located at the pretrial detention centre (investigatory jail) under the authority of the Ministry of Security of Tajikistan. He is being charged for the offences mentioned above and awaiting trial.

12. According to the source, the arrest and detention of the above-mentioned person is arbitrary because of his illegal abduction in a foreign country and forced transfer back to Tajikistan, whereas the Russian authorities had examined the request for extradition presented by the Tajik authorities and concluded that he was not guilty of the accusations, and released him. It is also mentioned that the detention and the charges held against Mr. Iskandarov are related to his political activities as a leader of an opposition party critical to the Tajik Government.

13. In its observations, the Government informs that: in 2003 the prosecution authorities opened and carried out an inspection at Tadjikgaz, an enterprise under the direction of Mr. Iskandarov. The inspection revealed serious irregularities in the financial management giving rise to suspicion that a considerable amount of money has been embezzled. On this ground a criminal investigation was opened. Mr. Iskandarov was heard by the authorities (it is unclear, whether as a witness or a person charged). The hearing went on through several days in August 2004. While the hearing by the investigation authorities was still going on, he informed the authorities that he had to travel to Moscow for an urgent family matter. The authorities

consented on condition that he undertakes to come back in September, but he did not return. The Tajik authorities sought his extradition from the Russian Federation. He was first arrested by the Russian authorities pending extradition, but later released. Before a final decision was taken concerning his extradition, he disappeared from his flat in Moscow and some days later showed up in a prison in the Tajik capital Dushanbe. The Government emphasizes that he "(…) was officially handed over to the Tajik side by the law enforcement authorities of the Russian Federation". Upon his reappearance in Tajikistan he was placed in pretrial detention in April 2005.

14. The investigations into the charges against Mr. Iskandarov have been continuously carried out and were completed in July 2005. The prosecution indicted him and some of his accomplices with serious offences. These were: terrorism, banditry, unlawful acquisition, transfer, supply, storage and transportation of large quantities of firearms, ammunition, explosive substances and devices by a group of persons in prior conspiracy, embezzlement or fraudulent use of especially large amounts of others' property and illegal engagement in private protection (bodyguardship). Mr. Iskandarov was found guilty and sentenced to 23 years' imprisonment by the Supreme Court.

15. The Government emphasized that the trial against Mr. Iskandarov was fair; he had the assistance of defence lawyers and all his allegations asserting that he made confession before the investigation authorities under duress were examined in court and declared unfounded. The Government also stressed that Mr. Iskandarov had been given all the means to defend himself.

16. The source, in a letter dated 17 November 2006, informed the Working Group that the lawyers of Mr. Iskandarov have not produced any material to comment on the observations of the Government. Instead, the source submitted a copy of a letter written by the brother of Mr. Iskandarov. The content of this letter however does not clarify the position of the source, as to the reply of the Government.

17. The Working Group considers deprivation of liberty arbitrary, when (a) it manifestly lacks any legal basis, (b) it punishes the peaceful exercise of one's fundamental freedoms like freedom of expression or opinion, or (c) the establishment of guilt is the result of an unfair trial.

18. In the present case the two first grounds for arbitrary detention are obviously irrelevant. On the one hand, the Government provided the Working Group not only with information concerning the offences for which Mr. Iskandarov was prosecuted against and found guilty but also with the relevant text of the Tajik criminal legislation. On the other hand, however, the source argues that the charges against him were motivated by his being a political opponent to the Government, not even the source contended that Mr. Iskandarov is punished for the peaceful exercise of his fundamental freedoms.

19. The Working Group observed that the principal complaint raised in the communication is Mr. Iskandarov's alleged abduction from the Russian Federation to Tajikistan. Since the allegations of the source and the Government are completely contradictory in this regard, and the Russian Federation, under whose jurisdiction the alleged abduction was carried out, does not take part in the present proceeding, the Working Group is not in a position to take a stand in the matter of this allegation of the source.

20. The Working Group also noted that the source did not raise the issue of alleged procedural unfairness in the trial against Mr. Iskandarov. This might be explained by the fact that the communication was submitted on 20 May 2005, shortly after he reappeared in Tajikistan, but well before the trial against him began.

21. Yet, the Working Group felt duty-bound to analyse the material at its disposal from the aspect of procedural fairness. In the available material before it, however, it could not identify any such serious lack of observance of the international standards relating to a fair trial as to confer on the deprivation of liberty of Mr. Iskandarov an arbitrary character.

22. The Working Group delivers the following opinion:

On the basis of the material before it, the Working Group could not conclude whether or not the deprivation of liberty of Mahmudruzi Iskandarov is arbitrary.

Adopted on 21 November 2006.

OPINION No. 40/2006 (ALGERIA)

Communication: addressed to the Government on 18 July 2006.

Concerning: Mr. Abdelmadjid Touati.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. It has 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.

5. Abdelmadjid Touati, a native of Tiaret, is a mason who at the time of his arrest was working at a construction site in the Bachdjarah district of Algiers. He was arrested with several other persons in Algiers on 18 March 2006 by agents of the intelligence and security service and was reportedly taken to the Ben Aknoun military barracks, which is used by the Algerian intelligence service, the Department of Intelligence and Security (*Département du Renseignement et de la Sécurité,* DRS).

6. It was reported that, a few weeks after his arrest, there was a wave of arrests in the town of Tiaret. Several people were charged with offences under the anti-terrorism legislation and accused of planning to go to Iraq to support several armed organizations operating in that country.

7. Mr. Touati is reportedly being held incommunicado. His family has not been informed of his place of detention and has had no news of him for over five months. The 12-day period of police custody authorized by article 51 of the Code of Criminal Procedure has long since lapsed. According to information from the source, Mr. Touati has still not appeared before an examining magistrate or a representative of the prosecution, and no charges have been filed against him.

8. Fears have been expressed regarding the lengthy period of incommunicado detention, which facilitates the use of torture and in itself constitutes a form of cruel, inhuman and degrading treatment. The fears expressed by the source refer specifically to Mr. Touati's physical and psychological integrity.

9. According to the source, Mr. Touati should have been permitted to contact his family and receive visits. What is more, there has been infringement of his right to the services of a lawyer in order to prepare his full answer and defence.

10. According to the Government's observations: "On 6 April 2006, the judicial police proceeded to arrest a terrorist group of which the person known as Abdelmadjid Touati, alias 'Abou Moutna', was a member. This group included foreign nationals (particularly Tunisians) who were also under investigation for terrorist activities. Considering that the activities of the person known as Abdelmadjid Touati, alias 'Abou Moutna', constitute a breach of the peace under Algerian law, on 18 June 2006 the Ministry of the Interior and Local Communities issued an arrest warrant (*mesure d'assignation*) for him, in accordance with the legislation on the state of emergency."

11. The Government considers that the rules for police custody have been scrupulously observed. In short, the situation of the person known as Abdelmadjid Touati, alias "Abou Moutna", does not constitute arbitrary detention, and his physical integrity has in no way been threatened.

12. The Working Group does not contest the legitimate right of any State to combat terrorism. However, it points out that efforts to combat terrorism must respect human rights and that, in all circumstances, any measure involving deprivation of liberty must be in conformity with the standards of international law. The Security Council and the General Assembly, recognizing the importance of combating terrorism, recall the commitment of States to ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law.[2]

[2] Security Council resolutions 1456 (2003) and 1624 (2005) and General Assembly resolutions 57/219, 58/187 and 59/191.

13. In the present case, the Government has not presented any convincing arguments to refute the source's allegations, particularly those that claim that Mr. Touati did not have the benefit of a fair and just trial allowing him to contest the charges brought against him, which implicated him in terrorist activities. The Working Group notes that, in its reply, the Government does not dispute the fact that Mr. Touati has not appeared before a judge and has not been in a position to instruct counsel for his defence. Nor has it disputed the fact that Mr. Touati has been held incommunicado for seven months, without being able to communicate with his family and without his family being informed of his arrest and place of detention.

14. To justify this situation, the Government points out that, on 18 April 2006, the Ministry of the Interior and Local Communities issued an arrest warrant (*mesure d'assignation*) for him in accordance with the legislation on the state of emergency. The Working Group notes that the Government does not specify what it means by *assignation*. If what is meant is "house arrest" (*assignation à résidence*), Mr. Touati is not currently under house arrest, but is being held incommunicado, since his family is unaware of his whereabouts. If he is being held in preventive detention (*détention administrative*), the Government does not specify the legal framework that authorizes such detention and the guarantees that would be applicable. Under international law, any deprivation of liberty is subject to the provisions of article 9 of the International Covenant on Civil and Political Rights, to which Algeria is a party.

15. In its general comment No. 8 (1982) on article 9 of the International Covenant on Civil and Political Rights (right to liberty and security of persons), the Human Rights Committee stipulated that: "Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted."

16. In its reply, the Government refers to the state of emergency in force in Algeria, without specifying whether a legislative measure authorizing the Minister of the Interior to take steps to restrict liberty is in force in Algeria. In any event, and even if such a measure exists, the Working Group considers that deprivation of liberty ordered by an administrative authority without judicial supervision and all the necessary guarantees is not in keeping with the International Covenant on Civil and Political Rights, to which Algeria is a party.

17. The Working Group further recalls that Mr. Touati has been deprived of his liberty because of his presumed participation in an offence and that a number of guarantees and specific rights are therefore applicable to him under international human rights law. Such guarantees are applicable regardless of whether the suspicions against him have been formulated in criminal charges. The Working Group considers that, when "administrative detention" (*internement administratif*) is applied under public safety legislation in order to circumvent judicial guarantees and detain persons suspected of participation in terrorist activities or other crimes, it is also in contravention of the provisions of article 14 of the International Covenant on Civil and Political Rights, to which Algeria is a party.

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

> The deprivation of liberty of Mr. Touati 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.

19. The Working Group requests the Government of the People's Democratic Republic of Algeria to take the necessary steps to remedy the situation and bring it into conformity with the principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 21 November 2006.

OPINION No. 41/2006 (PEOPLE'S REPUBLIC OF CHINA)

Communication: addressed to the Government on 1 May 2006.

Concerning: Mr. Wu Hao.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. The Working Group further notes that the Government concerned has informed the Group that Mr. Wu Hao was, on 10 July 2006, released and is, therefore, no longer in detention. This fact has been confirmed by the source.

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 21 November 2006.

OPINION No. 42/2006 (JAPAN)

Communication: addressed to the Government on 8 August 2005.

Concerning: Mr. Daisuke Mori.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

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 case, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.

6. According to the information received, Daisuke Mori, a Japanese citizen and a convicted murderer, born on 28 April 1971, resident in Miyagi-ken, worked as an assistant nurse at the Hokuryo Clinic, located in Sendai City, Miyagi-ken, which was closed down on 10 March 2001. On 6 January 2001, around 8 a.m., Mr. Mori was visited at his house by several officers from the Miyagi Prefecture Police Department. They were guided by the head nurse of the Hokuryo Clinic. Mr. Mori was requested to voluntarily appear at the Miyagi Prefectural Police Headquarters, Izumi Station, in order to speak about an 11-year-old female patient of the clinic. The police officers did not inform Mr. Mori of the possibility to be arrested later or about his right to contact a lawyer or his right to remain silent.

7. At the police station, Mr. Mori was interrogated by a police officer who threatened him and slandered against his father, who was also a police officer. Further, the officer made insulting remarks about Mr. Mori's girlfriend. Mr. Mori was neither provided with breakfast nor lunch. At midnight, exhausted and without the presence of legal counsel, he signed a confession statement admitting his responsibility. Thereafter, he was arrested. The police officers showed an arrest warrant issued by the Sendai District Court. Mr. Mori was later transferred to the Miyagi Prefecture Headquarters in Sendai City.

8. On 9 January 2001, Mr. Mori withdrew his confession and admission of responsibility and denied all allegations made against him. As a consequence, the interrogation was conducted in a more severe manner. From 9 January 2001 to 31 March 2001, Mr. Mori was interrogated during 10 hours every day. Both the police officers and the Public Prosecutor used abusive language against him including phrases such as "you should be executed", "you are nothing but garbage among human beings" and the like. They were pounding the desk in the interrogation room repeatedly and forced him to confess his alleged crimes.

9. From 10 to 15 January 2001, Mr. Mori did not feel well and ran a fever of 38 centigrade. During that period he was subjected to continued interrogation during 12 hours each day, finishing at 11 p.m. The Public Prosecutor and the policemen replaced a back-supported chair with a stool although Mr. Mori told them that he chronically suffers from a herniated disc.

10. According to the source, on 20 January 2001, the Public Prosecutor became furious with Mr. Mori because he refused to write the confession statement. He violently kicked the front board of the desk, on the other side of which Mr. Mori's shins were pressed hard in the sitting position. The violent kick caused Mr. Mori great pain on his right knee.

11. Mr. Mori was later charged with destruction of evidence and attempted murder, according to article 199 of the Criminal Procedure Law of Japan. He was accused of "having mixed a muscle relaxant in a then 11-year-old patient's intravenous drip on 31 October 2000, turning her into a vegetative state". Subsequently, he was indicted with an alleged case of homicide and four alleged cases of attempted murder.

12. According to the source, the sudden death of the patient did not result from the muscle relaxants administered to her. The police made up a fictitious case of attempted murder.

13. The source adds that in criminal trials in Japan, the courts as well as the police tend to be overly dependent upon confessions as evidence. Some jurists even submit that in Japan "confession is the king of evidence". False confessions obtained under pressure eventually lead to false charges.

14. Since the time of his arrest, Mr. Mori was prohibited to meet with his family members except for two occasions. On 25 August 2003, his mother was allowed to see him. On 26 September 2003, his father was granted a meeting with him for 10 minutes. Even today, he is not allowed to see or communicate with people other than his family members or his defence counsels.

15. According to the source, although Mr. Mori was requested to appear at the police station voluntarily, he was the victim of violent interrogatories conducted behind locked doors. The police conducted his investigation in an unjust way. He was induced to make a false initial confession simply because he was exhausted and could not bear the examination any further. Interrogatories were conducted for a long period of time each day, accompanied by threats, insults and violence.

16. The source adds that in Japan, once charged, the rate of being convicted reaches 99.9 per cent. Mr. Mori was a victim of false charges which were the result of a confession obtained by means of threats and tricks; taking advantage of starvation and lack of sufficient sleep caused by the long time questioning. Though he later denied his responsibility, he was charged on the basis of the initial false confession made without counsel of a lawyer.

17. In its response, the Government points out that Mr. Mori committed the murder of one patient and attempted four more cases of murder through asphyxiation by putting muscle relaxation medicine into the patients' intravenous drips, specifically, vecuronium bromide, a neuromuscular blocking agent which causes cardiovascular effects.

18. According to the Government, Mr. Mori was prosecuted for murder and attempted murder on 6 and 26 January, 16 February, 9 and 30 March and 20 April 2001. Except for the latter date he was arrested on each of the days. During the trial of first instance, Mr. Mori pleaded that it was not true that he had administered muscle relaxation medicine. These incidents had been contrived by the clinic. He added that the confession which he made soon after his arrest had been forced by the police. However, these claims were not substantiated. On 30 March 2004, the court of first instance sentenced him to life imprisonment.

19. The Government reports that Mr. Mori's arrest was effected in accordance with article 199 of the Code of Criminal Procedure and upon a warrant issued by a judge. His detention was

carried out in conformity with article 60 of the above-mentioned Code. The prohibition of interviews during the period of detention was imposed by the judges in conformity with article 81 of the Code of Criminal Procedure, which establishes the possibility of pretrial detention if there are reasonable grounds to suspect that the defendant will escape or that he will destroy or conceal evidence.

20. In its comments and observations to the Government's reply, the source points out that it neglects the fundamental rule of the law that "anyone is presumed innocent unless he is proved otherwise". The Japanese Government couched its "Summary of the Facts" not in terms of "the suspected facts" but in terms of "the committed crime". The Government has no evidence to conclude that Mr. Mori "committed murder" and "attempted four more murders" since he has completely denied the suspicion and is contending with it.

21. It is not fair to state that the defendant's "claims were not substantiated", because the burden of proof rests with the public prosecutor. Only when the public prosecutor proved without any reasonable doubt that a suspect has committed a crime, he or she can be convicted of that crime. In Japan, however, this basic principle of criminal procedure is not being respected. In general, the legal proceedings are carried out as if the defendant carries the burden of proof regarding his or her innocence. The reply by the Government indicates that the defendant bears the responsibility of proving his innocence, when it states that "these claims were not substantiated in the trial".

22. The source points out that it had questioned how the law is put into practice. However, the Government merely elaborates about what the regulations are. The real issues, however, to which the Government has not replied, were in fact the following:

(a) The defendant was asked to go to the police station without being told the reason and without being provided with the notice of the right to remain silent;

(b) The defendant was provided with false facts (e.g. that there was the result of a polygraph test which he failed) and was interrogated threateningly;

(c) After the defendant had withdrawn his confession, he was interrogated for 10 hours a day for 26 days. During the interrogation he was made to sit on a stool without a backrest and he was subjected to indirect violence (e.g. hitting the desk and kicking against the wall).

23. The Working Group, after having received the comments from the source on 7 July 2006, addressed the Government again, asking for more information about the circumstances surrounding the trial of first instance in which Daisuke Mori was declared the author of a murder in addition to four attempted murders.

24. The Government in essence responded the following on 22 August 2006: The judgement of the court of first instance, running up to 426 pages, meticulously assessed the evidence produced by both the Prosecutor and the defence counsel. The Court determined the delinquency of Mr. Mori without actually resorting to his confession, which merely served as corroboration. Concerning the voluntariness of his confession the Court decided that the procedure of

investigation including the interrogation was in fact conducted legally, since the defendant was appropriately informed, as prescribed by law, of his right to remain silent at the beginning of the interrogation. There were no established facts that police officers unjustifiably and forcibly compelled him to confess during the course of the interrogation or at any other time.

25. The source observes in its comments to the second Government's reply that Japanese Regional and High Courts do not respect the principle of *in dubio pro reo*, whereas this is one of the fundamental principles to be applied in criminal procedures. In this connection, the source raises serious doubts in law and in fact with respect to the reliability of expert opinions introduced in court concerning sample material taken from the victims.

26. The source disagrees with the Court's interpretation of evidence as no witness testified against Mr. Mori and the expert evidence carried many inexactitudes with respect to the amount of vecuronium found in the patient's intravenous drip.

27. The source reiterates, in spite of the Government's allegations to the contrary, that while Mr. Mori was present in the police station on 6 January 2001, he was not informed of his right to remain silent and of his right to consult a lawyer. The source further reiterated that Mr. Mori was threatened and not provided with any food during the day of his interrogation. Finally, the source refers to the fact that neither the defendant nor his lawyers were informed about the date of his appeal in court.

28. In the light of the allegations made, the Working Group notes at the outset that the Government denies that it did not inform Mr. Mori of his right to remain silent at the police station; however, it affirms in line with the source that Mr. Mori withdrew his confession statement and declared himself innocent after consulting with his lawyer. Moreover, Mr. Mori remained merely 24 hours without access to a lawyer.

29. Although article 14 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) does not explicitly state that all accused persons shall be assisted by a lawyer when interrogated at a police station, the Working Group has consistently construed this provision to that effect as part of the right of defence and considers the presence of a lawyer desirable in such situations. However, we do not consider it to be an infraction of the right to fair trial if, as has occurred in the present case, the defendant is initially interrogated without the benefit of a lawyer, but is able to consult one on the following day whereupon he withdraws his initial confession statement.

30. The possible mistreatment of Mr. Mori at the police station by not providing him with any food during one day and the rude and inappropriate behaviour of the Prosecutor when the defendant withdrew his confession is not serious enough to consider the trial as being unfair.

31. Both the source and the Government recognize that during the trial complicated expert evidence was presented and assessed by the Court.

32. Moreover, the source concedes that the evidence is insufficient to merit a declaration of annulment on the basis of a violation of the principle of presumption of innocence and the Working Group does not elaborate on such issues.

33. The Working Group is not an appellate court with the competence to review the evaluation of evidence presented in Japanese courts. It is merely competent to test whether, as declared in article 14 of ICCPR, the defendant has not been compelled to testify against himself or to confess guilt, whether he has enjoyed the opportunity to present all necessary evidence and the assistance of a lawyer, and whether he has been able to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

34. The principle of *in dubio pro reo* forms a criterion for interpretation of evidence. Since this principle is not protected by the right to fair trial as defined in article 14 of ICCPR, it is not applicable in this case.

35. The Working Group considers detention to be arbitrary if there has been a total or impartial inobservance of applicable international human rights norms on fair trial of such seriousness as to give the deprivation of liberty an arbitrary character.

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

The deprivation of liberty of Mr. Daisuke Mori is not arbitrary.

Adopted on 21 November 2006.

OPINION No. 43/2006 (UNITED STATES OF AMERICA)

Communication: addressed to the Government of the United States of America.

Concerning: Mr. Ali Saleh Kahlah Al-Marri.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The Working Group welcomes the cooperation of the Government, which provided the Working Group with information concerning the allegations of the source. The reply of the Government was brought to the attention of the source, which made observations in reply.

4. According to the information received, Ali Saleh Kahlah Al-Marri, 37 years old, a Qatari national, was arrested on 12 December 2001 by Federal Bureau of Investigation (FBI) agents, at the direction of the Attorney's Office for the Southern District of New York. Mr. Al-Marri had entered the United States of America legally on 10 September 2001, with his wife and five children, to pursue postgraduate studies.

5. Mr. Al-Marri was held as a material witness in the investigation into the 11 September 2001 terrorist attacks on the Ministry of Defense and the World Trade Center.

On 28 January 2002, he was formally arrested and charged with "possessing unauthorized counterfeit access devices with intent to defraud". Other charges of credit card fraud and making false statements to the FBI were subsequently added.

6. In June 2003, less than a month before he was due to stand trial, the President of the United States designated him as an "enemy combatant". The criminal charges were dropped. Mr. Al-Marri was then transferred to military custody in the Naval Consolidated Brig in Charleston, South Carolina. There, he was repeatedly interrogated. On one occasion, interrogators threatened to send him to Egypt or Saudi Arabia where, they told him, he would be tortured and sodomized, and his wife would be raped in front of him. Interrogators are also said to have falsely told him that some of his brothers and his father were in jail because of him, and promised that they would be released if he cooperated. Interrogations continued until approximately autumn 2005, but during the year 2006 Mr. Al-Marri has not been interrogated.

7. Mr. Al-Marri is the first non-United States national to be held as an "enemy combatant" on United States soil. He was held incommunicado from June 2003 to August 2004, when he was allowed a first visit from the International Committee of the Red Cross (ICRC). He has now had three visits from delegates of ICRC.

8. Since 23 June 2003, Mr. Al-Marri has been held, shackled, in a cell measuring approximately three by two metres. His cell is often made extremely cold. The water supply is sometimes turned off, forcing Mr. Al-Marri to defecate on his food tray in order to ensure that the faeces do not remain for days in the cell. The small cell window is covered with plastic, so that he is not able to see the outside world. A portable industrial fan is left on 24 hours a day near the door of his cell, making it difficult for him to sleep. It is reportedly turned up high when he is deemed to be "non-compliant". Sometimes when he is sleeping, guards wake him by shaking him, or by banging constantly on his cell door. Mr. Al-Marri is allowed only brief periods outside his cell for exercise.

9. As a direct result of his prolonged isolation and other inhumane treatment, Mr. Al-Marri has experienced a number of symptoms that demonstrate severe damage to his mental and emotional well-being, including hypersensitivity to external stimuli, manic behaviour, difficulty concentrating and thinking, obsessive thinking, difficulty with impulse control, difficulty sleeping, difficulty keeping track of time and agitation.

10. Moreover, the source notes that, as a result of these conditions of detention, he has developed a number of medical problems including sharp and debilitating tingling pains in his legs, vision problems, including seeing flickering lights and white spots, constant headaches, back pain, dizziness, uncontrollable tremors and ringing in his ears.

11. Mr. Al-Marri has not received adequate medical treatment for his declining mental and physical health. The prison doctors who have seen him have refused to deal adequately with his complaints. A medical doctor recommended that a special X-ray was needed to assess nerve damage, but his request was denied. Further medical recommendations that he be given a chair with a good cushion and a thicker mattress were also denied.

12. Finally, the source reports that Mr. Al-Marri has been denied a prayer rug and has not been given a clock, making it impossible for him to know when to pray. It is also reported that prison officers mistreated and disrespectfully handled his copy of the Koran, discouraging free religious practice.

13. In its reply dated 11 May 2006, the United States Government confirms that on 23 June 2003, Mr. Al-Marri was designated as an "enemy combatant" by President Bush and that he is currently being held in military custody in the Naval Consolidated Brig in Charleston, South Carolina. The Government also informs that it is involved in pending litigation concerning Mr. Al-Marri, and refers the Working Group to two briefs for the United States Government filed with the District Court of South Carolina and two recent judicial decisions concerning Mr. Al-Marri, which it encloses. According to the Government the documents referred to provide the background information requested by the Working Group.

14. On the basis of the four documents attached to the United States reply, the Government's arguments before the domestic courts can be summarized as follows.

15. Mr. Al-Marri has been given the opportunity to contest the legality of his detention, as well as his conditions of detention. On 8 July 2003, his lawyer filed a petition for a writ of habeas corpus in the Central District of Illinois. On 1 August 2003, the Court dismissed the petition on the ground that the petition had been filed in an improper venue. On 8 July 2004, Mr. Al-Marri filed a habeas corpus action before the District Court of South Carolina raising five claims: that he is a civilian and not an enemy combatant; that he has the right to counsel; that his detention is illegal because military cannot detain an individual seized within the United States without charge; that he has not been allowed to contest the President's decision designating him as an enemy combatant; and that his indefinite detention for the purpose of interrogation is unlawful under the Constitution and the laws of the United States.

16. On 9 September 2004 the Government filed an answer and attached the President's order declaring the petitioner an enemy combatant, an unclassified declaration of Mr. Jeffrey N. Rapp, Director Joint Intelligence Task Force for Combating Terrorism, and a classified secret declaration of Mr. Rapp. The Government argued that Mr. Al-Marri is properly detained as an enemy combatant, because the President exercised his constitutionally and congressionally authorized war powers. The authority to capture and hold enemy combatants for the duration of the conflict without charges is part and parcel of those war powers, especially when they are aliens. According to the Government, this assertion is well established in several judicial precedents, including *Hamdi v. Rumsfeld* and other rulings regarding the detention of hundreds of thousands of aliens within the United States during the Second World War. Therefore, alien enemy combatants are afforded more limited process rights than citizens and the court's factual review of the basis of the detention is very limited.

17. The Government also considered that Mr. Al-Marri is lawfully detained by the military, because his detention allows armed forces to gather military intelligence and prevents him from returning to the commission of hostile acts against the United States. Moreover, according to the Government's answer, as stated in *Hamdi v. Rumsfeld*, the executive is best prepared to exercise the military judgement attending the capture of alleged combatants and the judiciary must not

interfere in military operations. Furthermore, the President's decision to designate Mr. Al-Marri as an enemy combatant rests on a strong intelligence foundation.[3] The Government also considered that the fact that Mr. Al-Marri was taken into custody within the United States does not place him outside the scope of Congress's authorization to use force.

18. Finally, regarding petitions concerning aspects other than the legality of Mr. Al-Marri's detention, the Government considered that the military has granted him access to counsel, that he had the opportunity to contest the President's decision designating him as an enemy combatant through the habeas corpus action, and contested his request regarding the ceasing of all interrogation while this litigation is pending, since interrogation is permissible under the laws of war.

19. On 8 July 2005, the judge issued an order dismissing the petition insofar as it was related to the question whether the President of the United States is authorized to detain a non-citizen as an enemy combatant. The judge also stated that Mr. Al-Marri could not rely on a precedent (*Padilla v. Hanft*) in favour of a person detained as an enemy combatant on United States soil, because - as opposed to Mr. Padilla - he is not an American citizen. The District Court Judge found that, firstly, citizens and aliens do not have the same constitutional protections. Secondly, the authority to detain enemy aliens in times of war is not a novel concept. Thirdly, the Authorization to Use of Military Force (AUMF), which was enacted to allow the President to use all necessary and appropriate force to protect the United States, also encompasses alien Al-Qaida operatives who entered the country to commit hostile and warlike acts, as Mr. Al-Marri. Therefore, Mr. Al-Marri's detention was legal.

20. On 8 August 2005, Mr. Al-Marri filed a complaint alleging that he was being subjected to unlawful and unconstitutional conditions of confinement in the naval brig. The Government answered on 27 October 2005, arguing sovereign immunity. The Government stated that the Geneva Conventions of 12 August 1949, international treaties and other sources of international law referred to by Mr. Al-Marri in his petition did not create privately enforceable rights.

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[3] Director of the Joint Intelligence Task Force for combating terrorism dated 9 September 2004. According to the unclassified declaration of Mr. Rapp, Mr. Al-Marri is an Al-Qaida "sleeper" agent sent to the United States for the purpose of engaging in and facilitating terrorist activities subsequent to 11 September 2001, and exploring ways to hack into the computer systems of United States banks and otherwise disrupt the United States financial system. According to the same declaration, Mr. Al-Marri attended an Al-Qaida training camp and was trained in the use of poisons. The analysis of his laptop revealed files containing lectures by Bin Laden and his associates on the importance of Jihad and martyrdom, lists of websites related to Al-Qaida activities, coded messages in his e-mail, pictures of the 11 September attacks, an animated cartoon of an airplane flying into the World Trade Center and a map of Afghanistan. The declaration also states that his computer contained a list of approximately 36 credit card numbers with the names of holders and dates of expiration, which would be used to achieve fraudulent operations, including opening bank accounts under a false name. None of these credit cards was held by Mr. Al-Marri. Finally, according to the declaration Mr. Al-Marri allegedly tried to call several times an Al-Qaida financer, Mr. Mustafa Ahmed Al-Hawsawi, in the United Arab Emirates.

Regarding the conditions of the detention, the Government affirmed that conditions of detention by military had always been a matter left to the discretion of military and executive branch officials, subject only to international obligations which are not enforceable. The Government also asserted that Mr. Al-Marri failed to allege facts that could establish that the detention "substantially burdened" the practice of his religion. Regarding the complaints related to library materials and correspondence with family and others, the Government stated that captured enemy combatants, in particular alien enemy combatants, during wartime do not have broad First Amendment (freedom of speech) rights. Moreover, the Government considered that alien enemy combatants do not have the rights consecrated in the Fourth Amendment (to be free of monitoring or observation during the detention) and the Eighth Amendment (prohibition of cruel and unusual punishment). Finally, the Government stated that there has not been any violation of the rights to due process consecrated in the Fifth Amendment, because Mr. Al-Marri has had the opportunity to contest the alleged violations through the habeas corpus action.

21. On 8 May 2006, Mr. Al-Marri's habeas corpus action filed on 8 July 2004 was rejected by the District Court of South Carolina. The Court found that, as stated in the Supreme Court's decision in *Hamdi v. Rumsfeld*, the burden of proof at all times remains on the Government to show by clear and convincing evidence that the petitioner is an enemy combatant. The standard of review is thus limited to determining who is more persuasive on the issue of whether the petitioner falls outside the enemy combatant criteria, the Government or the petitioner. The Court found the Government to be more persuasive than the petitioner, because the petitioner only presented a general denial to the Government's assertion of facts. The Court considered that Mr. Al-Marri's refusal to assume the burden of proving his own innocence was in fact a refusal to present any evidence and participate in a meaningful way in the proceedings.

22. The Working Group forwarded the observations of the Government to the source. In its submission in reply of 17 August 2006, the source reaffirmed that Mr. Al-Marri continues to be held indefinitely in United States military custody without charge or trial, pursuant to the executive order designating him as an enemy combatant signed by President Bush in June 2003. The source alleges that Mr. Al-Marri is entitled to full protection under both United States and international human rights law, including his right to not be arbitrarily detained, which cannot be derogated even in time of war or national emergency.

23. According to the source, United States lower court rulings which determined that the detained person must receive a notification of the factual basis for the classification as enemy combatant and must have a meaningful opportunity to rebut the Government's assertions before a neutral decision maker, are not sufficient to fulfil the State's international obligation to protect the right to not be arbitrarily detained. The source considers that Mr. Al-Marri's case can only be met by an adversarial proceeding through trial or preliminary hearing in the United States criminal courts, meeting all the guarantees of article 14 of ICCPR.

24. The source states that the habeas corpus proceeding, in which the burden was on Mr. Al-Marri to rebut the largely hearsay-based information presented by the Government, in no way satisfies the due process requirements under international law.

25. Furthermore, the source argues that Mr. Al-Marri's right to equal protection consecrated by article 26 of ICCPR has been violated, because individuals accused of similar acts and detained within United States territory have been tried or have trials pending in United States criminal

courts. The source also notes that the Committee against Torture in its concluding observations on the United States affirmed that detaining people indefinitely without charge constitutes per se a violation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4]

26. Regarding the conditions of detention, the source affirms that the Government's response arguing sovereign immunity and military discretion is not compatible with the State's international human rights obligations. The source states that it is preoccupying that the Government has sought to foreclose judicial review of Mr. Al-Marri's conditions of detention, stating that its international obligations are not judicially enforceable in United States courts. This is worsened by the fact that Mr. Al-Marri's mental and physical health has been seriously affected by the conditions of his detention.

27. At the outset, the Working Group would like to stress that, in its observations, the Government of the United States did not comment on the arguments of the source and limited itself to affirming that Mr. Al-Marri was designated by President Bush as an "enemy combatant" on 23 June 2003 and that since then he is being held in military custody. The Government further enclosed four documents to provide background information. These documents address the legality of Mr. Al-Marri's detention under domestic law, but do not speak to its compatibility with the United States' international obligations.

28. The Working Group notes that, in order not to be arbitrary, it is not sufficient that Mr. Al-Marri's detention is in accordance with United States domestic laws. Those laws and the way they are applied in the specific case must also be compatible with the international law binding for the United States.

29. The analysis of the documents provided by the Government confirms that Mr. Al-Marri, who legally entered the United States on 10 September 2001, was arrested by the FBI on 12 December 2001 in the investigation of the 9/11 terrorist attacks, and kept in detention until 28 January 2002 under a federal law permitting the arrest and brief detention of "material witnesses", i.e. persons who have important information about a crime, if they might otherwise flee to avoid testifying before a grand jury or in court. Although federal officials suspected Mr. Al-Marri of involvement in terrorism and were investigating him as a suspect of most serious crimes, they held him as a material witness, not as a criminal suspect. This was already an abuse of the law and a violation of the basic rights of a person suspected of involvement in a crime, i.e. the right to silence, the right to be assisted by a lawyer, the right to communicate with family and the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power.

30. It is also undisputed that Mr Al-Marri was formally charged on 28 January 2002 with credit card fraud and later on with other similar charges. He entered a plea of not guilty and was about to be tried before a grand jury (a pretrial conference was set for 2 July 2003), when on 23 June 2003 the President designated him as an "enemy combatant" and directed that he be transferred to the control of the Defense Department for detention. The prosecution apparently

[4] CAT/C/USA/CO/2, para. 17.

dropped the charges on which Mr. Al-Marri had been kept in pretrial detention for close to 15 months. As a result, Mr. Al-Marri was transferred from United States criminal jurisdiction to military custody in South Carolina, where he was held incommunicado. In August 2004, i.e. more than a year later, he was allowed a visit from the ICRC and in October 2004 he was for the first time authorized to meet with his lawyers.[5] It is also not contested that as of to date he is not allowed any visits or telephone communication with his family and continues to be held under conditions that could amount to inhuman or degrading treatment.

31. As far as the term "enemy combatant" is concerned, the Working Group recalls that it does not constitute a category recognized and defined under international law and therefore does not provide a ground for deprivation of liberty.[6] Concerning the case under consideration, the Working Group notes that Mr. Al-Marri, who is suspected of involvement in terrorist acts, was not captured on the battlefield of an armed conflict as defined by international humanitarian law. The Working Group considers that the struggle against international terrorism cannot be characterized as an armed conflict within the meaning that contemporary international law gives to that concept.[7] Therefore, the legal provision that could allow the United States to hold belligerents without charges for the duration of hostilities cannot be invoked to justify Mr. Al-Marri's indefinite detention.

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[5] This would appear to be a consequence of the decision of the Supreme Court of the United States of 28 June 2004 that the persons being held in Guantánamo Bay as enemy combatants are entitled to legal counsel and to challenge the legality of their detention (United States (No. 03-343) 2004, *Rasul v. Bush* (No. 03-334) 2004).

[6] See the joint report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120), paras 20 ff.

[7] See the joint report on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120), para. 21, and the Official Statement of the International Committee of the Red Cross (ICRC) dated 21 July 2005, regarding "The relevance of IHL in the context of terrorism" (available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705?OpenDocument>): "International humanitarian law (the law of armed conflict) recognizes two categories of armed conflict: international and non-international. International armed conflict involves the use of armed force by one State against another. Non-international armed conflict involves hostilities between government armed forces and organized armed groups or between such groups within a State. When and where the 'global war on terror' manifests itself in either of these forms of armed conflict, international humanitarian law applies, as do aspects of international human rights and domestic law. For example, the armed hostilities that started in Afghanistan in October 2001 or in Iraq in March 2003 are armed conflicts. When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern. […] The designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict."

32. For these reasons, the Working Group considers that the detention of Mr. Al-Marri is governed by human rights law, specifically articles 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is party and which it did not derogate from in accordance with ICCPR article 4, paragraph 1.

33. Article 9, paragraph 1, ICCPR guarantees to everyone "the right to liberty and security of person", prohibits "arbitrary arrest or detention" and states that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". The prohibition of arbitrariness mentioned in paragraph 1 serves to ensure that the law itself is not arbitrary, i.e. that the deprivation of liberty permitted by law is not "manifestly unproportional, unjust or unpredictable, and that the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case".[8]

34. In paragraph 4 of its general comment No. 8 (1982) concerning article 9 (right to liberty and security of persons), the Human Rights Committee lays down the elements that must be tested in determining the legality of so-called "preventive detention" (which the Working Group generally refers to as administrative detention): "… if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9, paragraphs 2 and 3, as well as article 14, must be granted".

35. The Working Group recalls that Mr. Al-Marri was first deprived of his liberty as a material witness and in this capacity interrogated without the guarantees of a criminal defendant. Then he was charged and detained on remand for 15 months on charges which, though not light, are very minor in relation to the grounds on which the Government has been holding him since June 2004. When the moment for him to be able to challenge these charges was close, when his "day in court" was finally approaching after a year and a half, the President designated him as "enemy combatant" and the criminal charges were dropped. Thus Mr. Al-Marri, who had been

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[8] The Human Rights Committee has considered, in the framework of a temporary or pretrial detention of a judicial nature, 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." See: Decision of 23 July 1990, communication No. 305/1988, *Hugo van Alphen v. The Netherlands*, para. 5.8, CCPR/C/39/D/305/1988 of 15 August 1990. See also decisions of 5 November 1999, communication No. 631/1995, *Aage v. Norway*, para. 6.3 (CCPR/C/67/D/631/1995) of 21 July 1994; communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, para. 9 (8), (CCPR/C/51/D/458/1991); Views of 3 April 1997, communication No. 560/1993, *A (name deleted) v. Australia*, United Nations document CCPR/C/59/D/560/1993, para. 9.2.

in custody of the United States Government on United States territory for a year and a half, was transformed by executive decree from criminal defendant into a person apprehended in the course of an armed conflict, and thus indefinitely deprived of the right to challenge his detention and defend himself against the accusations levelled against him. The Working Group concludes that this course of events strongly indicates that the Government intended (and in fact did) circumvent the guarantees afforded to Mr. Al-Marri in the criminal process, both under United States law and international law binding on the United States.

36. The Working Group stresses that under international human rights law deprivation of liberty is subject to certain conditions and, even if initially lawful, becomes arbitrary if it is not subject to periodic review. The Human Rights Committee has considered that the habeas corpus remedy has to be maintained at all times and in all circumstances, concerning any modality of deprivation of liberty, because it offers a protection against serious human rights violations such as torture.[9] Indefinite and prolonged detention "beyond the period for which the State can provide appropriate justification are incompatible with article 9"[10] of the International Covenant on Civil and Political Rights to which the United States is party.

37. Furthermore, the Working Group recalls that international human rights law provides for a number of rights specific to persons deprived of their liberty on the ground of suspicion that they were involved in an offence. These guarantees apply whether such suspicions have been formalized in criminal charges or not. The Working Group notes that according to the information provided by the Government, Mr. Al-Marri was involved in a range of activities which, if proven, would constitute serious criminal offences. While this information was presented as the basis for his detention, Mr. Al-Marri remains uncharged and therefore has no opportunity to contest or respond to these assertions in accordance with the international legal requirements of due process which would be available to him under the criminal law.

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

> The deprivation of liberty of Mr. Ali Saleh Kahlah Al-Marri is arbitrary, being in contravention of article 9 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.

39. 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 Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 24 November 2006.

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[9] General comment No. 29 on article 4: Derogations during a state of emergency, para. 15.

[10] *A.v. Australia*, op. cit., para. 9.4.

OPINION No. 44/2006 (SAUDI ARABIA)

Communication: addressed to the Government on 2 August 2006.

Concerning: Mr. Syed Asad Humayun.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. The Working Group welcomes the cooperation of the Government, which provided it with the requested information.

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

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

5. According to the information submitted by the source, Syed Asad Humayun is a citizen of Pakistan and married to a United States national. Both Mr. Humayun and his parents are residents of the Kingdom of Saudi Arabia.

6. Mr. Humayun was arrested on or around 25 March 2006. He was apparently detained at Thukbah for most of the first 30 days of his detention, although he may as well have been moved from one detention centre to another. He is currently being held in Khobar Central Jail. Mr. Humayun is allowed to receive visits only by his parents and his lawyer.

7. According to the information received, Mr. Humayun has neither been charged with any offence nor been otherwise informed of the reasons for his detention. He has neither been brought before a judicial officer, nor otherwise been provided with the possibility to challenge the legality of his detention. Mr. Humayun has been forced to sign certain papers written in the Arabic language which he does not read or understand. He does not know whether he has thereby signed a confession. The Saudi Arabian authorities have menaced him and threatened to arrest also his parents unless he confesses. They have seized the passport of Mr. Humayun's father in order to exercise additional pressure on the family.

8. The source alleges that the detention of Mr. Humayun 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 the arrest and detention.

9. The source further argues that, insofar as Mr. Humayun is accused of a crime, the deprivation of liberty is arbitrary because he is being denied the right to a "fair and public hearing by an independent and impartial tribunal, in the determination of any criminal charge against him" (article 10 of the Universal Declaration of Human Rights). As stated above, he has

not been informed of the charges against him, is not provided with an interpreter who would assist him in understanding papers written in Arabic which he was required to sign, he may have been forced to sign statements incriminating himself, and he has not been brought before a judge during the months since his arrest.

10. The allegations of the source have been brought to the attention of the Government. In a statement dated 11 October 2006 the Government alleges that Mr. Humayun was arrested on 31 March 2006 on the charge of counterfeiting ATM cards and using them to fraudulently withdraw more than 1,200,000 riyals from bank accounts of about 320 card holders. The Government alleges that Mr. Humayun's father assisted another accomplice of Mr. Humayun, a Pakistani national, to escape to Pakistan with the fraudulently acquired funds. An investigation conducted by the competent Saudi Arabian authorities established the validity of the charges brought against the persons concerned and that confessions were made according to the law. Charges against Mr. Humayun and his father were referred to the Public Investigation and Prosecution Department in the district of Al-Khobar in accordance with a letter from the Governor dated 13 August 2006 in order to enable the Department to take the requisite action within the scope of its jurisdiction. The matter relating to the counterfeited cards was referred to the Board of Grievances in the Eastern Province in accordance with a communication of 26 August 2006 from the Control and Investigation Board so that it could be submitted to the competent criminal court for adjudication. The issue concerning an application for extradition of the Pakistani fugitive was also transferred to the Department by the Governor on 3 August 2006.

11. The source, in its reply to the statement by the Government, did not contest the substance of the Government's allegations.

12. The Working Group starts by pointing out that several of the allegations of the source are slightly contradictory in themselves. It is unrealistic to argue, for example, that Mr. Humayun was unaware of the charges against him. Namely the source itself admits that he was able to receive the visits of his lawyer, who, being familiar with legal questions could obviously assist his client in the communication with the authorities and to understand the charges against him.

13. In contrast, the presentation of the Government was consistent and reliable. The suspicion against him - the fraudulent tampering with ATM cards and the financial damage caused to card-users - is a serious charge worldwide, which gives rise to criminal prosecution in every country. The criminal investigation is still ongoing, therefore procedural flaws, if any, like the alleged lack of satisfactory interpretation can, and if proved true, and in the view of the Working Group, shall be corrected in the course of the forthcoming investigation and trial of the case. For that reason, bearing also in mind that Mr. Humayun is in custody since March 2006, a period of time, which cannot be held at this stage unreasonably long, it would be premature to take a stand concerning the alleged unfairness of the proceedings conducted against him.

14. Assessing all the information before it the Working Group delivers the following opinion.

The deprivation of liberty of Syed Asad Humayun is not arbitrary.

Adopted on 22 November 2006.

OPINION No. 45/2006 (UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND)

Communication: addressed to the Government on 9 February 2006.

Concerning: Mr. Mustafa Abdi.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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. 32/2006.)

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 case, in the context of the allegations made, the response of the Government thereto and the observations by the source.

6. The case summarized below was reported to the Working Group as follows: Mustafa Abdi is a citizen of Somalia born on 8 December 1975. He arrived in the United Kingdom of Great Britain and Northern Ireland on 7 May 1995 with a false Kenyan passport. On 24 May 1995 he applied for asylum. On 14 February 1996 the Home Office refused the asylum claim but granted him exceptional leave to remain in the United Kingdom for a year. On 21 January 1997, Mr. Abdi was granted further exceptional leave to remain until 14 February 2000.

7. On 9 March 1998 Mr. Abdi was arrested in London. On 23 July 1998 he was convicted at Southwark Crown Court of rape and indecency on a child and sentenced to eight years and two years imprisonment to run concurrently. On 28 May 2002 Mr. Abdi completed his custodial sentence.

8. Already on 21 May 2002, Mr. Abdi had been served with a Notice of decision to make a deportation order and reasons for deportation letter. Accordingly, when his custodial sentence came to an end on 28 May 2002 his detention was continued under immigration powers.[11]

[11] He is detained under Schedule 3 of the Immigration Act 1971. Paragraph 2 (2) of Schedule 3 provides that the Secretary of State may detain a non-British national pending the making of a deportation order against him. Paragraph 2 (3) of the same Schedule authorizes the Secretary of State to detain a person against whom a deportation order has been made pending his removal or departure from the United Kingdom.

9. On 2 July 2002, Mr. Abdi filed an appeal against the decision to make a deportation order and sought asylum again. An asylum interview was conducted on 12 September 2002, but the asylum claim was refused on 26 June 2003. On 28 July 2003, Mr. Abdi appealed against the refusal of the asylum claim. On 25 November 2003, both the appeal against the refusal of the asylum claim and the appeal against the deportation were dismissed.

10. On 19 April 2004, a deportation order was served on Mr. Abdi. Proceedings since then have mainly concerned the authorities' attempts to issue Mr. Abdi an emergency travel document (ETD) and to obtain a "disclaimer" from him. In order to be returned to Somalia Mr. Abdi requires an ETD as he does not have a valid Somali passport (apparently, obtaining a new Somali passport is not an option). However, Mr. Abdi has refused to cooperate with the authorities in this matter. Furthermore, the authorities are insisting that Mr. Abdi signs a "disclaimer", a document that would serve as evidence that Mr. Abdi left the United Kingdom voluntarily and would thus allow the Secretary of State for the Home Department (SSHD) to order Mr. Abdi's deportation despite the human rights situation in Somalia. Mr. Abdi refuses to sign such a disclaimer.

11. Bail was refused on 20 December 2004 and again on 11 October 2005. On the latter occasion, the immigration judge accepted that the Home Office had resumed enforced removal action of failed Somali asylum-seekers to Somalia. The judge therefore considered detention necessary as removal was imminent. However, Mr. Abdi remains in immigration detention, currently at Her Majesty's Prison (HMP) Bedford (after stays at HMP Wandsworth and HMP Hull).

12. The source alleges that the continued detention of Mr. Abdi is arbitrary. He completed his criminal sentence on 28 May 2002, more than four years ago. Since then he has been deprived of liberty under immigration powers pending removal. But as there is no clear timetable for removal, the human rights situation in Somalia remaining very preoccupying, his continued detention amounts to a violation of his basic human rights. Moreover, it also violates the SSHD's own Operational Guidance Manual on length of detention.

13. In its reply the Government to a great extent confirmed the allegations ascertained by the source and added that Mr. Abdi's appeal against both the refusal of his asylum claim and the decision to make a deportation order against him were dismissed on 25 November 2003 and that, as he did not seek to appeal further, he had exhausted all his available avenues of appeal on 4 December 2003. Therefore, on 19 April 2004 a Deportation Order was served on him and since 21 May 2004, several arrangements were made so that a travel document could be produced for Mr. Abdi, but he refused to cooperate.

14. The Government also states that Mr. Abdi is to be removed to Somalia on a European Union Letter, which requires that removals to Somalia can only take place if the person concerned has signed a disclaimer indicating his voluntary return. According to the Government this is a requirement of the airlines used to carry the returnees. Mr. Abdi refuses to sign a disclaimer. Otherwise he would be immediately deported to Somalia after having been served with the deportation order on 19 April 2004. The Government also ascertains that

Mr. Abdi could, at any time, apply to the administrative court for a statutory review, or he could seek a writ of habeas corpus, as a means to challenge the lawfulness of his detention. Neither he nor his lawyers have made any application to the court to challenge his detention. The Government concludes that Mr. Abdi's continued detention is justified. He is to be deported as a result of his having committed a very serious sexual assault on a child and he has been assessed as being at high risk to reoffending. His deportation remains an imminent and realistic prospect and his detention has been maintained in view of this. According to the Government, Mr. Abdi has, himself, prolonged his detention by refusing to sign the disclaimer.

15. The reply of the Government was forwarded to the source. In its comments the source, at the outset, states that, contrary to the assertion of the Government, there are court proceedings afoot seeking to challenge the legality of Mr. Abdi's detention. His lawyers have lodged an application for judicial review at the beginning of July 2006. Following a permission hearing on 25 September 2006 the High Court granted permission to apply for judicial review and the matter is to be heard before the High Court on 6 and 7 December 2006. However, the source confirms the assertion of the Government that Mr. Abdi's asylum claim was refused and that there are presently no outstanding representations before the Government to challenge his removal.

16. Further, an issue has arisen during the proceedings in the High Court as to the exact period of time for which Mr. Abdi has in fact been detained under immigration powers. Even though it has always been the understanding of both the Government and the source that immigration detention commenced on 28 May 2002 it is possible that it is not as long as believed. The source notes that this date is based on the assumption that Mr. Abdi would have been granted parole on 28 May 2002, however, it may be that it was not. On any view, Mr. Abdi has been detained under administrative powers for at least three years.

17. Furthermore, the source submits that there is a fundamental contradiction in the submissions of the Government which attempts to blur the distinction between voluntary departure to Somalia and forcible removal. According to the source "removal" and "voluntary return" are fundamentally different concepts and in seeking to meld the two into the contradictory concept of "voluntary removal" the Government seeks to obscure the true issue in the present case.

18. The source suggests that involuntary removal to Somalia was an impossibility at all material times because the State has entirely disintegrated. This is clear from parliamentary debates in the House of Commons on 3 May 2006 and from the practise of the Government. Although the Government hopes to recommence removals to Somalia soon such removals were not taking place as of 25 September 2006, the date of the permission hearing in the High Court. It was referred to in open court that it became possible to remove a "small number" of Somalis only between March and May 2004 to South-Central Somalia, but no returns to Somaliland. It is because of logistical difficulties and security concerns that the source remains unconvinced that any alleged failure to cooperate has contributed to the inability of the Government to remove Mr. Abdi to his home country.

19. Even assuming that voluntary return would have been possible, this case, in the opinion of the source, raises in stark terms the question whether or not the State is entitled to detain an individual indefinitely if he refuses to return "voluntarily" to a conflict zone. In any event it is questionable whether a return to Somalia made under threat of indefinite detention could be said to be "voluntarily" in any real sense.

20. Finally, turning to the refusal of Mr. Abdi's application for bail by the Immigration Judge on 11 October 2005, the source alleges that the judge was materially misled by a representative of the Government as to the likelihood of removal. It was explained to the judge that removal was "imminent" and that this was one of three reasons given by the judge to refuse the application. Imminence of removal is always a highly material factor in immigration bail applications. Since it simply was not true that removal was imminent in the present case, the outcome of that application might have been different.

21. The Working Group notes that it is not a matter of dispute that Mr. Abdi served his criminal sentence in full on 28 May 2002, that the Government bases his detention since that (or around that) date on immigration powers and that there are currently no ongoing legal proceedings with respect to Mr. Abdi's refused asylum claim and concerning his removal. The Working Group, however, takes notice of the fact that, contrary to the assertions of the Government, the legality of Mr. Abdi's current detention is being challenged in High Court and a hearing has been scheduled for 6 and 7 December 2006 accordingly.

22. The Working Group recalls that the Commission on Human Rights, in its resolution 1997/50, extended the mandate of the Group so as to include situations of asylum-seekers and migrants in detention. Of course, the Working Group's mandate in that respect is to give its opinion as to whether deprivation of liberty is compatible with the Government's obligations under international human rights law, in particular article 9 of the International Covenant on Civil and Political Rights (ICCPR), and not with regard to the asylum claim or migration status, or the question whether removal is justified.

23. On the basis of the submissions of the Government and of the source, the Working Group considers that Mr. Abdi's detention does indeed have a basis in the United Kingdom migration laws. He also enjoys the right to judicial review of his continued detention, as required by article 9, paragraph 4, of ICCPR, although some reservations can be expressed as to the frequency of and delays in the judicial review process.

24. This does not, however, settle the question whether or not Mr. Abdi is arbitrarily detained. The Working Group has two sets of concerns in this respect, the first relating to the duration of Mr. Abdi's detention, the second to the actual purpose pursued by the use of immigration detention in this case.

25. With regard to duration, the Working Group notes that Mr. Abdi has been detained for four-and-a-half years as of today. The Working Group finds it difficult to think of circumstances under which this duration would not be excessive. It certainly is in the present case, where the prospects of Mr. Abdi's removal actually taking place were dim from the beginning and have

been deteriorating since then, particularly since 2004.[12] Where the chances of removal within a reasonable delay are remote, the Government's obligation to seek for alternatives to detention becomes all the more pressing. Looking forward, the possibility of Mr. Abdi's removal would appear to be currently as remote as it was ever before. His continued detention therefore has assumed an indefinite character.

26. The circumstance that the asserted purpose of detention, i.e. removal, cannot in fact justify the detention because it is entirely unrealistic points to a second issue in this case. The history of Mr. Abdi's case and the Government's arguments strongly suggest that the Government's concern that - if released in the United Kingdom - he might reoffend is not only the reason the Government is formally pursuing his removal, but also the reason why he is kept in detention notwithstanding the practical impossibility of removal. In other words, Mr. Abdi is in fact detained as a security measure to protect the public in the United Kingdom.

27. This situation renders his detention arbitrary for two reasons. Firstly, the Government is thereby circumventing the procedures available under domestic law to impose security measures against dangerous offenders who the court believes are likely to reoffend in the same way. For this purpose, public protection sentences were introduced by the Criminal Justice Act 2003. They are issued by the sentencing court and continued dangerousness is reviewed by the parole board. This procedure (which is not applicable to Mr. Abdi, because he was sentenced before the entry into force of the 2003 Act) would require the Government to show that there is indeed such a high and continued risk in Mr. Abdi's specific case and would involve considerable procedural safeguards. In the immigration proceedings, the Government appears to be able to maintain

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[12] In view of the appalling situation in Somalia the Office of the United Nations High Commissioner for Refugees (UNHCR) reconfirmed its first call upon all Governments from January 2004 to refrain from forced removals of Somali nationals to the country. In its Advisory from November 2005 the UNHCR referred to breakouts of fighting on a regular basis and inter-clan conflicts in central and southern Somalia as well as a high level of violent crime, particularly in the city of Mogadishu. The situation was further aggravated by food insecurity, lack of access to basic services and livelihood opportunities for the Somali population due to a high level of insecurity for aid operations in the area. Frequent violations of the United Nations arms embargo resulted in the continuation of explosives and heavy weapons entering the country on a large scale. While returns to northern Somalia were possible under certain conditions, especially if the persons concerned had clan links and could expect effective clan protection, the UNHCR recommended avoiding large-scale involuntary returns or forced removals of persons not originating from the region. Similarly, the United Nations independent expert on the situation of human rights in Somalia stated in his recent report to the Human Rights Council of 13 September 2006 that "[a]fter 15 years, the lack of security in Somalia continues to have dire consequences on the human rights of Somalis. The right to life is violated throughout Somalia and most of the country is marked by insecurity and violence, with the south and central areas being the most insecure. In the past year, fighting in the capital city of Mogadishu among rival militia was especially fierce and the dead, wounded and displaced were mostly civilians. It is estimated that hundreds of civilians were killed and thousands injured in the fighting, in contravention of international humanitarian and human rights law". (A/HRC/2/CRP.2 (GE.06-13949), para. 13).

Mr. Abdi in detention simply by pointing to the offence that gave rise to his conviction. Mr. Abdi is thereby deprived of the procedural safeguards which, because of the presumption of innocence, necessarily accompany such a highly sensitive measure as imposing detention as a preventive security measure against offenders who have served their sentence or are entitled to probation.

28. Secondly, the need to protect society against the threat emanating from persons convicted for sexual offences who have served their sentence and are entitled to release is the same with regard to United Kingdom citizens and foreigners. But by having recourse to immigration powers to impose security measures against Mr. Abdi, the Government is making use of the - in this respect entirely fortuitous - circumstance that he is a foreigner to deprive him of procedural safeguards against deprivation of liberty. Mr. Abdi is therefore deprived of the equal protection of the law on grounds of citizenship.

29. To sum up, Mr. Abdi is in his fifth year of detention since he completed serving his sentence and, due to the lack of prospect for the removal to Somalia, his detention has assumed the character of indefinite detention. Such indefinite detention can only be qualified as "arbitrary" within the meaning of article 9, paragraph 1 of ICCPR.[13] Moreover, insofar as immigration powers are used against him in order to continue limiting his freedom in order to protect society, the detention violates the right to equality before the law and equal protection of the law without discrimination enshrined in article 26 of ICCPR, which adds to the arbitrary character of his detention.

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

> The deprivation of liberty of Abdi Mustafa is arbitrary, being in contravention of article 9 of the Universal Declaration of Human Rights and articles 9 and 26 of the International Covenant on Civil and Political Rights, to which the United Kingdom is a party.

31. The Working Group notes that the deprivation of liberty in Mr. Abdi's case does not squarely fall within any of the three categories which it generally uses to classify cases of arbitrary detention. The fact that Mr. Abdi continues to be detained although he has served his criminal sentence approaches his case to category I, but it cannot be said that the deprivation of

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[13] The Human Rights Committee has considered, in the framework of a temporary or pretrial detention of a judicial nature, 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." See: Decision of 23 July 1990, communication No. 305/1988, *Hugo van Alphen v. The Netherlands*, paragraph 5.8, CCPR/C/39/D/305/1988 of 15 August 1990. See also decisions of 5 November 1999, communication No. 631/1995, *Aage v. Norway*, paragraph 6.3 (CCPR/C/67/D/631/1995) of 21 July 1994; communication No. 458/1991, *Albert Womah Mukong v. Cameroon*, paragraph 9 (8), (CCPR/C/51/D/458/1991); Views of 3 April 1997, communication No. 560/1993, *A (name deleted) v. Australia*, UN Doc. CCPR/C/59/D/560/1993, para. 9.2.

liberty is devoid of a legal basis. Its discriminatory character approaches the detention to category II. The circumstance that he is deprived of his freedom not on the basis of actually having committed crimes but on the basis of a perceived risk of reoffending raises questions with regard to the presumption of innocence and thus category III. The Working Group considers, however, that in the light of the clear mandate of the then Commission on Human Rights to consider also cases of immigration detention, which generally would not fall within any of the three categories, it is acting fully within the bounds of its mandate in declaring that Mr. Abdi's detention is arbitrary.

32. Having found the detention of Mr. Abdi to be arbitrary, the Working Group requests the Government of the United Kingdom to take the necessary steps to remedy the situation and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 24 November 2006.

OPINION No. 46/2006 (DEMOCRATIC REPUBLIC OF THE CONGO)

Communication: addressed to the Government on 7 March 2006.

Concerning: Mr. Théodore Ngoyi.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. The Working Group regrets that the Government did not reply, notwithstanding the fact that it had extended the 90-day limit at the Government's request.

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

4. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government. In 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.

5. According to the source, Théodore Ngoyi, a pastor, attorney, president of the Congo for Justice political party and also spokesperson for *Rassemblement des partis politiques et des Forces sociales pour le Non au référendum constitutionnel en République Démocratique du Congo* (Alliance of Political Parties and Social Forces for a "No" to the Constitutional Referendum in the Democratic Republic of the Congo), was arrested at his home in Kinshasa, in the commune of Gombe, by some 30 armed police officers in plain clothes and in military uniform, who had arrived in a vehicle without licence plates. Agents of the Kin Mazière police special services reportedly also took part in the arrest. About 10 police officers broke into the house, threatening to shoot anyone who resisted. Mr. Ngoyi and his employees, some of whom were women, were then beaten with rifle butts by police officers, who also punched them and kicked them.

6. Théodore Ngoyi was then apprehended, handcuffed and thrown into the vehicle of the agents of the police special services, who took him to the office of the prosecutor at the Gombe regional court. After questioning, Mr. Ngoyi was accused of "violating general regulatory measures and offences against the authorities and the head of State". On 31 December 2005, Mr. Ngoyi was transferred to the Kinshasa Penitentiary and Re-education Centre (CPRK, formerly Makala Central Prison), where he is being held in wing 7.

7. On 5 January 2006, Mr. Ngoyi was brought before the Gombe magistrates' court, which on 6 January 2006 extended his pretrial detention by 15 days. The following day, on 7 January, Mr. Ngoyi appealed against that decision, and the appeal was heard on 12 January 2006. On 13 January 2006, the judge issued an order confirming the extension of Mr. Ngoyi's detention, but without giving the grounds for the decision. On 16 January 2006, Mr. Ngoyi brought the case before the Supreme Court.

8. On 23 January 2006, at the request of the procurator-general of the Court of National Security, Mr. Ngoyi was questioned by a deputy procurator-general. During the questioning, the examining magistrate considered that written evidence on certain points was required, and he authorized Mr. Ngoyi to go to his home to retrieve the documents in question. The procurator-general of the Court of National Security then asked his deputy to draw up a request to transfer Mr. Ngoyi to the Ngaliema clinic for treatment, as he was ill and his personal physician had already ordered his hospitalization. After first refusing to entertain the request, on 25 January 2006 the director of CPRK finally authorized Mr. Ngoyi to have access to the medical care that he required. Mr. Ngoyi was hospitalized at the Ngaliema clinic. However, pending collection of all the evidence relating to the case, no further hearings were planned.

9. Mr. Ngoyi appeared before the Court of National Security on 16 February 2006. Pastor Ngoyi's lawyers maintained that his detention was illegal, that the case had been brought before the court without observance of the required procedure, that there was an irregularity in the summons and that the courts should have suspended the proceedings. The prosecution, recognizing the irregularity and illegality of the proceedings against Mr. Ngoyi and of his detention, asked the Court to consider Mr. Ngoyi's request. The Court was to deliberate on 17 February 2006, the day before its dissolution pursuant to the promulgation of the new Constitution. However, the Court refrained from giving an opinion. Article 225 of the draft Constitution, adopted by referendum on 18 December 2005, provides that "the Court of National Security shall be dissolved upon entry into force of this Constitution". Since the new Constitution was promulgated on 17 February 2006, the Court of National Security was dissolved on 18 February 2006.

10. The source emphasizes that, in accordance with article 138 of the Criminal Code, "except in cases of flagrante delicto, offences against persons covered by articles 136 and 138 may be prosecuted only upon the complaint of the injured person or of the institution to which such person belongs". No complaints were filed by the person concerned or by members of the Government.

11. Moreover, article 225 of the draft Constitution, adopted by referendum on 18 December 2005, provides that "the Court of National Security shall be dissolved upon entry into force of this Constitution". Mr. Ngoyi will therefore not appear before this Court. According to the source, the criminal proceedings against Pastor Ngoyi must be considered to

have lapsed, and Mr. Ngoyi (along with all the suspects in detention) should be released without a trial of any kind. Consequently, the source considers that for these two reasons, Mr. Ngoyi's detention is devoid of any legal basis.

12. The source adds that the proceedings against Pastor Ngoyi were motivated by the action taken by Mr. Ngoyi's party and *Rassemblement des partis politiques et des Forces sociales pour le Non* before the Supreme Court for the annulment of the results of the constitutional referendum, and because of the statements that he made on a local private television station denouncing a certain "sale" by the President, Joseph Kabila, of part of the national territory in South Kivu province.

13. The source's communication was transmitted to the Government by the Working Group on 7 March 2006. Following the expiry of the 90-day time limit, two reminders were sent to the Government (on 9 August and 25 September 2006) inviting it to reply to the source's allegations; however, the Working Group has so far received no reply. The Working Group regrets that the Government has not communicated the requested information, despite the fact that it extended the time limit for submission at the Government's request, and notwithstanding the Working Group's repeated requests. In accordance with its methods of work, the Working Group considers that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made by the source.

14. The Group notes that, according to the source, the criminal procedure and prosecution brought against Mr. Ngoyi are flawed by irregularities, and that these irregularities were acknowledged by the procurator-general before the court. The Government, which had the opportunity to challenge such allegations, has not seen fit to do so. Consequently, the Working Group concludes that these allegations are substantiated. In addition, the Government has not contested the fact that, following the dissolution of the Court of National Security, no body has been designated to hear the appeal formulated by Mr. Ngoyi challenging the legality of his detention. His continued detention in these conditions is in contravention of the provisions of article 9, paragraph 4, of the International Covenant on Civil and Political Rights, to which the Democratic Republic of the Congo is a party.

15. As for the allegations that the proceedings against Mr. Ngoyi were motivated by his peaceful political activities and those of his party, the Working Group considers that, in the absence of a reply from the Government, these allegations are also substantiated, and that this constitutes a violation of article 19 of the International Covenant on Civil and Political Rights.

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

> The deprivation of liberty of Mr. Théodore Ngoyi is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

Adopted on 22 November 2006.

OPINION No. 47/2006 (PEOPLE'S REPUBLIC OF CHINA)

Communication: addressed to the Government on 29 June 2006.

Concerning: Chen Guangcheng.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

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. 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 of the observations by the source.

4. According to the information submitted by the source, Chen Guangcheng is a citizen of the People's Republic of China born in 1971 and resident in East Shigu Village, Shuanghou Township, Yinan County, Linyi City, Shandong Province. Chen Guangcheng, who is blind since early childhood, is a self-taught lawyer and has a long history of campaigning for the rights of farmers and the disabled. He assisted villagers in solving drinking water pollution problems when he was attending Nanjing Chinese Medicine University in 2000. He created and ran the "Rights Defense Project for the Disabled" under the auspices of the Chinese Legal Studies Association between 2000 and 2001. Since 1996, he has provided free legal consultation to farmers and the disabled in rural areas. In 2003, he was sponsored by the "International Visitors Project" to visit the United States of America. In 2004, he ran a "Citizen Awareness and Law for the Disabled Project" supported by the United States National Endowment for Democracy and the Monica Fund.

5. Starting in April 2005, Chen Guangcheng and his wife, Yuan Weijing, began to investigate villagers' claims that Linyi City authorities were employing extensive violence in implementing government birth quotas. Later, they put together briefs for lawsuits against officials involved. Their work, and that of activists and lawyers who visited the area to assist in documenting the abuses and in providing legal advice to villagers who wished to take legal action, represented the first known concerted domestic effort to challenge the use of violence in the enforcement of China's population policy. The first report on the subject was made public on 10 June 2005 through the Citizens Rights Defense Network (gongmin weiquan wang).

6. On 12 August 2005, Chen Guangcheng and Yuan Weijing were put under de facto house arrest. Chen Guangcheng was said to be held under "residential surveillance", but according to the relevant law (see paragraph 21 below), if such measure is to be applied to a suspect, a residential surveillance decision must be issued and shown to the suspect, who must sign or put his mark on it. None of this reportedly occurred in Chen Guangcheng's case.

7. The house arrest was enforced by security guards paid on a daily rate by village and township officials and the Yinan County Public Security Bureau (PSB). Yinan PSB statements called them "militia", but they reportedly did not meet the official criteria for militia members. Chen Guangcheng's house arrest was overseen by various local government and Communist Party officials, including the Shuanghou Township mayor and party secretary, and the Yinan County party school president, party secretary and party office director.

8. On 25 August 2005, Chen Guangcheng evaded the police surrounding his village and went to Shanghai and Nanjing, then to Beijing, to seek help from lawyers. In Beijing, friends arranged for him to meet foreign journalists, diplomats, and international legal experts, to discuss the lawsuits.

9. In the afternoon of 6 September 2005, Chen Guangcheng was detained at the home of a friend in Beijing by six men who said they were public security officers from Shandong. The men shoved Chen Guangcheng into a car. He was held overnight in a hotel, where the head of the Linyi Public Security Bureau (PSB) and the city's deputy mayor came to see him in the morning. The Linyi PSB head told Chen Guangcheng that he had revealed news information to foreign media and was suspected of violating article 111 of the criminal law (illegally providing intelligence to foreign countries), for which the maximum sentence is life in prison. However, neither the six public security officials from Shandong Province who deprived Chen Guangcheng of his freedom on 6 September, nor the head of the Linyi PSB showed him any arrest warrant or other document justifying his detention. The men from the Linyi PSB coercively took Chen Guangcheng back to his home.

10. Chen Guangcheng was again placed under house arrest without any order to that effect. On 9 September 2005 his landline and mobile phone services were cut off, and his computer seized. On 23 September 2005 public security officials searched his house from 2.50 to 10 p.m., without showing any warrant or other document justifying the search.

11. On 4 October 2005, law lecturer Xu Zhiyong and lawyers Li Fangping and Li Subin attempted to visit Chen Guangcheng and negotiate with local officials to have his house arrest lifted. The lawyers were stopped on their way to the house. Chen Guangcheng reportedly managed to leave his house and spoke with them briefly, but was then forcibly taken back. When he resisted, he was beaten up by men surrounding his house. The lawyers tried to go to Chen Guangcheng's house, but they were stopped and Xu Zhiyong and Li Fangping were beaten up. Thereafter, all three were taken to Shuanghou Township Police Station where they were interrogated until the following morning. They were told that the case now involved "State secrets" and were escorted back to Beijing.

12. On 24 October 2005, two other Beijing scholars and friends of Chen Guangcheng went to visit him. As Chen Guangcheng ran out to greet them, he was stopped and beaten by around 20 men stationed outside. The visitors were quickly escorted away. Chen Guangcheng's wife, Yuan Weijing, has also been prevented from leaving the house, and was beaten when she came out to greet visitors on 27 December 2005.

13. On 30 October 2005, Chen Guangcheng's lawyer filed a lawsuit on his behalf before the People's Court of Yinan County, charging two Shuanghou Township officials with intentional injury for their involvement in beating him outside his house on 24 October when friends came

to visit Chen Guangcheng and Yuan Weijing. The two officials allegedly headed a group of more than 20 militia men who beat Chen Guangcheng with fists and sticks, knocked him down several times and kicked him. Chen Guangcheng was not able to see a doctor to verify his injuries because the militia surrounding his house rejected his requests to seek medical attention, but there were a number of eye witnesses on the scene. So far the court has ignored Chen Guangcheng's suit.

14. On 11 March 2006, Chen was arrested at home by Yinan County police and taken to the Yinan Detention Centre. The police did not show a warrant or other document justifying the arrest. At Yinan Detention Centre, Chen was held incommunicado for three months. Only on 10 June 2006, the Yinan County police acknowledged he was detained there.

15. On that day, 10 June 2006, Chen Guangcheng was formally detained on suspicion of "gathering crowds to obstruct traffic" and "destructing property". On 21 June 2006, officials of the Yinan PSB issued Chen arrest warrant No. 193 (2006), stating that the Yinan County People's Procuratorate approved that the county PSB carry out the arrest of Chen Guangcheng on suspicion of "intentional destruction of property" and "gathering a crowd and disturbing traffic order", and recalling the relevant provisions of the Chinese Criminal Code (hereinafter "CCC") and Criminal Procedural Law.

16. On the same day, 21 June 2006, Chen Guangcheng's lawyers were able to visit him in detention for the first time in three months. When the lawyers asked him where he was detained during those three months, prison guards interrupted the discussion, preventing Chen Guangcheng from answering the question. His family has not been allowed to visit. His wife remains under house arrest.

17. The following day, 22 June, Mr. Li Jinsong, one of Chen Guangcheng's lawyers, was taken into police custody for questioning. On 23 June 2006, two lawyers, Li Jinsong and Li Subin tried to visit Chen Guangcheng's wife, Yuan Weijin, and to provide legal counsel on matters related to obtaining medical parole for Chen Guangcheng. They were stopped in front of Chen Guangcheng's house and beaten by guards who were there enforcing the residential detention of Yuan Weijin. On 24 June 2006, all six lawyers who went to Linyi County to provide legal counsel and handle procedures in Chen Guangcheng's and three other villagers' cases returned to Beijing. It was reported that due to the harassment they encountered, they were unable to carry out their work. On 27 June 2006, lawyers Li Jinsong and Li Subin went back to Linyi, trying to meet with Chen Guangcheng's wife, Yuan Weijin, in order to obtain a copy of the arrest warrant, convey to her Chen Guangcheng's condition at the detention centre, and also to obtain her signature in order to process legal papers to apply for medical parole for Chen Guangcheng. Again, they were harassed by thugs in the village while police refused to intervene. Around 20 men turned over their car and smashed their cameras. Li Jinsong was then taken to the police station for questioning.

18. The source alleges that the detention of Chen Guangcheng is arbitrary. The authorities detain Chen Guangcheng in order to make him desist from providing legal assistance to families bringing lawsuits against the Linyi authorities' violent campaign to meet assigned population

targets[14] and from spreading information about these abuses. This is evidenced by the timing of the initial arrest, by the accusations of "illegally providing intelligence to foreign countries" after Chen Guangcheng spoke to foreign journalists about the lawsuits, by reports that the police forced some villagers to testify against Chen Guangcheng, saying that he fabricated the reports about abuses, and by the fact that local officials told Chen Guangcheng's wife that her husband's life would be in danger unless he abandoned the lawsuit.

19. On some occasions, Chen Guangcheng and his family have been told that releasing information about violence inflicted on rural people around Linyi City to enforce the population control policies constituted a breach of laws governing protection of State secrets.

20. The source further argues that from 12 August 2005 until 10 June 2006, when the Yinan PSB issued a detention order against Chen Guangcheng, there was no legal basis for the various forms of deprivation of liberty he suffered at the hands of officials (house arrest, abduction in Beijing on 6 September 2005 and detention at the Yinan County Detention Centre from 11 March to 10 June 2006). With regard to the house arrest, the source notes that Chen Guangcheng was said to be held under "residential surveillance", a form of house arrest that can be applied by Public Security, Procuratorates, and Courts under the Criminal Procedure Law (CPL, articles 50 and 51), including in cases where authorities have insufficient evidence to charge a person with an offence but are investigating that person for criminal responsibility, or if the penalty for the alleged offence would be minor. The maximum period allowable for such detention is six months (CPL, article 58). However, according to the Regulations on Procedures of the Public Security Organs for Dealing with Criminal Cases (issued by the Ministry of Public Security in 1998), if such a measure is to be applied to a suspect, a residential surveillance decision must be issued by public security organs at county level or above and this document must be shown to the suspect, who must sign or put his mark on it (CPL, articles 95 and 96). At

[14] The source reports that in July 2004, the Linyi City Party Committee and government had issued a document on strengthening population and fertility control work. Violent measures reportedly began to be used in some districts of Linyi City by the end of that year. In mid-February 2005, Linyi City government reissued the July 2004 document, in a move seen as encouraging the use of force to meet population control targets. According to Linyi residents, in March 2005 local authorities began forcing parents of two children to be sterilized and women pregnant with a third child to undergo abortions. Officials detained family members of those couples who fled, beat them and held them hostage. There has been official confirmation of the abuses in Linyi: on 19 September 2005, an official of the National Population and Family Planning Commission of China said that their investigation had found that there had been violations of law and policy in Linyi that had infringed the rights of citizens, and that as a consequence, some officials had been dismissed, while some were in detention and facing investigation for criminal responsibility.

Lawsuits filed by four villagers who suffered violent treatment in this campaign, Du Dejiang, Liu Benxia, Han Yandong and Hu Bingmei, were due to be heard in October 2005 in Yinan County People's Court. But on 10 October 2005, the Court announced that the hearings would be postponed. Other villagers who had been planning to bring suit have pulled out after being harassed, threatened, or bribed.

no time was Chen Guangcheng shown a warrant ordering him to be put under residential surveillance, nor was he officially given any reasons for such a measure to be imposed on him. From 12 August 2005 until 10 June 2006, i.e. during 10 months, Chen Guangcheng's deprivation of liberty had no legal basis and was therefore arbitrary.

21. Finally, Chen Guangcheng's lawyers are prevented from meeting their client in private and from consulting with his family, and have not been given a copy of the arrest warrant setting forth the charges against Chen Guangcheng. Indeed, they have been harassed by thugs allegedly acting on behalf of the authorities and by the police in order to discourage and prevent them from assisting Chen Guangcheng.

22. The allegations of the source have been brought to the attention of the Government. In a statement dated 6 July 2006 the Government alleges that, on 11 March 2006, Chen Guangcheng and his family members Chen Guangjun, Chen Guangyu and others, assembled a crowd of villagers and obstructed traffic, causing a major traffic jam on national highway 205. On 12 March 2006, Chen Guangjun and Chen Guangyu were taken into criminal detention, in accordance with the law, on suspicion of having committed an offence under article 291 CCC, on the gathering of crowds for the purpose of disrupting the movement of traffic. Chen Guangcheng was held for questioning by the local public security authorities, in accordance with the law, on suspicion of involvement in the offence at the scene of the crime, and was released at 9 p.m. on 12 March 2006.

23. Article 291 CCC stipulates that "[w]here people are gathered to disturb order at railway stations or bus terminals, ferry landings, civil airports, market places, parks, theatres and cinemas, exhibition halls, sports grounds or other public places, or to block traffic or disrupt the movement of traffic, or to resist or obstruct public security officials from carrying out their duties according to law, if the resulting situation is serious, the ringleaders shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention or surveillance".

24. The Government alleges that, in dealing with Chen Guangcheng and his associates, the public security authorities acted in compliance with the law, when remanding them in custody or holding them for questioning. Throughout this period their lawful rights were fully protected and there is no substance to the allegation that Chen Guangcheng was subjected to beatings and placed under house arrest.

25. The reply of the Government has been brought to the attention of the source for comments on 3 November 2006. Their response, dated 10 November 2006, may be summarized as follows.

26. The source notes that the statement of the Government fails to address their key challenges in their communication. It states that before Chen Guangcheng, Chen Guangjun, and Chen Guangyu were taken into criminal detention on 11 March 2006, Chen Guangcheng had already been subjected to illegal house arrest and residential surveillance for 197 days since mid-August 2005. His wife, Yuan Weijing, has now been under residential surveillance for 14 months without legal authorization.

27. With respect to the incident which took place on 11 March 2006 the source alleges that when Chen Guangcheng marched with other villagers to protest the beating of one villager, several dozens of police blocked their way and surrounded them on national highway 205,

thereby causing traffic disruption. The source states that after Chen Guangcheng was held for questioning by the local public security authorities on 12 March 2006, he was not released on that day and never released ever since. Instead, he was held under detention for 89 days without legal authorization until 11 June 2006 when authorities issued a criminal detention order. During the 89 days of illegal detention, the Yinan County Public Security Bureau refused to answer the family's repeated requests for information about the cause and location of his detention. His lawyers, who saw Chen Guangcheng at the Yinan Detention Centre for the first time in late June, confirmed with him that he was detained by public security officials at various locations between 12 March and 11 June 2006. The source referred to written testimonies collected by lawyers from witnesses, who were also detained and then released on bail, including Chen Guangdong, Chen Gengjiang, Chen Guanghe, Chen Guangyu, Chen Hua, and Han Yandong. These villagers were forced to confess or provide incriminating false information against Chen Guangcheng. They stated that police used various torture methods at the detention centre in order to break their will, such as tying them up to chairs with chains, deprivation of sleep for up to 15 days, and withholding of food and water.

28. On 24 August 2006, the Yinan County People's Court convicted Chen Guangcheng for "intentional destruction of property" and "gathering crowds to disrupt traffic" and sentenced him to four years and three months of imprisonment. However, the Linyi City Intermediate People's Court, when reviewing the appeal by Chen Guangcheng's lawyers, overturned this verdict on 30 October 2006 on the basis of insufficient evidence for convicting Chen Guangcheng for the offence stipulated in article 291 CCC. The Intermediate Court referred the case back to the lower court for retrial. The source alleges that under these circumstances Chen Guangcheng should have been declared innocent and immediately released from prison until proven guilty at a future retrial. However, Chen is still being held at the Yinan County Detention Centre in Shandong Province. According to the source, his continued detention is arbitrary and against Chinese law and it submits that the Government should respect the local courts' judicial independence in handling this case.

29. The Working Group notes that, despite the affirmation from the Government that Mr. Chen was released at 9 p.m. on 12 March 2006, it appears as if Mr. Chen is in detention waiting for retrial.

30. The Working Group holds that it is undisputed that Mr. Chen has been subjected to a deprivation of liberty in form of house arrest and residential surveillance at different stages between 12 August 2005 and 11 March 2006. This can be derived from the prohibition to leave his home and the fact that Mr. Chen was forced back to stay in it. The Working Group has considered, in its Deliberation No. 01, that house arrest is a deprivation of liberty whenever the person is not authorized to leave a closed area. The Working Group stresses that not even the Government argues that there exist any legal basis for his deprivation of liberty between these dates.

31. As to the period after 11 March 2006, when he was charged following a demonstration on that day pursuant to article 291 CCC for the gathering of crowds for the purpose of disrupting the movement of traffic by the Government, charges which were communicated on 11 June 2006 as those of "gathering crowds to obstruct traffic" and "destructing property", the Working Group finds that there were significant obstacles in the exercise of Mr. Chen's defence. It refers, namely, to his incommunicado detention from 12 March to 11 June 2006 and the limitations

imposed upon him with respect to contact with his lawyers, after which he was convicted on 24 August 2006 for these offences to four years and three months of imprisonment. Although the Linyi City Intermediate People's Court on appeal overturned this verdict, Mr. Chen has not been released since then. On the contrary, he will have been judged for these offences in a retrial scheduled for 27 November 2006.

32. As the Court decided to quash the judgement of the inferior court, the Working Group will not take a position on the non-observances of the guarantees of a fair and impartial trial, because, at least in principle, the failure to respect his right to fair trial can be redressed when Mr. Chen's case is retried. Whether the Court has, with this judgement, already remedied the situation, the Working Group for lack of sufficient information cannot comment on. However, if the information received is accurate, in relation to the continuance of Mr. Chen's detention despite the judgement of the Court, the Working Group would consider this very worrying.

33. The Working Group notes that, as stated by the source and which the Government did not contest, Mr. Chen is a well-known lawyer and activist of China, blind since early childhood, who has been documenting and investigating with his wife abuses by authorities in the governmental policy of birth quotas, and later providing legal advice and bringing law suits against officials involved. The Working Group concludes from the numerous statements the same officials have communicated to him that Mr. Chen has been detained several times in connection with these activities, be it with or without formal charges against him.

34. The Working Group believes that the charges Mr. Chen had and still has to face appear to be no other than obstacles to prevent him from continuing his work as a lawyer, defending villagers' rights, and raising his voice in their defence. Thus, Mr. Chen is being deprived of his liberty for his defence of human rights and in order to prevent him from and punish him for peacefully exercising the 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" and his right of freedom of assembly as enshrined in its article 20: "everyone has the right to freedom of peaceful assembly".

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

> The detention of Chen Guangcheng is arbitrary, as it contravenes the principles and norms set forth in article 9 of the Universal Declaration of Human Rights and, for the period of 12 August 2005 until 12 March 2006, falls within category I of the categories applicable to consideration of cases submitted to the Working Group, and, for the period since 12 March 2006, falls within category II of the said categories.

36. The Working Group asks the Government to take the necessary steps to remedy the situation to bring it in conformity with standards and principles set forth in the Universal Declaration of Human Rights, and to consider the possibility of ratifying the International Covenant on Civil and Political Rights.

Adopted on 24 November 2006.

OPINION No. 1/2007 (CANADA)

Communication: addressed to the Government on 11 August 2006.

Concerning: Ms. Nathalie Gettliffe.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. The Working Group further notes that the source informed the Group that Nathalie Gettliffe, who had been sentenced in Canada to 16 months imprisonment on charges of abducting two of her children from their father, was returned to France in December 2006 to serve the remainder of her term. On 13 January 2007, Ms. Gettliffe was released under judicial surveillance by a judge of Evry. She is, therefore, no longer in detention.

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 8 May 2007.

OPINION No. 2/2007 (MYANMAR)

Communication: addressed to the Government on 10 July 2006.

Concerning: Ms. Aung San Suu Kyi.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The Working Group welcomes the cooperation of the Government by providing the requested information on the facts alleged and the applicable law. The reply of the Government was forwarded to the source, which did make comments on it. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case.

4. The information submitted to the Working Group is summarized as follows: Ms. Aung San Suu Kyi, a citizen of the Union of Myanmar, General Secretary of the National League for Democracy (NLD) and Nobel Peace Prize laureate, is being held under house arrest in Rangoon. She spent more than 10 of the last 16 years in detention and has been held in her Rangoon residence without contact with the outside world for more than four years. She is denied visitors and has no outside telephone contact.

5. Ms. Suu Kyi was arrested in May 2003 following an assassination attempt during which more than 70 of her supporters were murdered. The attack was reportedly orchestrated by a group associated with the Union Solidarity Development Association (USDA). Although Ms. Suu Kyi survived the attack, her safety continues to be threatened because she is allowed only infrequent visits by her medical doctors.

6. On 24 May 2006, Ms. Suu Kyi received a rare visit from Ibrahim Gambari, Special Envoy of the Secretary-General on the situation in Myanmar and the Special Adviser on the International Compact with Iraq and Other Political Issues, who called for her release. The source submits that the detention order of Ms. Suu Kyi expired with no official announcement that she will be released from house arrest. On 27 May 2006, the authorities extended Ms. Suu Kyi's house arrest for another year.

7. The source contends that Ms. Suu Kyi is being held under article 10 (b) of the 1975 State Protection Act, which permits the authorities to detain anyone considered a threat to State security for up to five years, renewable on an annual basis, without charge or trial.

8. According to the source, there is no opportunity for domestic judicial review of Ms. Suu Kyi's detention. Since her initial term of house arrest begun on 30 May 2003, Ms. Suu Kyi has been denied all access to NLD leaders and the press. She has no access to relatives or lawyers and her communications and visits are permitted at the Government's sole discretion.

9. The source asserts that on 23 May 2006, Major General Khin Yi, who serves as the Nation's Police Chief, told a conference of regional Police that the release of Ms. Suu Kyi would likely have little effect on the country's political stability and that there would not be rallies and riots if Ms. Suu Kyi was released since public support for her has fallen.

10. The source further submits that Ms. Suu Kyi is a known advocate of political change exclusively by peaceful means. No controlling body, acting in good faith, would find or believe that she is a potential danger to the State.

11. The source affirms that there can be no legal justification for Ms. Suu Kyi's detention under the law, because her release would not endanger State sovereignty or public peace and tranquility. Because she is not a threat to the country's political stability, her continued detention is arbitrary.

12. The source concludes that Ms. Suu Kyi is being held because of her political views. It is not a coincidence that she is the Secretary General of the NLD. By singling out Ms. Suu Kyi for arrest and detention on the basis of her thought, conscience, opinion, and expression, as embodied by her work for the NLD.

13. The reply of the Government to the allegations of the source can be reproduced as follows. In 2003, during her trips to various townships in Myanmar, Ms. Suu Kyi carried out activities detrimental to the peace and tranquility of the livelihood of the local community. She delivered speeches to discredit the Government to impair the dignity thereof and also conducted campaigning with the intention of harming the integrity of the Union and solidarity of the

national races. As her conduct constituted a threat to the security of the State and public peace and tranquility, she was retained under section 10 of the Law to safeguard the State against the dangers of those desiring to cause subversive acts.

14. The Government went on by explaining that the Central Body formed under the Law passed restriction orders to restrain Aung San Suu Kyi from 28 November 2003 to 27 November 2004. After expiration of the one-year restraint, the Central Body obtained the prior sanctions from the Council of Ministers to extend the restraint on a yearly basis until now.

15. The Government concludes by pointing out that under the law the authorities are empowered to restrain individuals without trial.

16. When considering the communication, the Working Group stated from the following considerations.

17. This is already the fourth occasion when the Working Group on Arbitrary Detention called to address the deprivation of liberty under the form of house arrest of the same individual, namely Aung San Suu Kyi (see Opinions 8/1992, 2/2002 and 9/2004). The basic facts in the previous opinions and the present communication are either identical or very similar. A leading opposition figure in the Union of Myanmar is repeatedly paralysed in her participation in the political life of her country by the application against her of subsequent house arrest orders. Apart from their possible detrimental health and psychological effects, the measures systematically taken against her are tantamount to deprivation of liberty (see Deliberation 001 of the Working Group referred to the former Opinions), and are aimed to prevent her to exercise her right to freedom of opinion and expression. Moreover, the system of "restraints" hampered Ms. Suu Kyi to enjoy the safeguards of a fair trial against arbitrary detention, because as the Government itself clarified, house arrests are ordered without trial. The unsubstantiated hints of the Government to "activities detrimental to the peace and tranquility" and to Ms. Suu Kyi's "campaigning with the intention of harming the integrity of the Union" are irrelevant to justify her detention, because not even the Government asserts that Ms. Suu Kyi has ever resorted to violence or incited to hostility or violence.

18. The Working Group notes that the obvious unwillingness of the Government to comply with the Working Group's Opinions and recommendations to put an end to the house arrest of Ms. Suu Kyi is particularly worrying.

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

The deprivation of liberty of Aung San Suu Kyi is arbitrary being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights and falls under categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

19. 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 Universal Declaration of Human Rights. The Working Group believes that under the circumstances the adequate remedy would be the immediate release of Aung San Suu Kyi.

Adopted on 8 May 2007.

OPINION No. 3/2007 (EGYPT)

Communication: addressed to the Government on 5 December 2006.

Concerning: Ahmed Ali Mohamed Moutawala and 44 other persons.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The Working Group regrets the lack of cooperation of the Government despite repeated invitation 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 source reports that the following 45 persons were arrested between 1990 and 1994 by agents of the State Security Intelligence (SSI). They were held incommunicado during periods from one to three months, periods during which they were allegedly tortured. 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 arrest. They continue to be kept in detention.

5. Ahmed Ali Mohamed Moutawala, aged 39, artist, resident in Kufr Al Mansoura, Al Mania, arrested on 21 August 1990, detained in Al Fayoum Prison.

6. Issam Abdelhamid Diab, 38 years old, student at Cairo University, resident in Cairo, arrested on 29 September 1990, detained in Limane Abou Zaabel Prison.

7. Walid Ahmed Mohamed Salama, aged 40, resident in Bulaq Al Dakrour, Gizeh, arrested on 2 March 1991, detained in Abou Zaabel High Security Prison.

8. Salama Abdelfodil Ahmed, born on 7 February 1971, student, resident in Shubra-El-Khema Industrial City, Al Qalubia, arrested on 15 May 1991, detained in Abou Zaabel High Security Prison.

9. Ahmed Fakhri Farag, born on 6 December 1965, accountant, resident in Boulaq Al Dakrour, Gizeh, Cairo, arrested on 17 May 1991, detained in Abou Zaabel High Security Prison.

10. Suleiman Al Abd Abubekr, 40 years old, student at Cairo University, resident in Imbaba, Gizeh, arrested on 29 September 1991, detained in Abou Zaabel High Security Prison.

11. Tah Khalifa Tah, aged 38, student at Cairo University, resident in Cairo, arrested on 1 February 1992, detained in Abou Zaabel High Security Prison.

12. Taha Mansour Mohamed Hilmi, 44 years old, independent worker, resident in Chebra Misr, Cairo, arrested on 25 June 1992, detained in Abou Zaabel High Security Prison.

13. Saleh Ibrahim Ali Abdelghaffar, aged 41, carpenter, resident in Seif Eddine, Al Zarqa, Damiette, arrested on 26 July 1992, detained in Abou Zaabel High Security Prison.

14. Esseyad Fathi Al Chahri, 41 years old, student, resident in Cairo, arrested on 28 November 1992, detained in Abou Zaabel High Security Prison.

15. Chaabane Slimane Saad, aged 45, employed, resident in Qariat Massara, Dirout, Assiout, arrested on 7 November 1992, detained in Abou Zaabel High Security Prison.

16. Alaa Eddine Abderrahim Mohamed Hanfa, 36 years old, student, resident in Tahta, Sohag, arrested on 30 October 1992, detained at Istiqbal Turah.

17. Aymen Mohamed Abdelmadjid Amer, aged 38, student at the Faculty of Sciences, Cairo University, arrested on 17 August 1992, detained in Abou Zaabel High Security Prison.

18. Abdou Mohamed Al Dassouqi Al Dadjene, 49 years old, restaurant owner, resident in Chatt Houria, Damiette, arrested on 1 January 1992, detained in Abou Zaabel High Security Prison.

19. Abdel Moneim Djamel Eddine Abdel Moneim Mounib, aged 43, journalist, resident in Abou Obeida Al Djarrah Avenue, Al Haram Fayçal, Gizeh, arrested on 11 November 1992, detained in Abou Zaabel High Security Prison.

20. Abdelfettah Kamel Mohamed Chehata, 56 years old, State officer, resident in Kafr Al Fouqaha, Toukh, Al Qalubia, arrested on 17 March 1992, detained in Abou Zaabel High Security Prison.

21. Ahmed Fardj Hussein Mohamed, aged 40, independent worker, resident in Dirout, Assiout, arrested on 23 November 1992, detained in El Oued Al Jadid Prison.

22. Samir Mahmoud Hacène Khamis, 50 years old, civil servant, resident at Abdelfettah Azeb Tura Avenue No. 7, Bulaq, Al Gizeh, arrested on 10 November 1993, detained in Abou Zaabel High Security Prison.

23. Ahmed Ali Mohamed Abdurrahim, aged 40, student, resident in Al Qussia, Assiout, arrested on 12 October 1993, detained in El Oued Al Jadid Prison.

24. Samida Barakat Samida, 40 years old, student, resident in Cairo, arrested on 13 September 1993, detained in Abou Zaabel High Security Prison.

25. Salah Abdulaziz Al Aydi, aged 48, accountant, resident in Mit Nama, Chabra Al Khaima, Al Qalubia, arrested on 30 November 1993, detained in Oued Al Natroune High Security Prison.

26. Samir Mohamed Abdel Moneim, 38 years old, artist, resident in Nadj Al Aarj, Al Brahma, Qafr Kanaa, arrested on 22 December 1993, detained in Oued Al Djadid Prison.

27. Asseyed Mohamed Draz, aged 47, independent worker, resident in Kafr Al Shaikh, arrested on 5 March 1993, detained in Abou Zaabel High Security Prison;

28. Oussama Farouk Aouis Ramadan, 40 years old, student, resident in Cairo, arrested on 9 October 1993, detained in Abou Zaabel High Security Prison;

29. Maslahi Hamdi Hidjazi, aged 34, resident in Hadaiq Al Quba, Cairo, arrested on 20 March 1993, detained at Abou Zaabel High Security Prison;

30. Mamdouh Mohamed Fakhri Al Semmane, 34 years old, student, resident in Qana, arrested on 27 February 1993, detained in Oued Al Djadid Prison;

31. Khaled Ahmed Hussein Abdel Ouareth, aged 37, student, resident in Qana, arrested on 5 February 1993, detained in Istiqbal Turah Prison;

32. Khaled Abdesadek Mustapha Al Hamaki, born on 1 October 1966, engineer, resident at Al Jamaa Avenue No. 56, Al Saada, Chebra Al Khalma, Al Qalubia, arrested on 7 October 1993, detained in Abou Zaabel High Security Prison;

33. Iffat Ibrahim Salah Hamoudine, aged 47, engineer, resident in Atlas Industrial Neighbourhood, Zone J, Apartment No. 6, Halouane, Cairo, arrested on 7 March 1993, detained in Abou Zaabel High Security Prison;

34. Hamdi Amine Ismail Abdullah, 37 years old, student, addressed at Cairo, arrested on 16 February 1993, detained at Al Fayoum Prison;

35. Tarek Naim Ryad, aged 39, student, addressed at Beni Souif Veterinary Centre, arrested on 14 October 1993, currently detained in the detention centre of the Security Services in Beni Souif;

36. Ismail Fathi Esseyed Al Chahri, 38 years old, student, addressed in Cairo, arrested on 15 January 1993, detained in Abou Zaabel High Security Prison;

37. Saleh Abdelmalek Ali Ibrahim, aged 47, schoolteacher, resident in Arb Abou Karim, Dirout, Assiout, arrested on 6 August 1994, detained in Wadi Al Jadid Prison;

38. Mohamed Mouawad Abdurahmane Mouawad, 38 years old, student at the Faculty of Medicine, resident in Al Taouail, Sakalta, Sohag, arrested on 15 June 1994, detained in Istiqbal Turah High Security Prison;

39. Sabra Salama Moussa, aged 45, resident in Bijam, Chabra Al Khaima, Al Qalubla, herboriste, arrested on 1 February 1994, detained in Damenhour Prison;

40. Mohamed Lofti Abdulaziz Abdurahim, born on 8 August 1977, student, resident in Dirout, Assiout, arrested on 1 January 1994, detained in Oued Al Jadid Prison;

41. Mohamed Abderrahim Al Charqaoui, born on 4 June 1950, electronic engineer, resident at Bourassa Avenue No. 5, Al Taoufqiya, Cairo, arrested on 28 July 1994, detained in Istiqbal Tura High Security Prison;

42. Khaled Khelf Abd Almoutajalla, 41 years old, student, addressed at Qariat Tassa, Sahel Selim, Assiout, arrested on 20 May 1994, detained in Oued Al Jadid Prison;

43. Khelf Djaber Hamada Djaber, born on 5 July 1971, student, addressed at Farchout Qana, arrested on 11 May 1994, detained in Oued Al Jadid Prison;

44. Misser Azb Abdelghani Athmane, aged 36, lawyer, resident in Nadj Hamada, Qana, arrested on 14 August 1994, detained in Al Fayoum Prison;

45. Hichem Azb Abdelghani, 35 years old, student, resident in Meloua, Al mania, arrested on 18 October 1994, detained in Al Fayoum Prison;

46. Baha'Eddine Khalf Ali Abderrahim, aged 37, student, resident in Al Djabbar, Tama, Sohag, arrested on 15 April 1994, detained in Oued Al Jadid Prison;

47. Attef Mohamed Ahmed Abdellah, 37 years old, student, resident in Al Aqqal Al Bahri, Assiout, arrested on 19 March 1994, detained in Oued Al Jadid Prison;

48. Abd El Mouneim Abderrazak Abd El Moula, aged 41, student, resident in Beni Souif, arrested on 1 November 1994, detained in Abou Zaabel High Security Prison;

49. Abdelatif Ali Abd Al Amar, 36 years old, student, resident in Beni Harb, Tahta, Sohag, arrested on 19 March 1994, detained in Oued Al Jadid Prison.

50. 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 has been in force without interruption since 6 October 1981. The emergency rule was extended on 30 April 2006 for another three years.

51. According to the source, the Emergency Law, Law No. 162 of 1958, allows arbitrary 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 ill-treatment.

52. The source adds that some of these persons were nonetheless able to challenge their detention before a judicial authority, mainly before the Exceptional State Security Courts or military courts, which, in most cases, ordered their release. However, the administrative authority did not comply with these judicial decisions and issued new administrative detention orders using the powers conferred on them by the state of emergency.

53. The source alleges that in spite of the fact that Egypt is a State party to the International Covenant on Civil and Political Rights, it has never followed fully their provisions by reason of the state of emergency governed by article 4 of the Covenant.

54. According to the source, these 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. Some of them are suspected members or supporters of banned Islamist groups but have never participated in violent acts, otherwise they would have been brought before military or exceptional courts and would have been charged and tried.

55. The source adds that the conditions in the prisons and detention centres in which these persons are being kept amount to cruel, inhuman or degrading treatment. Many of these persons are suffering from illnesses because of the lack of hygiene and medical care, overcrowding and poor food quality.

56. The source concludes that the detention of these persons is arbitrary because it is devoid of any legal basis. The authorities have so far failed to provide any decision justifying their arrest and continued detention during more than 12 years.

57. It also argues that their detention 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.

58. In conclusion, the source considers that the detention of these 45 persons is contrary to several articles of the International Covenant on Civil and Political Rights.

59. The Working Group notes at the outset that, despite the lack of cooperation from the Government, it possesses sufficient factual elements to take a position on the merits of the allegation. It is undisputed that the 45 individuals carefully identified by name, age and date of detention, were arrested between 1990 and 1994 and are still in detention. That is to say that they have been detained for between 13 and 17 years. Most of them were unable to challenge the lawfulness of their detention. Some of them could obtain a judicial decision ordering their release, but no one was in fact set free.

60. It is the position of the Working Group that not even a state of emergency may justify such long terms of detention without charges which completely circumvents the guarantees of a fair trial. Moreover, by failing to allow the detainees to apply to a judge or, in those cases where the detainees could seek review of their detention, by disregarding the judicial orders for release, the Government has nullified the control of the Judiciary over the lawfulness of their detention. Therefore, the Working Group, in the absence of any response from the Government, considers that the deprivation of liberty of the above-mentioned persons is arbitrary under category III of the categories applicable to the consideration of cases submitted to the Working Group.

61. The Working Group further notes that the source's allegation that the 46 detainees have been deprived of their liberty for having expressed their political opinions which are contrary to the Government has not been contradicted. The Working Group therefore finds that the deprivation of liberty results from the exercise of their right to freedom of expression, guaranteed by article 19 of the International Covenant on Civil and Political Rights, and is accordingly arbitrary also under category II of the categories applicable to the consideration of cases submitted to the Working Group.

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

> The deprivation of liberty of Ahmed Ali Mohamed Moutawala and the other above named 44 persons is arbitrary, being in contravention of article 9 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.

63. Consequent upon the opinion rendered, the Working Group 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 in view of the long period of time already spent in detention, the adequate remedy would be the immediate release of these persons.

Adopted on 8 May 2007.

OPINION No. 4/2007 (SAUDI ARABIA)

Communications: addressed to the Government on 29 September 2006 and 30 November 2006.

Concerning: Mr. Faiz Abdelmoshen Al-Qaid and Mr. Khaled b. Mohamed Al-Rashed.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government. In 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 cases, especially since the facts and allegations contained in the communication have not been challenged by the Government.

4. Khaled b. Mohamed Al-Rashed, a citizen of the Kingdom of Saudi Arabia born on 18 March 1962 with identity card No. 10610423236 issued at Dammam is a teacher at Fad Ben mufleh Al Sabiyi School in Thuqba Al Damam Province and is known as a member of the so-called Movement of Reformers.

5. According to the information received, Mr. Al-Rashed was arrested on 19 March 2006 at Makkah Al-Mukkaramah by members of the Intelligence Services, while he was in a religious peregrination (Omra) together with his wife. He had recently made some statements expressing his opposition to some governmental policies. No arrest warrant was shown to him and no reasons were given for his apprehension.

6. It was said that Mr. Al-Rashed was placed in incommunicado detention and subjected to ill-treatment both during his arrest and detention. Some days after his arrest, Mr. Al-Rashed was transferred to Al Hayr Prison near to Riyadh, where he is being currently held. His health has reportedly suffered a serious deterioration.

7. Faiz Abdelmohsen Al-Qaid, a citizen of the Kingdom of Saudi Arabia, 22 years old, is a student at the Faculty of Administrative Sciences at the University of Ibn Saud in Riyadh.

8. According to the information received, Mr. Al-Qaid was arrested on 12 October 2005, at 5.30 p.m. in Riyadh, by agents of the Intelligence Services, without any warrant or charges laid against him.

9. It was said that the Intelligence Services impute Mr. Al-Qaid having got in contact with the Arab Commission for Human Rights and sent them, via the Internet, information pertaining to the detention of Majeed Hamdane b. Rashed Al-Qaid as well as about the state of prisons in Riyadh.

10. Khaled b. Mohamed Al-Rashed and Faiz Abdelmohsen Al-Qaid have neither been formally charged with any offence, nor been informed of the duration of their custodial order. They have not been brought before a judicial officer, nor been allowed to appoint a lawyer to act on his behalf, nor otherwise been provided the possibility to challenge the legality of their detention.

11. As the allegations of the source have not been disputed, the Working Group can only conclude that the detention of the above-mentioned two persons does not have any legal basis. This circumstance in itself already renders their detention utterly contrary to the applicable international norms and constitutes an extremely grave violation of the right of these persons to their liberty.

12. The above-mentioned two persons have not been informed of the charges against them; have been denied access to a defence lawyer, and have not been brought before a judge in the, respectively, 14 and 19 months since their arrest.

13. Additionally, according to the information provided by the source, which has remained unchallenged by the Government, the unlawful detention of Mr. Al-Rashed is motivated solely by his membership at the so-called Movement of Reformers while Mr. Al-Qaid is detained solely for his activities as a human rights defender.

14. As a consequence, and in the absence of any argument to the contrary submitted by the Government, the Working Group can only conclude that these persons have been detained solely because of their political activities and because their legitimate exercise of their rights to freedom of opinion and expression.

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

> The detention of Mr. Al-Rashed and of Mr. Al-Qaid is in contravention of articles 9 and 19 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.

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

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

Adopted on 8 May 2007.

OPINION No. 5/2007 (QATAR)

Communication: addressed to the Government on 6 December 2006.

Concerning: Hamed Alaa Eddine Chehadda.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

4. The Working Group further notes that the source informed the Group that Hamed Alaa Eddine Chehadda, who had been arrested on 20 March 2005, was released in November 2006. He is, therefore, no longer in detention.

5. 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 9 May 2007.

OPINION No. 6/2007 (MAURITANIA)

Communication: addressed to the Government on 20 December 2006.

Concerning: Mohamed Sidiya Ould Ajdoud and 17 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. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The 18 cases mentioned below were reported to the Working Group on Arbitrary Detention as follows: Mohamed Sidiya Ould Ajdoud, born in 1959, professor, arrested on 25 April 2005;

4. Abdellah Ould Ahmed Ould Aminou, born in 1966, imam and professor, arrested on 25 April 2005;

5. Mohamed Mouhid Ould Mohamed Abdelhaq, born in 1976, imam and teacher, arrested on 25 May 2005;

6. Mohamed Ould Ahmed Ould Sid Ahmed, known as Al Chaer, born in 1968, doctor in literature and poet, arrested on 21 April 2005;

7. Ahmed Ould El Kowri, born in 1972, professor, arrested on 25 April 2005;

8. Mohamed Mahfoud Ould Ahmed, born in 1965, professor, arrested on 2 May 2005;

9. Mohamed Mahmoud Ould Salek, born in 1972, driver, arrested on 2 May 2005;

10. Mohamed Al Amine Ould Hassen, born in 1984, university student, arrested on 2 May 2005;

11. Mohamed Hassen Ould Mohamed Abderrahmane, born in 1981, graphic artist, arrested on 2 May 2005;

12. Mohamed Ould Abdelwadoud, born in 1976, university student, arrested on 3 May 2005;

13. Ahmed Ould Mohamed Abdellah, born in 1964, professor, arrested on 3 May 2005;

14. Mohamed Al Amine Ould Salek, born in 1971, professor, arrested on 3 May 2005;

15. Sidi Mohamed Ould Ahmed Vall, born in 1964, imam and professor, arrested on 6 April 2005;

16. Ahmed Ould Hine Ould Mouloud, born in 1978, student of religious sciences, arrested on 6 April 2005;

17. Abderrahmane Ould El Ghouth, born in 1979, student of religious sciences, arrested on 6 April 2005;

18. Sid Ould Abah Al Imam, born in 1980, sailor, arrested on 6 April 2005;

19. Ismaïl Aïssa, born on 16 January 1972, of Algerian nationality, residing in Mauritania, secondary schoolteacher and master's student in law, arrested on 29 May 2005;

20. Abdelmadjid Belbachir, born in 1974, of Algerian nationality, residing in Mauritania, student of religious sciences, arrested on 3 June 2005.

21. It was reported that the aforementioned persons, currently detained at the Nouakchott civil prison, were arrested between the months of April and June 2005 during a wave of arrests of opposition figures, presidents of associations, professors, lawyers, journalists and ordinary citizens known to have expressed criticism of the Government's policy. They were not informed of the grounds for their arrest or the charges brought against them.

22. They were held incommunicado for periods ranging from 20 to 44 days, some at the Nouakchott police academy, others at El Mina police station No. 2, without being informed of the precise reasons for their arrest. The source adds that they were subjected to serious acts of torture and particularly inhuman and degrading treatment.

23. According to the Government in power at the time, these persons were arrested in connection with a matter concerning the internal security of the State, and were reportedly accused of belonging to an extremist group acting outside of any legal framework, calling for

violence and using mosques for sectarian political propaganda. During their interrogation, they were reproached for expressing subversive ideas that were detrimental to the interests of the Government.

24. Between 9 May and 12 July 2005, the aforementioned persons were brought by officers of the judicial police before the public prosecutor attached to the Nouakchott court. They were accused of having committed acts constituting criminal association, falsification and use of false documents and unauthorized acts that would expose their country to reprisals; such acts are covered by articles 77, 141, 142, 143, 246 and 247 of the Criminal Code, articles 3 and 8 of Act No. 64-098 of 9 June 1964 on associations, as amended by Act No. 73-007 of 23 January 1973, and Act No. 73-157 of 2 July 1973, and by articles 3 and 20 of Act No. 2003-031 of 24 January 2003 on mosques. The prosecutor instructed the examining magistrate of the first chamber to investigate the case and issue arrest warrants for the accused.

25. Beginning in September 2005, many people who were arrested at the same time, in the same circumstances and with the same charges, were released through an amnesty measure. However, the 18 persons referred to above were not affected by this measure. Their lawyers subsequently petitioned for their provisional release. The examining magistrate accepted the petitions and on 14 September 2005 issued an order for their provisional release. However, the prosecutor's office immediately appealed against that decision, citing the seriousness of the charges. On 6 April 2006, the indictment division of the Nouakchott court of appeal - the court supervising the decisions made by the examining magistrate - issued a final decision confirming the order. However, the prosecutor's office filed an application for a judicial review of the court's decision.

26. According to the source, under domestic law, the indictment division's decision is enforceable. The persons in question were arrested for peacefully expressing their political views; they remained in detention because the authorities refused to apply to them a general amnesty for prisoners of conscience. They are still in detention because the authorities have refused to release them in spite of a final court decision on their provisional release.

27. The persons in question are still being deprived of their liberty, in violation of the procedure established by Mauritanian domestic law, which, in cases of pretrial detention, does not provide that decisions by the court's indictment division are subject to an application for judicial review with suspensive effect.

28. The source adds that these persons are being held in detention solely for having peacefully expressed their political opinions. It has not been established that they have committed any specific reprehensible acts that can be qualified as criminal. Precisely for this reason, the examining magistrate assigned to this case ordered their provisional release, and the court's indictment division confirmed the magistrate's order.

29. The Working Group considers that the continued detention of these persons despite the decision of the indictment division of the Nouakchott court of appeal ordering their provisional release is a violation of the principle according to which any detention measure must be in strict compliance with the law. Their deprivation of liberty no longer has any legal basis because of the final court decision ordering their provisional release - a decision that the authorities have refused to implement.

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

The deprivation of liberty of the aforementioned 18 persons is arbitrary, being in contravention of the provisions 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 I of the categories applicable to the consideration of the cases submitted to the Working Group.

31. The Working Group, having rendered this opinion, requests the Government to take the necessary steps to remedy the situation of these persons.

Adopted on 9 May 2007.

OPINION No. 7/2007 (AUSTRALIA)

Communication: addressed to the Government on 27 October 2006.

Concerning: Amer Haddara, Shane Kent, Izzydeen Attik, Fadal Sayadi, Abdullah Merhi, Ahmed Raad, Ezzit Raad, Hany Taha, Aimen Joud, Shoue Hammoud, Majed Raad, Bassam Raad, and Abdul Nacer Benbrika.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The Working Group welcomes the cooperation of the Government, which provided the Working Group with information concerning the allegations of the source. The reply of the Government was brought to the attention of the source, which made observations on it.

4. The case summarized below was reported to the Working Group as follows: Amer Haddara, aged 26; Shane Kent, aged 29; Izzydeen Attik; Fadal Sayadi, aged 25; Abdullah Merhi, aged 21; Ahmed Raad, aged 22; Ezzit Raad, aged 24; Hany Taha, aged 31; Aimen Joud, aged 21; Shoue Hammoud, aged 26; Majed Raad, aged 22; Bassam Raad, aged 24; and Abdul Nacer Benbrika, a 45-year-old dual Algerian-Australian citizen, also known as Abu Bakr, were arrested and charged with forming a terror cell following a series of coordinated anti-terror raids by New South Wales Police, Victorian and Federal Police in Sydney and Melbourne. Ten of them were arrested on 8 November 2005 and Majed Raad, Bassam Raad and Shoue Hammoud, the remaining three, were detained on 31 March 2006.

5. The 13 detainees have been charged with different terrorist offences under the anti-terror provisions of the Criminal Code of 1995. The offences are related to membership and support of an unnamed terrorist organization. None of the detainees has been charged with engaging in a terrorist act or committing an act in preparation of a terrorist act. According to their defence lawyers, the case against their clients is weak, based in part on hearsay and rumours, slim and peripheral.

6. The detainees are being held on remand and have been classified by the State correctional authority, Corrections Victoria, to be kept at the Acacia Unit of Barwon maximum security prison, near Geelong, in Victoria. According to the source, the conditions of their detention are oppressive and in clear contrast with regimes normally accorded to unconvicted prisoners, established by the Minimum Standard Guidelines for Australian Prisons (2004). Some of the accused have been held in solitary confinement for several months. According to the source the high-security detention of all the detainees has occurred as a result of a blanket decision relating to terrorist offences per se, without consideration of their individual circumstances.

7. In December 2005, a bail application hearing was held in Melbourne for Hany Taha and Abdullah Merhi. Their request was dismissed. In January 2006, an application for bail was filed on behalf of Mr. Haddara before the Supreme Court of Victoria. The request was also dismissed on the basis that his case did not give rise to "exceptional circumstances" as required by Section 15AA of the Crimes Act 1914. In his decision, Justice Osborn considered that Mr. Haddara's conditions of detention were especially difficult. He stated that if such confinement continued for a protracted period pending trial, it might be regarded as constituting "exceptional circumstances" according to the referenced law.

8. In April 2006, an application for bail was filed on behalf of Mr. Attik on the basis of his mental health, the impact of the detention on his mental health and the lack of access to adequate health care in custody. The Supreme Court of Victoria rejected the application for bail.

9. In May 2006, another application for bail on behalf of Mr. Haddara was filed before the Supreme Court of Victoria, also on the basis of "exceptional circumstances". This request was rejected; in spite of Justice Eames' statement noting that the preparation of his legal defence was difficult to his lawyer because of the remote location of the detention centre and the restrictive conditions of detention in the Acacia Unit at Barwon Prison.

10. The source alleges that the detention of these 13 persons is arbitrary, on the basis of alleged serious violations of their rights as defendants. According to the source, the detainees have a limited and restrictive access to legal representation. Thus, detainees' lawyers do not have appropriate access to the evidence gathered against the defendants; all their visits to the detainees are videotaped and recorded and all the materials provided to and received by the detainees, including documentation related to their defence, are scanned by prison officers. Very limited legal visits are often shortened. It was also reported that family members of the defendants have complained about verbal harassment and receiving hate mail.

11. In its reply, the Government states that each of the alleged offenders has been charged with one count of being a member of a terrorist organization, contrary to section 102.3 of the Criminal Code. Various additional charges have also been laid against some of the men, including charges of intentionally recruiting a person to join a terrorist organization, intentionally making funds available to a terrorist organization, and possessing an item connected to preparations for a terrorist act.

12. The Government confirmed that the above-mentioned offenders are being held on remand in the Acacia High Security Unit at Barwon Prison in Victoria, a unit that houses both remand and convicted prisoners. However, the two categories of prisoners do not mix. According to the Government, the above-mentioned defendants have never been held in solitary confinement and

if each prisoner has an individual cell, he spends approximately six hours out of his cell each day and normally exercises with one other prisoner. Each cell contains standard equipment, including a computer with a DVD/CD-ROM drive to access the electronic brief of evidence against them. They are able to make applications for any special arrangements they may require to assist them in preparation of their defence, consistent with article 14, paragraph 3 (b) of the International Covenant on Civil and Political Rights (ICCPR).

13. The Government also states that remand prisoners are permitted one non-contact visit per week of one hour duration and one contact visit per month with any children they may have under the age of 16 years. They however remain shackled and manacled during the contact visit with children for security reasons. Remand prisoners have also telephone access and are permitted to make 25 personal telephone calls per week.

14. As far as visits by legal counsel are concerned, the Government states that remand prisoners do not have limits on the number of visits from professionals, except by the conflicting demands of other prisoners to have access to the contact room available for professional visits. Accordingly, there is a system of booking the contact room to guarantee access. It also states that lawyers may visit their clients in the Acacia Unit between 8.45 a.m. and 3.30 p.m. Visits are video monitored for security purposes, but there is no audio sound or recording. Remand prisoners are also allowed to make an unlimited number of legal professional calls.

15. Referring to allegations of the source concerning the dismissal of the application for bail of Mr. Haddara by Justice Eames whilst noting: “that the preparation of [the alleged offender’s] legal defence was difficult to his lawyer because of the location and restrictive conditions of detention in Acacia Unit at Barwon Prison”, the Government clarifies that the Judge went on to add: “Nonetheless, I am not persuaded that the applicant has been unreasonably denied access to his lawyer. Indeed the evidence is that he has made frequent contact with his lawyer.”

16. According to the Government all the above-mentioned detainees have been through committal proceedings, at which a Magistrate found that there was a case against each on which a reasonable jury could convict. On 1 September 2006, 11 of the alleged offenders were committed to stand trial in the Supreme Court of Victoria on the charges under the Criminal Code. On 20 September 2006, the remaining two were also committed to the Supreme Court to stand trial and all matters have been listed for a directions hearing in the Supreme Court on 1 December 2006.

17. In its reply, the Government also provided detailed information addressing the allegations of lack of access to adequate health care in custody and the violation of the exercise of freedom of religion, especially during Ramadan. The Government informed that the allegations that the detainees were served pork meals have been referred to the Corrections Inspectorate for investigation. The Government also informed that complaints concerning the lack of access to adequate health care have been lodged by the detainees and are being investigated.

18. The Government considers that arbitrary detention occurs where the detention is not reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. The alleged offenders, according to the Government, have been charged with serious offences and remanded in custody in a facility that the Victorian government considers appropriate, given the nature of the offences with which they have been charged. Further, they have had their

applications for bail reviewed and rejected by judges of the Supreme Court of Victoria. They have reasonable access to their lawyers and facilities for preparing their defence consistent with both international standards and Australian Guidelines. Moreover, the Victorian government has also thoroughly investigated all allegations of mistreatment.

19. Commenting on the Government's reply, the source reiterates that the above-mentioned detainees were held in solitary confinement at least for more than 70 days in Unit 4, which has single-occupancy cells, each with its own enclosed yard, and no common areas. During their stay in Unit 4, the detainees have no contact with any other prisoners at all. The source insisted on the unnecessary restrictions on personal visits and the very intrusive measures imposed during the contact visits with children under 16. The source also provides detailed information concerning the alleged violations of the religious observances and diet, and on the violation of the right to health consequent to the detainees' conditions of detention and the lack of access to health care, particularly mental health care. According to the source, the level of mental health care available to the detainees falls short of that explicitly required by article 12 of the International Covenant on Economic Social and Cultural Rights and impliedly required by articles 7, 9 and 10 of ICCPR.

20. As a final matter, the source notes that the detainees have now all been committed to stand trial in the Supreme Court of Victoria at a date yet to be fixed. It is unlikely, however, that the trial will commence before late 2007, at the earliest. It may then continue for a period of 6 to 12 months. This means that the detainees may be held in their current oppressive conditions as unconvicted remand prisoners for up to three years, which, according to the source, raises particular issues in relation to the guarantee that persons charged with a criminal offence must be tried without undue delay. The source is of the view that the detention is not reasonable, necessary, just or proportionate, as required by article 9, paragraph 1, of ICCPR.

21. The Working Group notes that the allegations submitted by the source basically refer to conditions of detention, allegations which, consequently, do not fall within the Working Group's mandate, which refers to the lawfulness of the detention. The Working Group also notes that the source has submitted the same allegations to other United Nations human rights mechanisms, such as the Special Rapporteur on Freedom of Religion or Belief; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health and the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism.

22. The Working Group considers that the conditions of detention of the above-mentioned persons, as described by the source and not contested by the Government, are particularly severe, especially taking into account that they have been imposed upon persons who have not yet been declared guilty and who must, accordingly, be presumed innocent. Conditions of detention are relevant for the Working Group solely in the case that their severity or harshness reaches such magnitude that they affect, compromise or impede the right to an adequate preparation and exercise of the defence in conditions that guarantee the principle of equality of arms. The Working Group pays particular attention, in this context, to the possibility to communicate, in private and without interferences, with the defence lawyer.

23. In his communication, the source has invoked allegations that if they came to be established would constitute grave violations of the right to defence. The Government has refuted most of these allegations and furnished detailed information on the means put at the disposal of the defendants to prepare their defence and to communicate without major interferences with their lawyers. The information submitted by the Government was not commented on or refuted by the source. However, the Government has not refuted the allegation that correspondence between defendants and their lawyers are scanned by prison officers as well as the allegation that all the interviews between defendants and lawyers are videotaped, although without audio sound or recording, for security reasons.

24. With regard to the allegation that the detention is not reasonable, necessary, just or proportionate as required by article 9, paragraph 1, of ICCPR, the Working Group recognizes that the Committee on Human Rights has considered, in the framework of a temporary or pretrial detention of a judicial nature, 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. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances. Further, remand in custody must be necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime".[15] The Working Group notes that if several general criteria can be identified from the Committee's jurisprudence, such as legality, legitimacy (of the detention's goal), necessity, proportionality, and protection of human rights, every kind of deprivation of liberty may require additional and/or specific criteria.

25. In the case under consideration, the persons concerned are charged with serious offences; the investigation of the case was terminated in September 2006, less than a year after their arrest and detention, and all of them are now committed to stand trial before the Supreme Court of Victoria. The Working Group notes that even if the date of the trial is yet to be fixed, the period spent in pretrial detention could not be, at least at this stage, considered excessive.

26. Neither the source nor the Government have provided the Working Group with copies of the judicial decisions rejecting the applications for bail. While both the source and the Government have quoted some passages from these decisions, the Working Group is not in a position to make a definite assessment of the reasoning behind the dismissal by the Court of the defendants' applications for bail. It appears clear that the judges have given serious consideration to the arguments provided by the defence for release of some of the detainees or at least a relaxation of the conditions of their detention. The Working Group remains concerned, however, that the law appears to make the detention under extraordinarily restrictive conditions the rule for any person charged with a terrorist offence, without sufficient room for consideration of the specific charges against the detainees and their individual circumstances or dangerousness. The submissions of the parties suggest that the judges deciding on bail applications might not have sufficient discretion to consider these matters either, at least in the absence of "exceptional circumstances".

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[15] *A (name deleted) v. Australia* (CCPR/C/59/D/560/1993), para. 9 (2).

27. Despite these concerns (and in the absence of more detailed submissions by the source and the Government thereon), in the light of the charges brought against the defendants and the length of time they have spent, at this stage, in custody, their pretrial detention does not seem to be disproportionate. The Working Group reiterates that the allegedly oppressive conditions of their detention per se and the consequences of these conditions on the mental health of the defendants do not fall within its mandate.

28. In conclusion, the Working Group considers that the material before it does not disclose such a lack of observance of international norms relating to a fair trial which would confer on the detention of Amer Haddara, Shane Kent, Izzydeen Attik, Fadal Sayadi, Abdullah Merhi, Ahmed Raad, Ezzit Raad, Hany Taha, Aimen Joud, Shoue Hammoud, Majed Raad, Bassam Raad, and Abdul Nacer Benbrika, an arbitrary character.

Adopted on 9 May 2007.

OPINION No. 8/2007 (SYRIAN ARAB REPUBLIC)

Communication: addressed to the Government on 5 July 2006.

Concerning: Ayman Ardenli and Muhammad Haydar Zammar.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

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, which has made comments on it. 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 of the observations by the source.

4. According to the information submitted by the source Ayman Ardenli is a dual Syrian and Australian national, about 47 years of age, usually residing in Australia.

5. Mr. Ardenli was arrested at Damascus airport around August 2003. He was initially detained at the Aleppo Branch of Military Intelligence, where he was reportedly ill-treated and tortured. Thereafter he was transferred to the Far' Filisteen (Palestine Branch 235) detention centre of the Military Intelligence in Damascus, where he has been held since then. He is believed to be held in a communal cell measuring 475 cm by 475 cm with between 20 and 60 other people.

6. It is alleged that Mr. Ardenli has not been given any opportunity to challenge the legality of his detention. He is being denied all access to a lawyer, his family or consular officials. He has not been charged with any offence. It is thought that his arrest and detention may be connected to his father's previous involvement with the outlawed "Al Ikhwan al Muslimin" ("Muslim Brotherhood").

7. Muhammad Haydar Zammar is 43 years of age. He left the Syrian Arab Republic when he was about four years old and moved to Germany where he obtained citizenship. He reportedly lived in Hamburg.

8. Mr. Zammar was arrested in Morocco in October or November 2001, detained and interrogated there for two weeks and then secretly transferred to the Syrian Arab Republic. The newspaper *Washington Post* reported that senior Moroccan Government sources had informed it that agents of the United States of America had taken part in Mr. Zammar's interrogation in Morocco, and that United States officials had known that he would subsequently be transferred to Syria.

9. Since November 2001, Mr. Zammar has been detained at the Far' Filisteen (Palestine Branch 235) detention centre of the Military Intelligence Service in Damascus. During the summer or autumn of the year 2002, Mr. Zammar reportedly received one visit by representatives of Germany.

10. It is alleged that Mr. Zammar has not been given any opportunity to challenge the legality of his detention. He is being denied all access to his lawyer and his family. He has not been charged with any offence. It is thought that his arrest and detention are related to his alleged links to Al-Qaeda.

11. The source alleges that the detention of Mr. Ayman Ardenli and Mr. Muhammad Haydar Zammar is arbitrary. Mr. Ardenli has spent nearly three years in incommunicado detention without any judicial decision to that effect. Mr. Zammar has spent close to five years in incommunicado detention (with the exception of the visit by German officials in 2002), without any judicial decision to that effect. The deprivation of their liberty is accordingly manifestly devoid of any legal basis.

12. The allegations of the source have been brought to the attention of the Government on 5 July 2006. The Government's response, of 20 October 2006, states that Ayman Ardenli was released pursuant to a general amnesty issued by the President of the Syrian Arab Republic in 2005 and is, therefore, no longer in detention.

13. Concerning Muhammed Haydar Zammar, the Government states that he was in fact born in 1961, in Aleppo, Syria, is a German national and lived in Germany since 1971, as his father had legal residence in that country.

14. The Government states that he attended several military training courses in Pakistan and Afghanistan and joined the Hekmatyar forces to fight Russian military forces and other factions. He later took part in fighting in Bosnia. In late 1995, he was involved in an attempted attack on the United States Consulate in Hamburg (Germany) for which it was planned to make use of an exploding glider. He joined the ranks of the Taliban and Al-Qaeda, met with Osama Bin Laden, and collected money for the mujahidin.

15. He was arrested in Casablanca on 8 December 2001 and was handed over to the Syrian authorities on 31 December 2001. He was summoned to appear before the Syrian State Security

Court (SSSC) on allegations of being a member of an extremist organization that carries out terrorist activities in the Syrian Arab Republic. These acts are punishable under Syrian law pursuant to articles 288, 304 and 306 of the Syrian Criminal Code.

16. The reply of the Government has been brought to the attention of the source on 10 November 2006, which has made comments on it and provided updated information. As regards Ayman Ardenli, the source was neither in a position to confirm nor to deny the fact of his release.

17. The source explains that Muhammad Haydar Zammar appeared before the SSSC in October 2006. It alleges that he was convicted on four charges after an unfair trial on 11 February 2007. He was given a sentence of 12 years, which, according to the source, is the common penalty for membership of the outlawed Syrian organization with the name of "Muslim Brotherhood". Mr. Zammar stated during the trial that he had never been a member of the "Muslim Brotherhood". No evidence of such membership was presented in court, and the organization itself later issued a statement denying that Mr. Zammar had ever been a member or had established any ties with it or with any member.

18. The source further informs that he was also convicted on three charges carrying lesser sentences pursuant to article 306 of the Syrian Criminal Code, which makes it a criminal offence to be a member of an "organization formed with the purpose of changing the economic and social status of the state", to its article 278 for "carrying out activities that threaten the state or damage Syria's relationship with a foreign country", and to its article 285 for "weakening national sentiments and inciting sectarian strife". The source states that it is common in Syria to charge political prisoners with these kinds of offences and that Mr. Zammar remains subjected to incommunicado detention, solitary confinement, torture and ill-treatment.

19. The source also expresses its concern that Mr. Zammar's rights were violated by German and United States authorities. Apparently, officers from the German Federal Criminal Police Office (*Bundeskriminalamt* - BKA) provided information that was used for his arrest in Morocco. Officials from the German intelligence and law enforcement services interrogated Mr. Zammar in Syria for three days in November 2002 at a time when it was apparent that he was held in incommunicado detention and deprived of procedural rights and guarantees. United States officials reportedly provided written questions to his interrogators in Morocco, but did not have direct access to him. According to the source, Mr. Zammar was forcibly removed from Morocco to the Syrian Arab Republic in December 2001 in connection with the so-called "renditions" programme led by the United States.

20. The source states that, until the end of February 2007, Mr. Zammar had not received any visits by relatives in prison. He only had brief access to his lawyer and to members of his family during the court sessions before the SSSC between October 2006 and February 2007. Furthermore, it was not until 7 November 2006 that Mr. Zammar received his first visit from a German diplomat.

21. The Working Group observes that Mr. Ayman Ardenli has been arrested as an Australian resident, apprehended at Damascus airport and detained incommunicado at a military centre for a prolonged period of three years. He has not been given the opportunity at any time to challenge the legality of his detention, has not been charged with any offence, has been denied access to a

lawyer, and has not been judged in any trial. In accordance with its Revised Methods of Work, chapter C. (a), the Working Group reserves the right to render an opinion in this serious case of deprivation of liberty without any legal basis, notwithstanding that the Government of Syria informed it about the release of Mr. Ardenli.

22. As to the case of Mr. Muhammad Haydar Zammar, the Working Group notes that the allegations of his secret transfer from Morocco to Syria have not been denied. As a citizen of Germany, he was arrested in Morocco and held in custody for two weeks, interrogated and then sent to be kept in detention in Syria outside of any procedure contemplated by law. 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 (A/HRC/4/40).

23. It has not been denied that he was held in incommunicado detention for a significant period of no less than five years. During this term, he did not enjoy his right to legal defence and procedural safeguards. When he was finally sent to a trial before the SSSC, the Working Group considers that despite the severity of the charges Mr. Zammar has not been able to challenge the accusations against him, which undermines their credibility.

24. As the Working Group has already expressed in other cases, there are serious concerns about this Court's non-compliance with international standards on the right to a fair trial (Opinions Nos. 21/2000, 15/2006 and 16/2006). Lawyers are not granted access to their clients prior to the trial, proceedings are initiated before legal representatives have an opportunity to study the case file, and lawyers are frequently denied their right to speak on behalf of their clients. Lawyers require written permission from the Court's President before they can see their clients in prison. Moreover, those sentenced by the SSSC and the Field Military Court have no right to appeal their sentences (A/HRC/4/40/Add.1). Therefore, the Working Group believes that in the case of Mr. Zammar, the violation of the international norms related to a fair trial is of such gravity as to confer on the deprivation of his liberty an arbitrary character.

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

> The deprivation of liberty of Mr. Ayman Ardenli was arbitrary during the period of August 2003 until his release, as it contravened the principles and norms set forth in articles 9 of the Universal Declaration of Human Rights and 9 of the International Covenant on Civil and Political Rights and it falls into category I of the methods of work adopted by the Working Group on Arbitrary Detention.
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> The deprivation of liberty of Mr. Muhammad Haydar Zammar is arbitrary, as it contravenes the principles and norms set forth in articles 9 of the Universal Declaration of Human Rights and 9 and 14 of the International Covenant on Civil and Political Rights and falls into category III of the methods of work adopted by the Working Group on Arbitrary Detention.

26. Consequent upon the opinion rendered, and taking into account that Mr. Ayman Ardenli has been released, the Working Group requests the Government to take the necessary steps to remedy the situation and bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

Adopted on 10 May 2007.

OPINION No. 9/2007 (SAUDI ARABIA)

Communications: addressed to the Government on 1, 5, 8, 11 and 15 December 2006.

Concerning: Hussain Khaled Albuluwy, Abdullah b. Slimane Al Sabih, Sultan b. Slimane Al Sabih, Salah Hamid Amr Al Saidi, Ahmed Abdo Ali Gubran, Manna Mohamed Al Ahmed Al Ghamidi and Jasser b. Mohamed Al Khanfari 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. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The Working Group regrets that the Government has not provided information on the cases despite the opportunity it was given to comment. The Working Group was informed by the Government, by a letter dated 22 March 2007, that the requisite information is being gathered, without requesting for its reply, an extension of the 90-days time limit, which is the applicable time limit as stipulated in the Working Group's methods of work. Upon a further letter of the Working Group to the Government, dated 13 April 2007, indicating that the Working Group is going to consider these seven cases during its upcoming session, the Government has not availed itself of the opportunity to comment on the allegations submitted by the source. In the light of the allegations made, the Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases.

4. The case summarized below was reported to the Working Group as follows: Hussain Khaled Albuluwy, 36 years old, of Saudi nationality, is an IT Manager for the RMZ Company located in the Petromin neighbourhood of Dammam. It was reported that he was arrested on 17 June 2003, at his work place, by agents of the Security Services, without a warrant or charges laid against him. It was said that the Security Services impute Mr. Albuluwy of having been involved in a car accident that caused fatal victims.

5. Mr. Albuluwy has been detained for more than 40 months at Jubaïl prison in Riyadh, one year of which in solitary confinement. It was further reported that no charges have been laid against him and that no trial date has been set. Furthermore, he has been refused access to a defence lawyer.

6. Abdullah b. Slimane Al Sabih, of Saudi nationality, born on 21 September 1981, schoolteacher, with identity card No. 1000.493.963, issued in Riyadh on 2 July 1997, usually residing in Haï Al Aakik, Riyadh; and his brother Sultan b. Slimane Al Sabih, also of Saudi

nationality, born on 4 April 1979, State officer, with identity card No. 1000.493.955, issued in Riyadh on 20 September 1994, also residing in Haï Al Aakik, Riyadh, are detained in a General Intelligence Services detention centre located in Al Kharj, Al Kharj Province, a centre run by the Ministry of the interior.

7. It was reported that these two brothers were arrested on 26 February 2005 at 3 p.m. at their home by members of the General Intelligence Services. No arrest warrant was shown to them and no reasons were given for their apprehension. Their house was also searched without a search warrant being shown to them. No reasons were communicated to them for their apprehensions. After their arrests, they were transferred to Al Hayr prison in Riyadh. Later, they were taken to Al Kharj Prison. No charges have been laid against them. They have not been brought before a judge and have not been able to challenge the lawfulness of their detention before a judicial authority. No trial date has been set. Furthermore, they do not know the eventual duration of their detention. Brothers Al Sabih have been refused the right to receive visits and the access to lawyers.

8. Salah Hamid Amr Al Saidi, 28 years old, of Saudi nationality, with identity card No. 194136 issued in Mecca (Saudi Arabia) on 20 January 1994, widower and father of two girls aged 3 and 6, residing in Al Jazair Haï Al Utaïbiya Avenue, Mecca, is an officer of the Haj Ministry. He was arrested on 15 January 2006 by agents of the General Intelligence Services without a warrant. At the moment of his arrest he was informed that the order of arrest had been issued by the Ministry of the interior. Mr. Al Saidi was transferred to the General Intelligence Services Headquarters, where he was interrogated for several days. He has been detained for more than 10 months at Al Racifa prison in Mecca. It was further reported that no charges have been laid against him and that no date for a trial has been set. He has furthermore been refused access to lawyers.

9. Ahmed Abdo Ali Gubran, a Yemeni national, born on 1 January 1974 in Al Badia, Yemen, residing, since 1981, in Riyadh; a lawyer and legal advisor; with Yemeni passport No. 00609 438, issued in Riyadh on 13 June 2001 by the General Consulate of Yemen, married and father of four children, was arrested on 15 September 2004 at Riyadh International Airport upon his arrival from Damascus, where he had stayed during three months attending a postgraduate university course. No proper arrest warrant was shown to him and no reasons were given to justify his arrest.

10. Ali Gubran has not been given an opportunity to be heard by a judicial authority. He has not been presented before a judge or charged. After his first three months in secret and incommunicado detention in a cell measuring two square metres, Mr. Gubran was reportedly informed that no charges would be laid against him and that he would soon be released. However, he was transferred to Al Kharj prison. Mr. Gubran has not been allowed to contact or to appoint a defence lawyer or to establish contact with his consular representative. The General Consulate of Yemen has limited itself to inform Mr. Gubran's relatives about his detention at Al Kharj prison. Mr. Gubran has not enjoyed any judicial recourse to contest the lawfulness of his detention.

11. Manna Mohamed Al-Ahmed Al-Ghamidi, 32 years old, a schoolteacher, residing in Al-Kharj, with identity card No. 1007820119, issued on 28 August 1989 at Al-Kharj, was arrested on 2 December 2005 at Al-Kharj by members of the General Intelligence Services who

did not produce an arrest warrant. Mr. Al-Ghamidi was transferred to the General Intelligence Services compound in Jeddah (Saudi Arabia) where he was interrogated during several days and allegedly ill-treated. Later he was moved to Al Taif.

12. Mr. Al-Ghamidi was kept in incommunicado detention for three months. He was refused his right to contact a defence lawyer. Later he was accused of financing illegal charity associations and was brought before a judicial authority in Al Taif which ordered his immediate liberation for lack of evidence to sustain the charges. However, the agents refused to release him and transferred Mr. Al-Ghamidi first to Al Alicha prison and later to El Melz prison where he is currently being held. Mr. Al-Ghamidi has been detained for more than one year without a trial.

13. Jasser b. Mohamed Al-Khanfari Al-Qahtani, born on 22 September 1967, residing in Al Thuqba, Al Dammam (Saudi Arabia), a teacher and headmaster of a primary school, was arrested in Dammam on 18 March 2006 by agents of the General Security Intelligence Services, who neither produced any warrant nor other relevant arrest decision by a public authority. Mr. Al-Qahtani was taken to his house with a police escort. His home was searched, however, no search warrant was shown to him. Mr. Al-Qahtani was later moved to the General Security Intelligence Headquarters at Dammam where he was interrogated. Subsequently, he was transferred to the prison of Al Dammam where he is currently being held. Mr. Al-Qahtani has not been informed of the reasons for his arrest or of any charge brought against him. His relatives have not been allowed to visit him and he has not been authorized to contact or to appoint a defence lawyer.

14. The source argues that, as it has detailed for every individual case, these seven persons were not informed of the reasons for their arrest. No charges have been laid against them. With the only exception of Mr. Al-Ghamidi, they have not been brought before a judge and have not been able to challenge the lawfulness of their detention before a judicial authority. No dates for trials have been set. Furthermore, these persons are not aware of the eventual duration of their detention.

15. Although Mr. Al-Ghamidi was indeed brought before a judicial authority after three months of incommunicado detention, which ordered his release, the Government failed to comply with the release order and maintains his detention.

16. The Working Group observes that while these allegations were submitted to the Group through individual communications, they all refer to persons deprived of their liberty under similar circumstances. The Working Group therefore considers that it is appropriate to deal with them in a single opinion.

17. In the light of the allegations submitted and in the absence of Government's information regarding the cases, the Working Group concludes that the seven persons mentioned above were not informed about the reasons for their arrests; were not informed about the charges laid against them; were not allowed to consult or to appoint a defence lawyer; could not effectively contest or appeal their detention; and continue to be deprived of their liberty without having been formally charged or tried. Although Mr. Al-Ghamidi was brought before a judicial authority, which ordered his immediate release, this judicial order has been disregarded by the Government and Mr. Al-Ghamidi remains in detention.

18. In the Working Group's view, the current deprivation of liberty of the above-mentioned seven persons amounts to arbitrary detention. Their detention violates the guarantees afforded by the Universal Declaration of Human Rights with respect to the right not to be arbitrarily deprived of liberty.

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

> The deprivation of liberty of Hussain Khaled Albuluwy, Abdullah b. Slimane Al Sabih, Sultan b. Slimane Al Sabih, Salah Hamid Amr Al Saidi, Ahmed Abdo Ali Gubran, Manna Mohamed Al Ahmed Al Ghamidi and Jasser b. Mohamed Al Khanfari Al Qahtani is arbitrary, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights, and falls within category I of the categories applicable to the consideration of cases submitted to the Working Group.

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

Adopted on 10 May 2007.

OPINION No. 10/2007 (LEBANON)

Communication: addressed to the Government on 30 November 2006.

Concerning: Youssef Mahmoud Chaabane.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

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

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. It has transmitted the Government's reply to the source, and has received the source's comments on it. 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, the Government's reply and the source's comments.

5. The case mentioned below was reported to the Working Group on Arbitrary Detention as follows: Youssef Mahmoud Chaabane, a Palestinian born in 1965, a chauffeur, domiciled at the Bourj Barajneh camp in Beirut, was arrested on 5 February 1994 in Beirut, by members of the Syrian intelligence services, and was taken to Beau Rivage, a Syrian intelligence interrogation centre. After 10 days, he was handed over to the Furn El Chebbak - Dabta Adlieh gendarmerie in Beirut, where he was held incommunicado for one month. Mr. Chaabane was later brought to

Roumieh central prison, where he is currently being held. Mr. Chaabane was accused of murdering a Jordanian diplomat, Naëb Omran al-Maaitha, first secretary of the Jordanian Embassy in Beirut, and received a death sentence, which was commuted to life imprisonment on 19 October 1994.

6. According to the source, Mr. Chaabane was convicted by the Justice Council solely on the basis of confessions obtained under torture by the Syrian intelligence services in Lebanon. His arrest and trial took place in breach of Lebanon's international commitments, in particular the International Covenant on Civil and Political Rights, which Lebanon has ratified.

7. The source adds that the actual perpetrators of Mr. al-Maaitha's murder were convicted and executed in Jordan. Mr. Chaabane is still being held in detention, despite the fact that his innocence has been recognized. According to the source, the Lebanese courts are unable to retry Mr. Chaabane, as verdicts handed down by the Justice Council are not subject to appeal, which is a violation of article 14 of the International Covenant on Civil and Political Rights.

8. The source considers that Mr. Chaabane's detention is arbitrary and illegal. He was arrested without a warrant and was held in detention for 40 days without being brought before an examining magistrate or a procurator. His trial reportedly fell far short of the minimum requirements for a fair and just trial. Mr. Chaabane was convicted solely on the basis of confessions obtained under torture. The source concludes that Mr. Chaabane's continued detention after his innocence was confirmed by the arrest of the actual perpetrators, coupled with the Lebanese judicial system's inability to retry him, means that his detention is of an arbitrary nature.

9. In its reply, the Government explains that the judicial body known as the Justice Council is chaired by the president of the court of cassation, and is composed of four judges of that court, who serve as its members. It is a special court established by the legislature to consider serious cases, in particular those involving the internal and external security of the State, in accordance with articles 270 and 336 of the Criminal Code.

10. In accordance with Decree No. 4807 of 25 February 1994, the case of the murder in Beirut on 29 January 1994 of the first secretary of the Jordanian Embassy in Lebanon, Naëb Omran al-Maaitha, was referred to the Justice Council because it involved an attack against the internal security of the State.

11. On 19 October 1994, the Justice Council found Youssef Mahmoud Chaabane guilty, in accordance with article 549, paragraph 1, of the Criminal Code, and imposed the death sentence, which was subsequently commuted to life imprisonment with forced labour, in accordance with article 253 of the Criminal Code. Mr. Chaabane was also found guilty under article 72 of the Criminal Code of the serious offence of possessing weapons. The sentences are being served concurrently, the most severe being the sentence of life imprisonment with forced labour. These sentences were imposed on Mr. Chaabane for his participation, together with Tha'ir Mohammed Ali, in the premeditated murder of Naëb al-Maaitha, first secretary of the Jordanian Embassy in Lebanon.

12. On 2 December 2005, Mahmoud Chaabane filed an appeal against the verdict handed down on 19 October 2004, and requested a retrial. His appeal was based on a judgement reached

on 3 December 2001 by the State Security Court of Jordan. According to the judgement, Yasir Mohammed Ahmad Salamah Abu Shinar, also known as Tha'ir Mohammed Ali, and others were found guilty of belonging to an illegal association, the Revolutionary Council, which had been formed with the aim of carrying out military operations against the security of certain States, including the murder of the first secretary of the Jordanian Embassy in Lebanon, Naëb al-Maaitha. The judgement supposedly proved that Mr. Chaabane was innocent, since it contradicted the verdict handed down by Lebanon's Justice Council.

13. On 21 March 2006, the Justice Council issued a decision formally accepting the request for a retrial, but rejecting it in substance. The Justice Council upheld the decision under appeal, as the conditions for a retrial set out in article 328 of the Lebanese Code of Criminal Procedure had not been met, in particular paragraph (b), which reads as follows: "A retrial may be allowed if the individual has been found guilty of a serious or major crime and another individual has subsequently been found guilty of the same crime in the same capacity, provided that there is evidence to acquit the person found guilty."

14. The judgement cited as a basis for a retrial was issued by a Jordanian court and not by a Lebanese court, while article 328, paragraph (b), states that the two judgements must be rendered by Lebanese courts. Furthermore, since there is no contradiction between the Lebanese and the Jordanian judgements, the latter does not prove that Youssef Mahmoud Chaabane is innocent of the charges brought against him. The evidence adduced for Mr. Chaabane's appeal was considered insufficient to reopen the case.

15. Having reconsidered the legal procedures and the judgements in the case of the murder of the first secretary of the Jordanian Embassy in Lebanon, the Government contends that Youssef Mahmoud Chaabane is serving a prison sentence imposed on him in accordance with a verdict issued by the highest court in Lebanon, and following a trial that was properly conducted in Lebanon. The denial of the application for a retrial was based on Lebanese law.

16. In its comments on the Government's reply, the source emphasizes that the Government has not replied to the allegations concerning the conditions of Mr. Chaabane's arrest. It reiterates that the Syrian intelligence services arrested him and held him incommunicado for 10 days, notwithstanding the fact that they were not authorized to do so, and that his confessions were extracted under torture. Mr. Chaabane had no access to his family, a lawyer or a doctor, and he was completely deprived of the protection of Lebanese law. To obtain his confession, the Syrian intelligence services in Beirut tortured him. The source repeats that Mr. Chaabane was tried by a special court, which relied solely on confessions extracted under torture.

17. The source adds that Mr. Chaabane was unable to appeal against his conviction because judgements issued by the Justice Council were, at the time, irrevocable and not subject to any appeal. In December 2005, the law was amended to allow persons convicted by this court to request a review of their conviction. Mr. Chaabane's appeal was lodged in accordance with this amendment, but it was denied. The source emphasizes that some of the judges who had convicted Mr. Chaabane were among those who considered his appeal. They would be reluctant to challenge verdicts that they themselves had handed down. According to the source, this review is therefore not an effective remedy.

18. Lastly, regarding the Government's contention in its reply that there is no contradiction between the judgements handed down by the Jordanian and Lebanese courts, the source points out that the judgement of the Jordanian court never mentions the alleged involvement of Mr. Chaabane in this case and that, in any event, according to the Jordanian and Lebanese forensic medical examiners, there was only one gunman, even though two people - in this case, Youssef Mahmoud Chaabane and the person convicted in Jordan - both signed confessions stating that they had shot the diplomat.

19. Based on the foregoing, the Working Group notes that the Government has not challenged the allegations concerning the circumstances of Mr. Chaabane's arrest, detention and interrogation by the Syrian services. Mr. Chaabane was allegedly held incommunicado for 10 days on the premises of the Syrian services in Beirut, and confessions were allegedly extracted under torture - confessions that served as a basis for his being sentenced to death. Nor has the Government contested the fact that Mr. Chaabane was unable to have his conviction reviewed by a higher tribunal in accordance with the requirements of article 14, paragraph 5, of the International Covenant on Civil and Political Rights, to which Lebanon is a party. In its case law, the Human Rights Committee has on several occasions stated that the right to appeal established under article 14, paragraph 5, of the International Covenant on Civil and Political Rights imposes on States parties a duty substantially to review conviction and sentence, both as to sufficiency of the evidence and of the law.[16]

20. The Working Group considers that to be sentenced to capital punishment, when the Government has not provided evidence that the individual had the ability to have his guilty finding and conviction examined by a higher jurisdiction, is itself a very egregious breach of the standards of a fair trial. A fortiori, when the convicted person contends that his confessions were extracted under torture and when new evidence supports that contention.

21. The Working Group considers that, in the light of the circumstances, the violation of article 14, paragraph 5, of the International Covenant on Civil and Political Rights is of such gravity as to confer on the detention and sentencing of Mr. Chaabane an arbitrary character.

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

> The deprivation of liberty of Youssef Mahmoud Chaabane is arbitrary, being in contravention of the provisions of article 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.

23. The Working Group, having rendered this opinion, requests the Government to take the necessary steps to remedy the situation of Mr. Chaabane, in conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 11 May 2006.

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[16] Communications No. 1100/2002, *Bandajevsky v. Belarus* and No. 802/1998, *Rogerston v. Australia*.

OPINION No. 11/2007 (AFGHANISTAN and UNITED STATES OF AMERICA)

Communication: addressed to the Government on 11 December 2006.

Concerning: Amine Mohammad Al-Bakry.

The States are parties to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. The Working Group regrets that neither the Government of Afghanistan nor the Government of the United States of America have replied.

3. (Same text as paragraph 3 of Opinion No. 32/2006.)

4. According to the source, Amine Mohammad Al-Bakry, born on 29 December 1968, of Yemeni nationality, residing at Old Airport Road in the city of Al Medinah, Saudi Arabia, is the director of a private company specialized in the import and export of diamonds and precious stones. The company is owned by Djamel Ahmed Khalifa, husband of a sister of Osama bin Laden.

5. The source reports that Mr. Al-Bakry was abducted on 28 December 2002 in Thailand, during a business trip to Bangkok, allegedly by agents of the intelligence services of the United States or of Thailand. During the whole year 2003, his whereabouts were unknown. The Thai authorities confirmed to Mr. Al-Bakry's relatives that he had entered Thailand's territory but denied knowing his whereabouts. In January 2004, Mr. Al-Bakry's relatives received a letter from him through the International Committee of the Red Cross (ICRC), informing them that he was kept in detention at the United States Air Force Base of Baghram, near Kabul, Afghanistan.

6. The source states that Mr. Al-Bakry was detained due to his commercial connections with Mr. Khalifa. Mr. Khalifa himself was arrested in San Francisco, United States of America, and, after four months in detention, expelled to Jordan. In Jordan he was detained during two months without charges or trial. He is back in Saudi Arabia in freedom. The source considers that Mr. Khalifa was detained due to his family connection with Osama bin Laden.

7. The source alleges that Mr. Al-Bakry has been detained for (at the time of submission of the communication) more than 41 months in the military base of Baghram without any charge laid against him. No trial date has been set. Furthermore, he has been refused access to defence lawyers and the only visits he may receive are those from representatives of ICRC. Mr. Al-Bakry is not able to challenge the lawfulness of his detention or to appear before a competent, independent and impartial judicial authority.

8. According to the source, States are obliged to apply the norms of the International Covenant on Civil and Political Rights to all persons under their jurisdiction. The Covenant thus applies in all territories under the effective control of the Afghan and the United States Governments and to all persons under their jurisdiction. The United States has not temporarily derogated from of its obligations under the International Covenant on Civil and Political Rights in conformity with article 4 of the Covenant and with general comment No. 31 (2004) of the Human Rights Committee (CCPR/C/21/Rev.1/Add.13, para.10).

9. The source argues that Mr. Al-Bakry has been denied the right to a fair trial recognized by articles 105 and 106 of the Third Geneva Convention and article 75 of its Additional Protocol I. Both Governments deny prisoner-of-war status to the persons detained at Baghram military base. Consequently, international human rights law should be applied. The source adds that the right to a fair trial is inalienable and constitutes a guarantee necessary to the effective enjoyment of all human rights and the preservation of legality in a democratic society.

10. The Working Group would have welcomed the cooperation of the two Governments concerned. In the absence of any reply from them, the Working Group considers that the allegations of the source have not been disputed.

11. The Working Group notes that Mr. Al-Bakry was deprived of his freedom in Thailand. There is no indication that the circumstances under which he was arrested in any way involved an armed conflict which could trigger the applicability of international humanitarian law. In this context, the Working Group recalls that it has previously noted "that the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law".[17] As stated also by ICRC: "When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern. […] The designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict."[18] The rules of international law governing Mr. Al-Bakry's detention are therefore to be found in international human rights law, in particular in the International Covenant on Civil and Political Rights, to which both the United States of America and Afghanistan are parties (as well as, it might be added, Thailand).

12. Article 9 of the Covenant provides in paragraph 1 that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Paragraph 4 of article 9 enshrines the right to judicial review of the legality of detention. It reads: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

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[17] Situation of detainees at Guantánamo Bay, report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt (E/CN.4/2006/120), paragraph 9 and note 20.

[18] Official Statement of the International Committee of the Red Cross (ICRC) dated 21 July 2005 regarding "The relevance of IHL in the context of terrorism" (available at < http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/terrorism).

13. Mr. Al-Bakry was secretly arrested by unidentified agents probably belonging to United States information services, or to their Thai counterparts acting on instructions from the United States services, in Bangkok, where - according to the undisputed account of the source - he was carrying out his habitual business. Nobody, not even his close family, was informed of this detention. In January 2004, his family learned - only through ICRC - that he has been detained since a date unknown at the Baghram United States Airbase in Afghanistan. Except for ICRC visits and the possibility to transmit letters through them, he is held there completely incommunicado. He has not been informed of any charges raised against him. He has not had any possibility to challenge the lawfulness of his situation before a judicial authority, as article 9, paragraph 4 of ICCPR requires for all cases of detention, whether criminal charges are raised in judicial proceedings or detention remains administrative. No lawyer has been able to visit him. Accordingly, the deprivation of liberty suffered by Mr. Al-Bakry since December 2002, i.e. for the last four-and-a-half years, is in violation of article 9, paragraphs 1 and 4, of ICCPR which are the applicable provisions of international law, and constitutes a very serious form of "arbitrary detention" and an extremely grave violation of his human rights.

14. This arbitrary detention is directly perpetrated by the United States, who is therefore responsible for it. The Working Group notes, however, that, at least since January 2004, Mr. Al-Bakry has been detained on Afghan soil. All the information in the public domain and available to the Working Group indicates that the Government of Afghanistan is well aware of the fact that the United States Government is holding detainees in situations such as Mr. Al-Bakry's at Baghram Air Base, a military base the United States runs with the consent of the Government of Afghanistan since the end of the international armed conflict at the end of the year 2001. The Government of Afghanistan has not informed the Working Group of any measures taken to address this matter. The Working Group recalls that under article 2 of ICCPR, each State party assumes not only the obligation not to actively engage in violations, but also "… to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".[19] This obligation is incompatible with the acceptance of situations of year-long arbitrary detention of individuals on one's territory by a foreign power. The Working Group can therefore only conclude that Afghanistan also bears responsibility for the arbitrary detention of Mr. Al-Bakry.

15. The Working Group notes that the role of the authorities of Thailand in the transfer of Mr. Al-Bakry to United States custody is not clear. In any event, Mr. Al-Bakry having been only briefly in the custody of the Thai authorities - if at all - and this detention having occurred more than four years ago, the Working Group did not consider it necessary to bring the communication to the attention of the Government of Thailand and to seek its observations. The Working Group notes, however, that in its most recent report (A/HRC/4/40) it called attention with great concern to the question of irregular extraditions referred to as "extraordinary renditions", of which Mr. Al-Barkry's case would appear to be an example. In this respect, the

[19] The Working Group recalls that the Human Rights Committee has clarified that "States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction." (General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paragraph 10.)

Working Group reiterates that "[t]he practice of "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 (often the intelligence services), without procedural safeguards is irremediably in conflict with the requirements of international law. When a Government eludes procedural safeguards, in particular the affected person's right to be heard, it cannot in good faith claim that it has taken reasonable steps to protect that person's human rights after removal, including the right not to be arbitrarily detained. As a consequence, it will share responsibility for ensuing arbitrary detention". (A/HRC/4/40, para. 50).

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

> The deprivation of liberty of Mr. Al-Bakry is arbitrary, being in contravention of articles 2 and 9 of the International Covenant on Civil and Political Rights and falls within category I of the applicable categories to the consideration of cases submitted to the Working Group. Both the Government of the United States of America and the Government of Afghanistan bear responsibility for the violation of his right to liberty.

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

Adopted on 11 May 2007.

OPINION No. 12/2007 (ECUADOR)

Communication: addressed to the Government on 23 March 2006.

Concerning: Antonio José Garcés Loor.

Both States are parties to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 32/2006).

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

3. (Same text as paragraph 3 of Opinion No. 322/2006).

4. Antonio José Garcés Loor, an Ecuadorian national born on 30 April 1951, a state schoolteacher with 31 years of teaching experience in Ecuador, residing in Quito, is detained in Quito's prison No. 3, C wing, cell No. 20. He was arrested by police officers on 21 January 2005 at his place of work, Escuela República de Chile in Quito, while he was teaching a class. The police officers did not produce a warrant for his arrest. Mr. Garcés Loor was taken to the premises of the judicial police.

5. Three days after his arrest, José Garcés Loor was remanded in custody on pretrial detention by the magistrate of the tenth court of investigation, Luis Mora, and charged with committing an

indecent act with a minor. After reports were received from the photographic laboratory where José Garcés Loor had taken his film to be developed, he was accused of having taken photographs of a pornographic nature of a girl. Garcés Loor denied having taken the photographs. He contended that two mischievous girls borrowed his camera during a trip to Guayllabamba zoo, and took photographs of him and of another man, Segundo Mogrovejo.

6. After his indictment, Garcés Loor was summoned to attend court hearings on three occasions. On each occasion, the hearings had to be adjourned because the prosecution did not appear, and they were postponed for two months. The accused has been held in pretrial detention for over a year without having been given the opportunity to be heard by a judge.

7. The source states that Garcés Loor's detention is, in any case, arbitrary and illegal, given that on 20 June 2006, the National Congress decriminalized the offence of indecent assault in a law amending the Criminal Code. Garcés Loor cannot therefore be tried under any statute, since the corresponding articles of the Criminal Code have been repealed.

8. The source also states that Garcés Loor was tortured on National Police premises by an employee of the prosecutor's office who works on the third floor of those premises, and who hit him repeatedly in the sacrum with a stick inscribed with the words "human rights". When Garcés Loor was subsequently taken to a cell where there were other detainees, the police officers told them that they were bringing them a rapist. This led the inmates to strip him and hit him brutally, insulting him and burning his left cheek with a cigarette. The source alleges that these acts have not been duly investigated. As a result of this treatment, Garcés Loor suffered severe injuries to the penis; he cannot bend down, and he coughs up blood when he stands up. He is not receiving adequate medical care.

9. The source alleges that Garcés Loor is a professional of good repute and that he is respected and trusted by his students, his colleagues, parents, neighbours and the community in general. He has no police record or previous convictions. The source considers that his arrest violated the principles of rationality, proportionality and predictability. It constituted an unreasonable act on the part of the authorities, in contravention of the State's general duty to protect, and violated his right to personal liberty and security.

10. In conclusion, the source considers that José Garcés Loor's right to personal liberty, judicial guarantees and the due process of law have been violated. He has been subjected to arbitrary detention, which has seriously jeopardized his health, his family life and his reputation.

11. The allegations contained in the foregoing paragraphs were submitted to the Government on 23 March 2006. On 13 November 2006, the Government responded as follows: José Garcés Loor was subject to ordinary criminal proceedings, in accordance with existing Ecuadorian criminal legislation and criminal procedure legislation; all constitutional guarantees were met and due process was strictly observed.

12. The judicial records provided contain serious and incontrovertible evidence that Garcés Loor committed a grave offence against a minor. It is therefore unreasonable to maintain that he was arbitrarily detained, since he was free to exercise his procedural guarantees and he was given a public, impartial and independent hearing.

13. The accusation is based on acts that clearly constitute indecent assault, which is consistent with the current criminal offence of sexual abuse. The act took place at a time when the criminal law and the criminal offence of indecent assault were fully valid. Under the reform of the Criminal Code, that offence was replaced by the criminal offence of sexual abuse. The earlier criminal offence of indecent assault was incorporated into the new Ecuadorian legislation under the new concept of sexual abuse. The act constituting the criminal offence did not disappear, but rather became an element of the new criminal offence.

14. No substantial procedural formalities that could have affected the validity of the criminal proceedings or that could have influenced the decision in the case were omitted. The case began when the staff of a photographic laboratory to which José Garcés Loor had taken his film to be developed noticed that a minor appeared naked in the photographs, and reported the situation to the sexual offences unit of the Public Prosecutor's Office. The Office requested the relevant judicial authorization, after which it apprehended José Garcés Loor in the street. The minor's mother said that José Garcés Loor had lost his reason, since he had just asked her permission to marry her 11-year-old daughter. José Garcés Loor declared on television that he was in love with the minor. During the judicial proceedings, the minor gave details of the sexual abuse to which she had been subjected, and added that she had been unable to report the acts earlier because Garcés Loor had threatened to kill her. The case file contains several pieces of evidence of these acts, including expert reports, testimonies and serious suspicions concerning José Garcés Loor's part as the perpetrator of the offence.

15. José Garcés Loor was given a fair and just trial; he was able to exercise his legitimate right to a defence and was afforded all procedural guarantees. Due process of law was implemented throughout the proceedings, and his case is currently before the second criminal court, pending a decision.

16. Mr. Garcés Loor is not accused of "having taken photographs of a pornographic nature of a girl", which is what the source led the Working Group to believe. He is accused of committing a serious offence against a minor. There is also no mention in the proceedings of the clumsy and paltry excuse given to the Working Group that "two mischievous girls borrowed his camera", which demonstrates the defendant's intention to avoid and distract the attention of the legally competent judges of the international body.

17. The Government concludes that the facts described in themselves constitute major harm with terrible consequences for the girl. According to the Convention on the Rights of the Child, to which Ecuador is a party, "the best interests of the child" should take precedence over all procedural considerations. This is included in the Ecuadorian Children's and Youth Code. Efforts must be made to combat sexual abuse of minors, child pornography and paedophilia. This is precisely the aim in this particular case, in which an 11-year-old child has been the victim of a deplorable act. The aim of judicial proceedings is to ensure the correct application of justice and punish the guilty parties.

18. Neither in this nor any other case does the Working Group seek to replace domestic courts or to decide whether a person is innocent or guilty. Its task is limited to establishing whether or not José Garcés Loor is a victim of arbitrary detention, and whether in his case the judicial guarantees of due process have been upheld in accordance with international principles, norms and standards.

19. According to the source, there were serious violations of the right to a fair and impartial trial, which the Government has denied. The source has not submitted its observations or comments on the Government's reply, despite having been invited to do so. The source asserted that José Garcés Loor was arrested without a court order, which the Government denied. The Government has, moreover, explained in detail the measures taken by the Public Prosecutor's Office to obtain the warrant required to arrest this person. The source also stated that José Garcés Loor was tortured on National Police premises, to which the Government simply replied that, since all constitutional and procedural guarantees have been respected, the criminal proceedings cannot be invalidated. The source has also said that José Garcés Loor was tried for a criminal offence that no longer exists, to which the Government replies by stating that the criminal offence in question has been incorporated into the new offence of sexual abuse. The Government submitted the relevant legislation and confirmed its ongoing validity.

20. The Government has not, however, refuted the allegation that José Garcés Loor was unable to appear before a judge for over a year and that he was held in pretrial detention for an unreasonable length of time. In this particular case, the period of over a year awaiting sentencing does not appear to be entirely disproportionate to the complexity of the offence, the fact that the victim is a minor and the course of the proceedings. During its visit to Ecuador in February 2006, the Working Group noted the excessive length of time that accused persons - who should be presumed innocent until proven guilty - spend in pretrial detention. The Group considered this to be a matter of serious concern.

21. As for the allegation of torture and the lack of medical care, the Working Group also considers that any allegation of torture should be duly investigated, particularly since, during its visit to Ecuador, the Working Group observed several detainees in police cells who showed visible signs of ill-treatment, beatings and torture. Some inmates reported to the Working Group that they had been beaten in police cells and forced to confess, through physical ill-treatment, to crimes and offences they had not committed (A/HRC/4/40/Add.2). In this particular case, since the criminal charges are not based on this person's confession, and the allegation of torture would not, in principle, affect the trial. Nevertheless, and although it is not within its mandate, the Working Group considers that the Government, the Public Prosecutor's Office and the judicial authorities should carefully examine all allegations of torture, and notifies the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment of the Human Rights Council of the allegations that have been received.

22. In conclusion, the Working Group considers that the allegations made by the source have, in general, been refuted by the Government, which has submitted legal documents that detail and support its arguments and denials. The source has not made any comments or observations on the Government's reply, despite having been invited and given the opportunity to do so.

23. In conclusion, the Working Group considers that the material available to it did not contain any such serious lack of observance of the standards relating to a fair trial as to confer on the deprivation of liberty of José Garcés Loor an arbitrary character.

24. Based on the above, the Working Group considers that the detention of this person is not arbitrary.

Adopted on 11 May 2007.

OPINION No. 13/2007 (VIET NAM)

Communication: Addressed to the Government on 4 August 2006.

Concerning: Dr. Pham Hong Son.

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The Working Group welcomes the cooperation of the Government, which provided the Working Group with information concerning the allegations of the source. The replies of the Government were brought to the attention of the source, which made observations in its replies.

4. The case summarized below was reported to the Working Group as follows: Dr. Pham Hong Son, a citizen of Viet Nam, born on 11 March 1968, resident in Hanoi, an advocate for democracy and human rights in Viet Nam, was arrested for transmitting statements over the Internet advocating political openness and democracy.

5. Dr. Son graduated from Hanoi Medical University in 1992 and worked as a business manager for Tradewind Asia, a foreign pharmaceutical company, until his arrest. He published numerous articles online, such as, “The promotion of democracy: a key focus in a new world order”, and “Sovereignty and human rights: the search for reconciliation”. He also translated and posted articles online, such as “What is democracy?”, an essay on democratic values. In July 2003, Human Rights Watch awarded Dr. Son the Hellman/Hammett grant in recognition of his courage to write in the face of political persecution.

6. Dr. Son was arrested on 27 March 2002 at his home in Hanoi by members of the Security and Investigation Bureau of the Ministry of Public Security. He did not receive an arrest order upon his detention. Ms. Vu Thuy Ha, his wife, requested a copy of a warrant days after Dr. Son’s arrest but did not receive one. The Government of Viet Nam charged Dr. Son and convicted him of espionage under article 80 of the Penal Code.

7. Dr. Pham Hong Son was sent to a remote prison camp in Yen Giang Village, Thanh Hoa Province. He was detained for over four years. Dr. Son was in extremely poor health and was suffering a hernia. In 2005 a tumour developed in his nose. It was reported that Dr. Son did not receive treatment for his ailments and that he resorted to using a plastic band to support his hernia.

8. On 10 April 2003, an official indictment against Dr. Son was issued by the Chief Prosecutor of the Supreme People’s Prosecution, accusing him of gathering and supplying information and documents on behalf of foreign nations to use in opposition of the Socialist Republic of Viet Nam.

9. After 27 March 2002, Dr. Son was held at several detention centres in Hanoi, Phu Ly Province and Thanh Hao Province.

10. Dr. Son was accused of espionage crimes stemming from his e-mail contact with exiled reactionary elements, according to article 80 of the Criminal Code. He was also accused of receiving money from Thong Luan, a French group that supports democracy in Viet Nam, and disseminating materials and information "denigrating and distorting the policy of the Party and the State … and falsely accusing the State of violating human rights" to exiled persons.

11. According to the source, Dr. Son's arrest on espionage charges was pretextual for his posting of the article "What is democracy?". Dr. Son also wrote an article, "Hopeful signs for democracy in Viet Nam", which he also transmitted to senior government officials. On 24 March 2002, Dr. Son's house was searched by members of the special police unit P4-A25, and his computer and personal papers were seized. Following the incident, Dr. Son published an open letter on the Internet protesting the search of his home and confiscation of his property.

12. From the date of his arrest on 27 March 2002 to his first trial on 18 June 2003, Dr. Son was not allowed any contact with his family or legal counsel.

13. Dr. Son was not allowed to contact any lawyers, and he had to rely on his wife to select a lawyer on his behalf. Dr. Son's wife petitioned the investigative and prison authorities to allow Dr. Son to meet with his lawyers in jail before the trial but her request was refused. Nearly 15 months after his arrest and only 1 week before the trial Dr. Son met with his lawyers, Tran Lam and Dam Van Hieu.

14. Dr. Son was tried in a closed trial on 18 June 2003 at the People's Court in Hanoi. Neither foreign diplomats nor journalists were allowed to enter the court. At the trial, Dr. Son refused the defence prepared by the lawyers Tran Lam and Dam Van Hieu and he defended himself without the assistance of legal counsel. His wife was not allowed to remain in the courtroom while Dr. Son was present. The trial lasted half a day, and Dr. Son was convicted of espionage under article 80 of the Criminal Code. The Court sentenced him to 13 years of imprisonment, to be followed by 3 years of administrative probation upon Dr. Son's release from prison.

15. Dr. Son appealed the trial court decision. He was permitted to meet with his lawyers to prepare for his appeal but he was still not allowed any contact with his wife and family. Closed proceedings were held on 26 August 2003 at the People's Supreme Court in Hanoi. In protest over the lack of transparency of the proceedings and violations of his due process, Dr. Son and his lawyer Dam Van Hieu walked out and boycotted the proceedings, refusing to participate in the appeal. At the conclusion of the appeal, the Court reduced Dr. Son's sentence to five years of imprisonment, to be followed by three years of administrative probation upon his release from prison.

16. In its first response to the above-mentioned allegations, the Government reported that Pham Hong Son was released in August 2006 as one of 5,352 inmates under a special amnesty order by the President of Viet Nam on the occasion of the sixty-first anniversary of the National Day of the Socialist Republic. Since his release, Dr. Son has enjoyed normal citizenship rights, although he has to carry out the Court's decision of three years' administrative probation in his locality. Dr. Son was charged with having committed acts in violation of the law. On 18 June 2003, the First Instance Court sentenced him to 13 years' imprisonment for the crime of

espionage, in accordance with article 80, point 1, of the Penal Code. Due to his proper behaviour of cooperation and repentance, on 26 August 2003, the Ha Noi Appeal Court reduced his sentence to five years' imprisonment on charge of espionage (article 80, point 2, of the Penal Code).

17. The Government considered that the allegations summarized in the above paragraphs were totally untrue. It pointed out that in Viet Nam there are no prisoners of conscience or suppressed dissidents. Freedom of opinion and speech, freedom of the press, the right to be informed, the right to assemble, to form associations and hold demonstrations in accordance with the law are expressly recognized by article 69 of the 1992 Constitution.

18. The Working Group forwarded the Government's reply to the source, which confirmed that Dr. Son was released from prison on 30 August 2006. However, it reported that he was facing numerous restrictions on his fundamental freedoms as part of his release and was not enjoying normal citizenship rights to the extent that he is now facing, as part of probation, a de facto arbitrary detention. The restrictions upon Dr. Son violate his fundamental freedoms of movement, association and opinion and expression. Although he is allowed very minimal movement outside of his house, this does not materially change the nature of his house arrest.

19. According to the source, the police have restricted the distance that Dr. Son may travel to a limited area within the Hai Ba Trung district, where he lives. On 2 September 2006, a request for permission to travel to Hoan Kiem Lake, which is approximately 2 kilometres from his house, was rejected by the authorities. Another request to go to Nam Dinh City, approximately 100 kilometres south of Hanoi, for the purpose of visiting his mother and other relatives and to pay respect at his father's tomb was also rejected, despite the recent death of his father. His request to go to a hospital to have surgery for his inguinal hernia and for medical examinations of his respiratory tract was also refused and the authorities replied that he could be visited by a medical doctor at home.

20. The source further reports that Dr. Son is under constant police surveillance. Both uniformed police and plainclothes agents have been maintaining a constant presence at his house and around the vicinity of his home. There are always two agents that follow him whenever he leaves his house, affecting his freedom of movement. The authorities have harassed pro-democracy activists who have attempted to visit him and he has been prevented from meeting with dissidents, being physically harassed by police agents when he attempted to meet Hoang Mink Chin. Two mobile phones used by his relatives were blocked by order of the police and he was prevented from trying to have access to the Internet.

21. The Working Group considered that the comments from the source to the response by the Government contained new allegations and decided, at its forty-seventh session, to transmit them to the Government. In its second reply, the Government pointed out that, although Dr. Son had been granted a special amnesty concerning his sentence to five years' imprisonment, he had also been condemned to three years' administrative probation in his locality as an additional punishment in accordance with provisions of articles 80 and 38 of the Penal Code. The sentence to this additional punishment was totally right in accordance with the provisions of Vietnamese laws and fully suitable with the provisions of international law. The level of the additional punishment was decided by the People's Court based on the violations to the law committed by Dr. Son. According to the law, during the time of observing this additional punishment, the

convict should be allowed to freely go out of his or her residential area but is not allowed to practise or work in a number of professions. He cannot enjoy all citizenship rights of freedom as other normal Vietnamese citizens do. If he wants to go out of his residential area he has to get the approval of the professional agencies in his living area. This is very ordinary in many other States of the world and is not a form of arbitrary detention. On the other hand, Dr. Son's health condition is totally normal. If he eventually suffers from ailments, he has the full right to get his health examined and treated like other ordinary citizens.

22. In its comments on the Government's second reply, the source considers that, to the extent that Dr. Son now faces conditions as part of probation, he remains a victim of arbitrary detention. The conditions imposed on him amount to a form of de facto house arrest, a form of arbitrary detention as recognized by the Working Group. House arrest typically involves severe restrictions on freedom of movement, freedom of association and freedom of expression.

23. The Working Group has to decide first if the current situation of Dr. Son is a deprivation of liberty equivalent to detention.

24. The Working Group notes that, although Dr. Son is suffering from severe restrictions imposed on his freedom of movement, freedom of opinion and expression and freedom of association, he is not placed in closed and locked premises which he cannot leave without being authorized to do so. The Working Group has always maintained, in accordance with its Deliberation 1/93 on House Arrest, that "house arrest may be compared to deprivation of liberty provided that it is carried out in closed premises which the person is not allowed to leave". The Working Group concludes that the above-mentioned restrictions are not tantamount to deprivation of liberty.

25. The Working Group notes, however, that these restrictions are the consequence of the three years' administrative probation imposed by the Court in his sentence. For that reason, it is appropriate to make sure that his sentence was imposed in accordance with international standards. Consequently, and according to its Methods of Work (chap. C, para. 17a), the Working Group reserves the right to render an opinion in this case.

26. According to the source, Dr. Son did not enjoy a fair trial and his pretrial detention and conviction were due solely to the fact that he had used his right to freedom of expression.

27. With regard to the violation of the right to a fair trial, the Working Group notes that, in its reply, the Government did not reject or even discuss the facts and allegations contained in the communication, particularly those concerning the reasons for the arrest, detention and conviction of Dr. Son and those concerning the details of the trial proceedings. The Government did not comment on the allegations that Dr. Son was denied the right to a prompt hearing, the right to access to a lawyer of his choice, the right to be promptly informed of the charges against him, and the right to a fair trial in accordance with international norms as set forth in articles 9 and 14 of the International Covenant on Civil and Political Rights to which Viet Nam is a State party.

28. With regard to enjoyment of the right to freedom of opinion and expression, the Government has declared that Dr. Son was charged with having committed acts in violation of the law and sentenced to 13 years' imprisonment for the crime of espionage, in accordance with article 80 of the Penal Code, without giving any specific details on the facts that underlie the

charges against him and without invalidating the argument submitted by the source, that the detention and sentencing of Dr. Son followed the publication of articles critical of the Government.

29. On the question of the violation of national legislation mentioned by the Government, the Working Group recalls that, in conformity with its mandate, it must ensure that national law is consistent with the relevant international provisions set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments to which the State concerned has acceded. Consequently, even if the detention is in conformity with national legislation, the Working Group must ensure that it is also consistent with the relevant provisions of international law.

30. In the case in question, and given that the Government does not appear to have charged Dr. Son with acts other than those indicated in the communication, i.e. to have written statements critical to the Government, and to have disseminated these statements via the Internet, the national law which gave rise to his indictment cannot be regarded as consistent with the relevant provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

31. For all the above-mentioned reasons, the Working Group considers that Dr. Son's detention between 27 March 2002 and 30 August 2006 was motivated by the peaceful dissemination through the Internet of ideas and opinions advocating political openness and democracy, a right recognized by article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. His detention also affected his right to take part in the conduct of public affairs, a right enshrined in article 25 of the International Covenant on Civil and Political Rights.

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

> The deprivation of liberty of Dr. Son between 27 March 2002 and 30 August 2006 was arbitrary, being in contravention of articles 9, 14, 19 and 25 of the International Covenant on Civil and Political Rights to which Viet Nam is a State party, and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

33. Having found that the detention of Dr. Son is arbitrary, the Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation, in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

Adopted on 11 May 2007.
