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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF:
TORTURE AND DETENTION

Report of the Working Group on Arbitrary Detention

Addendum

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 twenty-third, twenty-fourth and twenty-fifth sessions, held in November 1998, May 1999 and September 1999 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 Commission on Human Rights at its fifty-sixth session (E/CN.4/2000/4).

GE.99-16421 (E)

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OPINION No. 22/1998 (PERU)

Communication addressed to the Government on 7 February 1995

Concerning Antero Gargurevich Oliva

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

1. The Working Group on Arbitrary Detention, in conformity with its methods of work and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government the above-mentioned communication, received by it and found to be admissible, in respect of a complaint of arbitrary detention said to have taken place in the country concerned.

2. The Working Group notes with concern that the Government of Peru has not provided any information on the case in question. The Working Group has no option but to announce its decision in respect of the allegation of arbitrary detention submitted to it.

3. In reaching its decision, the Working Group considers whether the case in question falls within one or more of the following categories:

(i) When deprivation of liberty is arbitrary because it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an amnesty act applicable to the person in question) (category I);

(ii) When deprivation of liberty is the result of judicial proceedings or a sentence consequent upon 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 or in 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 infringement of international standards relating 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. In the light of the complaint made, the Working Group would have welcomed the cooperation of the Government. In the absence of any such cooperation, the Working Group believes it is in a position to take a decision on the facts and circumstances of the case, particularly since the facts and allegations contained in the communication have not been refuted by the Government.

5. In its opinion No. 24/1995, the Working Group decided to leave the case pending until after the planned visit to Peru, which would provide it with the necessary background information to enable it to render an opinion in accordance with its methods of work. The visit to Peru was finally carried out and did indeed enable it to obtain the background information it needed to render an opinion, as is clear from the relevant report (E/CN.4/1999/63/Add.2). During its visit, the delegation of the Working Group was able to have a meeting with Mr. Gargurevich in Castro Castro prison.

6. The Working Group considers that:

(a) Antero Gargurevich Oliva, a sociologist, was arrested in Callao on 6 March 1994 by members of the National Anti-Terrorism Department (DINCOTE) on suspicion of belonging to groups that supported Sendero Luminoso. His name was found in papers in the possession of a person being tried for terrorism. Mr. Gargurevich was himself found to be in possession of papers relating to that subversive group which, according to the complaint, he had been given by his pupils. In his trial, Mr. Gargurevich was sentenced to 12 years' imprisonment, a sentence he began serving on 29 September 1993;

(b) The Government has not cooperated with the Working Group by providing it with the information requested;

(c) In its report on the visit, the Working Group presents an extensive analysis of the functioning of the "faceless" civil and military courts which, up to October 1997, handed down their judgements following secret hearings and with minimum defence guarantees. Such trials, in the Working Group's opinion, constitute such a serious violation of the rules of due process as to confer on the deprivation of liberty an arbitrary character, in conformity with category III of its methods of work. Mr. Gargurevich was tried in conformity with the rules in force up to October 1997.

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

The deprivation of liberty of Antero Gargurevich Oliva is arbitrary since it is contrary to articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

8. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998

OPINION No. 23/1998 (PERU)

Communication addressed to the Government on 4 May 1994

Concerning Pablo Abraham Huamán Morales*

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

1. The Working Group on Arbitrary Detention, in conformity with its methods of work and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government the above-mentioned communication, received by it and found to be admissible, in respect of a complaint of arbitrary detention said to have taken place in the country concerned.

2. The Working Group notes with appreciation the information forwarded by the Government concerned in respect of the case in question within 90 days of the transmittal of the letter by the Working Group.

3. In reaching its decision, the Working Group considers whether the case in question falls within one or more of the following categories:

(i) When deprivation of liberty is arbitrary because it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an amnesty act applicable to the person in question) (category I);

(ii) When deprivation of liberty is the result of judicial proceedings or a sentence consequent upon 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 or in 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 infringement of international standards relating 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. In the light of the complaint made, the Working Group welcomes the cooperation of the Government concerned. The Working Group is in a position to take a decision on the facts and circumstances of this case, taking into account the complaint made and the Government's reply.

5. In its opinion No. 42/1995, the Working Group decided to leave the case pending until it had received more information from both the source and the Government. Subsequently, in

* On 22 January 1999, the Peruvian authorities informed the Working Group that Mr. Huamán Morales had been pardoned by Presidential Decree of 6 June 1998 and released. This information had been made available to the Office of the High Commissioner for Human Rights on 10 June 1998; regrettably, the Working Group was unaware of this information when it adopted the present Opinion.

January and February 1998, a delegation of the Working Group visited Peru and obtained the background information it needed to render an opinion, as is clear from the relevant report. The delegation had a meeting with Mr. Huamán in Castro Castro prison in Lima.

6. The Working Group considers that:

(a) According to the complaint, Pablo Abraham Huamán Morales was arrested with two of his brothers and a sister on 15 October 1992; they were all committed for trial on charges of terrorism by the forty-third Provincial Procurator's Office in Lima. In due course, the Working Group was informed by the Government that his brothers, Luiso Rolo and Julián Oscar, had been released. During the visit, at the meeting with Pablo Abraham, the release of his sister, Mayela Alicia, was confirmed, leaving him the only one deprived of his liberty;

(b) During his stay at DINCOTE, which lasted 15 days, he was represented by an officially appointed lawyer whom he had never seen before the trial, who did not speak at the trial and whom he never saw again. He was tried by a faceless civil court and sentenced to 20 years' imprisonment for collaborating with terrorists. The Supreme Court, which was also faceless, confirmed the judgement;

(c) A decision on his case by the ad hoc committee on reprieves and pardons (described in the report on the Working Group's mission to Peru) is now pending;

(d) In its report on the visit, the Working Group presents an extensive analysis of the functioning of the faceless civil and military courts which, up to October 1997, handed down their judgements following secret hearings and with minimum defence guarantees. Such trials, in the Working Group's opinion, constitute such a serious violation of the rules of due process as to confer on the deprivation of liberty an arbitrary character, in conformity with category III of its methods of work. The trial of Mr. Huamán predates the reform that entered into force in October 1997.

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

> The deprivation of liberty of Pablo Abraham Huamán Morales is arbitrary since it is contrary to articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

8. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998

OPINION No. 24/1998 (PERU)

Communication addressed to the Government on 20 September 1993

Concerning Carlos Florentino Molero Coca

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

1. The Working Group on Arbitrary Detention, in conformity with its methods of work and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government the above-mentioned communication, received by it and found to be admissible, in respect of a complaint of arbitrary detention said to have taken place in the country concerned.

2. The Working Group notes with appreciation the information forwarded by the Government in respect of the case in question within 90 days of the transmittal of the letter by the Working Group.

3. In reaching its decision, the Working Group considers whether the case in question falls within one or more of the following categories:

(i) When deprivation of liberty is arbitrary because it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an amnesty act applicable to the person in question) (category I);

(ii) When deprivation of liberty is the result of judicial proceedings or a sentence consequent upon 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 or in 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 infringement of international standards relating 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. In the light of the complaint made, the Working Group welcomes the cooperation of the Government concerned. The Working Group is in a position to take a decision on the facts and circumstances of this case, taking into account the complaint made and the Government's reply.

5. In its Opinion No. 24/1994, the Working Group decided to leave the case pending until it had received more information from both the source and the Government. Subsequently, in January and February 1998, a delegation of the Working Group visited Peru and obtained the background information it needed to render an opinion, as is clear from the relevant report.

6. The Working Group considers that:

(a) Carlos Florentino Molero Coca, a university student interviewed by the delegation of the Working Group in Castro Castro prison, was arrested on 30 April 1992 and charged with

membership of the Sendero Luminoso movement. He was tried by a faceless civil court and sentenced to 12 years' imprisonment, which he is currently serving. According to the submission, he is innocent, since there was insufficient supporting evidence, he was sentenced for a crime he had not been charged with and no decision has been reached in an appeal for annulment;

(b) The prisoner told the delegation that: "DINCOTE pressed me to accuse my father of crimes, but I could not do that since I know that my father has not committed any crimes." He also said, "On top of that, I was tortured during the first few days of my arrest at DINCOTE" and, finally, "The charge against me was based on presumption, because I am at San Marcos University. The strongest evidence that I do not belong to that group is that I am kept away from the two political groups in this prison";

(c) From the information provided by the Government and that collected during the visit, it is apparent that the judgement at first instance, sentencing him to 12 years in prison, was confirmed in October 1993 by the Supreme Court, and that he had a lawyer, in the person of his own father;

(d) The Working Group, as it has maintained on numerous occasions, cannot comment on the innocence or otherwise of a person deprived of liberty;

(e) In its report on the visit, the Working Group presents an extensive analysis of the functioning of the faceless civil and military courts, whose decisions cannot be challenged and which, up to October 1997, handed down their judgements following secret hearings and with minimum defence guarantees. Such trials, in the Working Group's opinion, constitute such a serious violation of the rules of due process as to confer on the deprivation of liberty an arbitrary character, in conformity with category III of its methods of work.

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

> The deprivation of liberty of Carlos Florentino Molero Coca is arbitrary since it is contrary to articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

8. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998

OPINION No. 25/1998 (PERU)

Communication addressed to the Government on 20 February 1996

Concerning Margarita M. Chiquiure Silva

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

1. The Working Group on Arbitrary Detention, in conformity with its methods of work and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government the above-mentioned communication, received by it and found to be admissible, in respect of a complaint of arbitrary detention said to have taken place in the country concerned.

2. The Working Group notes with appreciation the information forwarded by the Government in respect of the case in question within 90 days of the transmittal of the letter by the Working Group.

3. In reaching its decision, the Working Group considers whether the case in question falls within one or more of the following categories:

(i) When deprivation of liberty is arbitrary because it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an amnesty act applicable to the person in question) (category I);

(ii) When deprivation of liberty is the result of judicial proceedings or a sentence consequent upon 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 or in 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 infringement of international standards relating 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. In the light of the complaint made, the Working Group welcomes the cooperation of the Government. The Working Group is in a position to take a decision on the facts and circumstances of this case, taking into account the complaint made and the Government's reply.

5. In its Opinion No. 34/1996, the Working Group decided to leave the case pending until after the planned visit to Peru, which would provide it with the necessary background information to enable it to render an opinion in accordance with its methods of work. The visit to Peru did indeed enable it to obtain the background information it needed to render an opinion, as is clear from the relevant report. The delegation of the Working Group had a meeting with Margarita Chiquiure in Chorrillos prison.

6. The Working Group considers that:

(a) Margarita M. Chiquiure Silva, a lawyer, was arrested on 28 February 1994 while leaving a judicial meeting she had been attending in the exercise of her professional duties, which consisted of no less than the defence of her own 14-year-old daughter. Accusations had been made against her daughter by a prisoner taking advantage of the Repentance Act, who linked her to Sendero Luminoso. In fact, according to the account given by Ms. Chiquiure to the delegation, the alleged "informer" never linked either her or her daughter to Sendero Luminoso, despite being tortured. The alleged informer had himself been in prison for more than three years as a result of allegations by another "informer";

(b) The Government stated that an appeal was pending in the Supreme Court against the lawyer's sentence of 20 years' imprisonment for the offence of terrorism. The Working Group observed that the appeal had been rejected by the Supreme Court in July 1997 and the sentence upheld. Both the High Court and the Supreme Court had operated as faceless courts;

(c) In its report on the visit, the Working Group presents an extensive analysis of the functioning of the faceless civil and military courts which, up to October 1997, handed down their judgements following secret hearings and with minimum defence guarantees. Such trials, in the Working Group's opinion, constitute such a serious violation of the rules of due process of such gravity as to confer on the deprivation of liberty an arbitrary character, in conformity with category III of its methods of work. Perhaps one of the cases that best illustrates these irregularities is that of the lawyer Margarita Chiquiure, as recorded in paragraph 67 of the report on the mission:

> "67. The Working Group received complaints that the system was a source of injustices: one person sentenced to 20 years' imprisonment said that the voice-distorters 'only made noise. I never heard the questions; I asked them to repeat them for me, but I don't know whether they did so' (Margarita Chiquiure, Santa Monica prison, quoted by permission)."

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

> The deprivation of liberty of Margarita Chiquiure Silva is arbitrary since it is contrary to articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

8. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998

DECISION No. 26/1998 (PERU)

Communication addressed to the Government on 29 February 1996

Concerning Lori Berenson

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

1. The Working Group on Arbitrary Detention, in conformity with its methods of work and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government concerned the above-mentioned communication, received by it and found to be admissible, in respect of a complaint of arbitrary detention said to have taken place in the country concerned.

2. The Working Group notes with appreciation the information forwarded by the Government in respect of the case in question within 90 days of the transmittal of the letter by the Working Group.

3. In reaching its decision, the Working Group considers whether the case in question falls within one or more of the following categories:

(i) When deprivation of liberty is arbitrary because it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an amnesty act applicable to the person in question) (category I);

(ii) When deprivation of liberty is the result of judicial proceedings or a sentence consequent upon 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 or in 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 infringement of international standards relating 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. In the light of the complaint made, the Working Group welcomes the cooperation of the Government concerned. The Working Group is in a position to take a decision on the facts and circumstances of this case, taking into account the complaint made and the Government's reply.

5. In its Opinion No. 45/1996, the Working Group decided to leave the case pending until after the planned visit to Peru, which would provide it with the necessary background information to enable it to reach an opinion in accordance with its methods of work. The visit to Peru did indeed enable it to obtain the background information it needed to render an opinion, as is clear from the relevant report.

6. The Working Group considers that:

(a) Lori Berenson, an American citizen interviewed by the delegation of the Working Group during the visit, was sentenced on 11 January 1996 by a secret military court to life imprisonment for the crime of treason. She stated that she was kept for more than five weeks in solitary confinement, without access to a lawyer, and that during this time she was subjected to intensive psychological manipulation;

(b) The Government stated that Lori Berenson was arrested on 30 November 1995 together with other persons, during an armed clash between members of the Tupac Amaru Revolutionary Movement and the police, at a time when the former were preparing to break into the National Congress in order to take some of its members hostage and thereby obtain the freedom of other militant members of the group. It confirmed that Ms. Berenson was tried by a military court, which fully respected the rules of due process, and was sentenced for the crime of treason, covered by and punishable under Decree-Law No. 25,659, before the reforms that entered into force in October 1997;

(c) In its report on the visit, the Working Group presents an extensive analysis of the functioning of faceless courts, and particularly military courts, whose decisions cannot be challenged and which, up to October 1997, handed down their judgements following secret hearings and with minimum defence guarantees. Such trials, in the Working Group's opinion, constitute such a serious violation of the rules of due process as to confer on the deprivation of liberty an arbitrary character, in conformity with category III of its methods of work.

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

> The deprivation of liberty of Lori Berenson is arbitrary since it is contrary to articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

8. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998

OPINION No. 27/1998 (VIET NAM)

Communication addressed to the Government on 9 June 1998

Concerning Professor Doan Viet Hoat

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

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

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

4. According to the source, Professor Doan Viet Hoat, the editor of Dien Dan Tu Do ("Liberty Forum"), was sentenced by a court in Ho Chi Minh City in late March 1993 to 20 years' imprisonment with hard labour for his role in the publication of the above-mentioned newspaper. On appeal, his term of imprisonment was reduced to 15 years, which he is currently serving in Thanh Cam prison. The source states that Doan Viet Hoat's brothers were refused admission to the prison when they tried to visit him on 5 February 1998; he was also forbidden to receive the food and medicines they had brought with them. One of the prison officers reportedly justified the refusal on the grounds that Doan Viet Hoat had made little progress in his re-education. According to the source, the imprisonment of Doan Viet Hoat is contrary to article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which Viet Nam is a party, since he has been imprisoned simply for having exercised his right to freedom of expression.

5. In the light of the allegations made, the Working Group welcomes the Government's cooperation. The Working Group transmitted the Government's reply to the source, which did not consider it necessary to make further observations. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case in the light of the allegations made and the reply transmitted by the Government.

6. According to another source, Doan Viet Hoat is being held in Thanh Cam prison for "serious offenders" in Cam Thuy (Thanh Hoa Province in the north of Viet Nam), after having been frequently moved from one prison to another since his conviction. The same source states that, after his arrest on 17 November 1990, no charge was brought against him for 28 months. He has been accused, with seven of his Dien Dan Tu Do colleagues, of having published "anti-communist" articles and having founded a "reactionary organization" (Vietnamese Penal Code, art. 73). It should be noted that the executive body of the World Association of Newspapers, on 1 June 1998, awarded Doan Viet Hoat the "Golden Pen", the most prestigious world press freedom prize, in recognition of his courage in the struggle for freedom of expression and freedom of the press in Viet Nam.

7. In its reply, the Vietnamese Government, which acknowledges that Doan Viet Hoat is indeed being held in Thanh Cam prison in Thanh Hoa Province, submits that:

(a) Doan Viet Hoat was properly tried and sentenced, pursuant to the provisions of section II, chapter I, article 73, of the Penal Code and not for having exercised his right to freedom of opinion;

(b) He has never been subjected to any form of hard labour, his state of health is normal, he is receiving adequate medical care and has access to his relatives;

(c) In the case of the visit by his brother Doan Hien, he was not authorized to see Doan Viet Hoat because, not being a Vietnamese citizen, he should have availed himself of the diplomatic channel in order to secure the necessary authorization.

8. The source stated that it had no comment to make on the Government's reply.

9. The Working Group finds that Doan Viet Hoat's detention was consistent with article 73 of the Vietnamese Penal Code, which is contained in the chapter relating to national security (arts. 72-100). In its report following its visit to Viet Nam (E/CN.4/1995/31/Add.4), the Working Group noted that the provisions of article 73 are so vague that they could give rise to the conviction of not only persons using violence for political ends, but also persons simply exercising their right to freedom of opinion and expression. In its recommendations, the Working Group requested the Vietnamese Government to make amendments so as to define more clearly offences relating to national security and thereby indicate what is prohibited without any ambiguity.

10. It should be noted that in its Opinions Nos. 15/1993 and 7/1994, the Working Group already declared the detention of Doan Viet Hoat to be arbitrary because it was, and remains,

convinced that his imprisonment is consequent solely on action which he took in furtherance of human rights, political pluralism and democracy in Viet Nam. In so doing, however, he was merely exercising his right to freedom of opinion.

11. In the light of the foregoing, the Working Group again declares that Doan Viet Hoat's deprivation of liberty is arbitrary since it is contrary to the provisions of articles 9, 19 and 20 of the Universal Declaration of Human Rights and articles 9 and 19 of the International Covenant on Civil and Political Rights, and falls within category II of the categories applicable to the consideration of cases before the Working Group.

12. Noting that the Vietnamese Government has not seen fit to act on its two previous decisions relating to the imprisonment of Doan Viet Hoat, the Working Group decides to report accordingly to the Commission on Human Rights, pursuant to paragraph 5 (d) of Commission resolution 1998/74.

Adopted on 3 December 1998

OPINION No. 28/1998 (MEXICO)

Communication addressed to the Government on 22 April 1994; new information transmitted to the Government on 28 March 1998

Concerning José Francisco Gallardo Rodríguez

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. In its Opinion No. 20/1994, the Working Group considered that it was not in a position to render a judgement on the deprivation of liberty in question since neither the complaint nor the Government provided sufficient facts and so it decided that "The case remains pending for further information" (28 September 1994).

3. On 13 March 1995, the Government forwarded information, while the source added new information which was transmitted to the Government on 26 March 1998. The Government did not request an extension of the time limit for transmitting its reply, but finally sent it on 17 September 1998.

4. 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, in 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 international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).

5. In the light of the complaints made, the Working Group has taken the Government's reply into consideration. Thanks to the new information transmitted to it, the Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case.

6. According to the complaint and the new facts provided by the source and the Government, army General José Francisco Gallardo Rodríguez was arrested on 9 November 1993 and charged with offences allegedly committed in 1989. Despite having been acquitted, he was kept in detention on new charges, but was subsequently acquitted of all of these. He was charged with the offences of defamation and offences against the army's honour, which he had allegedly committed in a letter addressed to the Secretary for National Defence and other authorities, in which he called for the appointment of an ombudsman within that branch of the armed forces. It is maintained that the joint or successive charges that have been made against him have given rise to some 15 preliminary investigations (28/89; 30/89; 42/91; 54/93; 157/93; 4/93-E; SC/168/93/I; SC/94/93/II, in which the charges were defamation and slander through statements on human rights in the army; SC/12/94/I; SC/59/94/I and SC/59/94/VI, for abusive language allegedly contained in a document found in the course of an examination of his wife's belongings in their home).

7. The criminal proceedings against him began in 1983, and he was acquitted in the following cases: (1) case No. 1860/83 before the Third Military Court for abuse of authority, proceedings being dismissed on the abandonment of the plaintiff; (2) case No. 1140/90 before the judge of the Seventh Military Zone for fraud, abuse of authority, misappropriation of funds, of which he was acquitted on 30 November 1992; (3) case No. 1120/91, for abuse of authority, acquitted on 11 November 1992; (4) case No. 1196/92, before the Fourth Military Court, for desertion through abandonment of post, acquitted; (5) case No. 3079/93, Second Military Court, for defamation of the army and non-performance of military duties, acquitted; (6) case No. 3188/93, Second Military Court, for proposing the appointment of an ombudsman for the army, which was alleged to constitute, contempt for authority, defamation and slander, acquitted; (7) case No. 2389/94, First Military Court, for unlawful enrichment, acquitted on 7 March 1995.

8. The following cases are pending: (1) case No. 2949/93, Second Military Court, for misappropriation and destruction of army property. This case results from administrative investigation No. 28/89, in which he was found not to have incurred responsibility, the investigation being closed and reopened in 1993. Of the seven charges against him, five were dropped as a result of amparo proceedings; (2) case No. 443/97/VI, for unlawful enrichment. In these two cases he has been sentenced to imprisonment for 14 years and 14 years and 8 months respectively, in enforceable judgements. Nevertheless, and in response to recommendations by the Inter-American Commission on Human Rights, applications for judicial review have been reopened and are currently pending.

9. During the time he has been in prison, General Gallardo has lodged standing complaints with the (governmental) National Human Rights Commission, which, considering that they involve judicial matters, has taken no decisions.

10. General Gallardo has claimed that, since the beginning of his persecution, he has been harassed. The most recent assault was perpetrated on 20 April 1998, in the prison in which he is being held, by a group of about 15 men, led by an infantry lieutenant colonel, who attacked him, beat him up and stole various personal possessions from his room. On other occasions his relatives have been threatened.

11. In its report 43/96, the Inter-American Commission on Human Rights stated that the human rights to personal freedom and due process of law had been violated.

12. The Mexican Government has reported the above-mentioned convictions, stating that internal remedies have not been exhausted, the applications for amparo initiated on the recommendation of the Inter-American Commission still awaiting a decision.

13. General Gallardo has now been deprived of liberty for five years. The reason simply seems to be the lawful exercise of his freedom of expression and opinion, as manifested in the published article in which he called for the appointment of an ombudsman for the army. This right is established in article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

14. In any event, there also appear to have been violations of articles 9, 10 and 11 of the Universal Declaration and articles 9 and 14 of the International Covenant, which establish the right of every defendant to be promptly informed of the charges against him in order to be able to prepare his defence, and to be tried within a reasonable time, pre-trial release being subject to guarantees to appear for trial. In the current case, the constant changes in the charges and keeping the defendant in pre-trial detention for five years constitute violations of the above-mentioned principles relating to due process of law.

15. The Working Group cannot omit to take account of certain special circumstances in the present case, such as the fact that the defendant has been recognized by numerous international organizations as a prisoner of conscience, that he is a member of PEN International, and that in April 1997 he was awarded the Sergio Mendes Arceu National Human Rights Prize.

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

> The deprivation of liberty of José Francisco Gallardo Rodríguez is arbitrary, since it is contrary to articles 8, 9 and 10 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

17. Having rendered this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998

OPINION No. 29/1998 (PHILIPPINES)

Communication addressed to the Government on 7 May 1998

Concerning Leonilo de la Cruz

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information on the case of Leonilo de la Cruz in good time. Leonilo de la Cruz was arrested in Marilao, Bulacan, by elements of the Presidential Task Force on intelligence and counter-intelligence. Reportedly, he was shown a warrant of arrest only four days after his arrest; furthermore, this warrant had already been quashed in earlier proceedings.
Leonilo de la Cruz was detained at the ISAFP (military intelligence) detention centre, Camp Aguinaldo, after being transferred from the intelligence security group (ISG), Philippine Army, Camp Bonifacio.

3. The Working Group notes that the Government has informed the Group that the above-mentioned individual has been released on bail, pending investigations. His release on bail has been confirmed by local press articles which have been brought to the attention of the Group.

4. Accordingly, and after having examined all the material before it and without making any determination as to whether Mr. de la Cruz's detention was arbitrary or not, the Working Group decides, pursuant to paragraph 14 (a) of its methods of work, to file the case of Leonilo de la Cruz.

Adopted on 3 December 1998

OPINION No. 30/1998 (CHINA)

Communication addressed to the Government on 10 October 1995

Concerning Zhou Guoqiang

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, but the latter did not provide 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. The communication, a summary of which was forwarded to the Government, concerns Zhou Guoqiang, age 38, a poet, law professor, founder of the Beijing Autonomous Workers' Federation, and promoter of the November 1993 Peace Charter that called for democratic reforms. On 3 March 1994, the police arrested him in Beijing while he was selling t-shirts with anti-Government slogans. Zhou Guoqiang was charged with "writing and distributing 'anti-government' articles to organizations abroad" and "collaborating with hostile organizations and elements both inside and outside the country to carry out anti-government activities". He was

sentenced, on 15 September 1994, to three years of re-education through labour and was held at Shuanghe Labour Camp in Heilongjiang Province. Zhou Guoqiang had been detained earlier in April 1983 and July 1989 and was placed under house arrest in May 1993 for his human rights activities.

6. In its reply, the Government confirms that the Labour Re-education Commission of the Municipality of Beijing ordered Zhou Guoqiang, in March 1994, to perform three years of re-education through labour for his activities relating to instigating disturbance and seriously upsetting the social order.

7. The source, in its observations on the Government's reply, notes with concern that Zhou Guoqiang was sentenced, in July 1995, to an additional year's imprisonment for an alleged attempt to escape from the labour camp where he was being held. Furthermore, the source informed the Working Group that Zhou Guoqiang was released in January 1998.

8. Under paragraph 17 (a) of the Working Group's revised methods of work, "if the person has been released for whatever reason, following reference of the case to the Working Group, the case is filed; the Group, however, reserves the right to render an opinion, on a case-by-base basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned". In the present case, the Working Group considers that, given the questions of principle raised in the case of Zhou Guoqiang, notably in the context of the problem of "re-education through labour", the principle of freedom of expression, and having regard to the facts of the case, it is appropriate to formulate an opinion.

9. After having completed its visit to China, the Working Group, at its twentieth session, decided to resume the consideration of cases concerning China, notably in the light of the following paragraphs of its report on the visit to China (E/CN.4/1998/44/Add.2) which deal with the issue of re-education through labour:

> "94. During the course of the visit, the members of the Working Group delegation inquired of the authorities whether the measure of re-education through labour was applicable to persons who disturbed the public order by peacefully exercising their fundamental freedoms guaranteed by the Universal Declaration of Human Rights … and who were not prosecuted under the criminal law. The delegation was informed that the measure of re-education through labour was only applied to those who had committed minor offences under the common law and who were not required to be formally prosecuted. The Working Group strongly believes that if the measure is applied to persons who disturb the public order as indicated, the commitment of such individuals to re-education through labour would clearly be arbitrary."
>
> "99. [T]he Working Group considers that re-education through labour should be decided under the a priori supervision of a judge while maintaining its administrative nature …"

10. The Group considers that its observations contained, in paragraph 94 of its report cited above, apply in the case of Zhou Guoqiang, who merely exercised his rights recognized under

the Universal Declaration of Human Rights: on the one hand, in article 18 (freedom of thought and conscience), article 19 (freedom of expression and opinion), article 20 (freedom of peaceful assembly and of association) and article 23 (right to establish a trade union and to affiliate oneself with a trade union) and, on the other hand, in article 8 (right to an effective remedy), article 9 (freedom from arbitrary arrest and detention) and article 10 (right to a fair trial).

11. In the light of the above, the Working Group renders the following opinion:

> The sentence of Zhou Guoqiang to re-education through labour is arbitrary, as it contravenes articles 7, 9, 18, 19 and 20 of the Universal Declaration of Human Rights, and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

12. As a consequence of the present Opinion, the Working Group requests the Government to take all necessary steps to implement its recommendations made after its visit to China, in particular the recommendation that calls for the establishment of a permanent independent tribunal for or associating a judge with all proceedings under which the authorities may commit a person to re-education through labour (see E/CN.4/1998/44/Add.2, para. 109 (d)).

Adopted on 4 December 1998

OPINION No. 31/1998 (CAMEROON)

Communication addressed to the Government on 10 June 1998

Concerning Pius Njawé

Cameroon is a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The Working Group's mandate was clarified and extended by resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government concerned.

2. The Working Group regrets that the Government did not reply within the 90-day time limit.

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

4. In the communication from the source it was stated that Pius Njawé, publisher and editor-in-chief of Le Messager newspaper, was arrested on 24 December 1997 and charged with having published false information, an offence punishable under article 13 of the Penal Code of Cameroon. He was accused of having published an article raising questions about the health of President Biya, who, according to Mr. Njawé's article, had suffered a heart attack at a football match. On 13 January 1998, Mr. Njawé was sentenced to two years' imprisonment and a fine of 500,000 CFA francs. On 14 April 1998, the Court of Appeal confirmed his conviction but reduced the imprisonment to one year and the fine to 300,000 CFA francs.

5. Again according to the source, and it should be recalled that the allegations have not been refuted by the Government although it has been given the opportunity to do so, Mr. Njawé is a

victim of a violation of his right to freedom of expression and opinion, a right guaranteed by article 19 of the International Covenant on Civil and Political Rights, to which Cameroon is a party.

6. According to subsequent information received from the source, Mr. Njawé's sentence of imprisonment was confirmed by the Higher Court on 17 September 1998 and, following the pardon granted by the President of the Republic, he was released on 12 October 1998.

7. In accordance with its methods of work (see para. 17 (a)), the Working Group reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. In this context, the Working Group is prepared to examine, in accordance with its methods of work, whether there has been a violation of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

8. The Working Group is of the opinion that the comments concerning the health of the President of the Republic made by the complainant in his newspaper and in the context of his work and his profession as a journalist were neither defamatory nor offensive, nor did they amount to an attack on the President's reputation. The fact that they were judged to have constituted an offence and gave rise to Mr. Njawé's conviction may in no circumstances be regarded as being permissible under the restriction provided for in article 19, paragraph 3, of the Covenant and, in the view of the Working Group, represents a violation of the right to freedom of expression and opinion, and the right to freedom of the press (Covenant, art. 19, para. 2).

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

> The deprivation of liberty of Pius Njawé since 24 December 1997, notwithstanding his release on 12 October 1998, was arbitrary since it was contrary to the provisions of articles 9 and 19 of the Universal Declaration of Human Rights and articles 9 and 19 of the International Covenant on Civil and Political Rights, and fell within category II of the categories applicable to the consideration of cases before the Working Group.

10. Consequently, the Working Group requests the Cameroonian Government to take the necessary steps to remedy the situation and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 3 December 1998

OPINION No. 1/1999 (CHINA)

Communication addressed to the Government on 21 July 1998

Concerning Xue Deyun (alias Ma Zhe) and Xiong Jinren, (alias Xiong Xiang)

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto.

5. According to the source, two Chinese writers, Xue Deyun (pen name Ma Zhe) and Xiong Jinren, have been detained since 26 January 1998 and are awaiting trial without having been given an official reason for their arrest. The above-mentioned persons allegedly were arrested together with two other individuals, Ma Qiang and Wu Ruohai, as they were preparing to launch “China Cultural Renaissance”, an unofficial literary journal supporting literary

freedoms. The police allegedly raided their homes without a warrant and confiscated draft copies of their works and address books. Ma Qiang and Wu Ruohai were reportedly released on 20 March 1998. Xue Deyun and Xiong Jinren, however, are still detained and could face, according to the source, charges of subversive activities. Xue Deyun had been previously detained on 29 December 1986 and imprisoned for three years for protesting with Beijing students in December 1986.

6. In its reply, the Government provides the following explanations: between May 1997 and January 1998, Xue Deyun and Xiong Xiang (also known as Xiong Jinren), by engaging in subversive activities, violated article 105 (2) of the Chinese Penal Code: fomenting subversion of State power and the overthrow of the socialist system by rumour-mongering, slander or other means, punishable by up to five years' imprisonment, labour in detention, placement under surveillance or deprivation of political rights. They were both legally detained in January 1998. In February 1998, with the approval of the Guiyang Municipal People's Court, they were placed under arrest. Xiong, having admitted his guilt, behaved well and showed signs of reform. He was spared a formal determination of criminal responsibility and has been set free. The Chinese judicial organs are at present engaged in proceedings against Xue Deyun.

7. In the Working Group's view, it follows from the above that:

(a) Xue Deyun and Xiong Jinren were intending to publish a literary, and hence cultural, journal and it is not disputed that its purpose was to express opinions peacefully, without inciting or resorting to violence;

(b) Xiong Jinren was set free because, among other reasons, he had admitted his guilt, and this presupposes that the acts of which he was accused were reprehensible, in particular being incompatible - which is not the case in this instance - with the exercise of the freedom of opinion and expression as guaranteed by article 19 of the Universal Declaration of Human Rights, according to which "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media";

(c) Since the charges against Xue Deyun are of the same nature, they also concern the exercise of the rights guaranteed by the above-cited article 19 of the Universal Declaration of Human Rights;

(d) Xue Deyun is being prosecuted for violating article 105 (2) of the Chinese Penal Code, which prescribes punishment for "incitement to subvert the political power of the State and overthrow the socialist system by spreading rumours, slander or other means".

8. In this connection, the Working Group recalls that, in the report on its visit to the People s Republic of China in 1997 (E/CN.4/1998/44/Add.2), it made the following observations with regard to article 105 (2): because of the broad and imprecise definition it gives for this revised offence, which is included among offences "endangering national security" in Part II, chapter I, of the Penal Code, as amended in 1997, this article is "liable to be both misapplied and misused" (para. 45), particularly since the definition is such that "even communication of

thoughts and ideas or, for that matter, opinions, without intent to commit" - as in the present case - "any violent or criminal act, may be regarded as subversion. Ordinarily, an act of subversion requires more than mere communication of thoughts and ideas" (paragraph 46 of the above-mentioned report).

9. In the light of the foregoing, the Working Group:

(a) Considers that the detention of Xue Deyun (alias Ma Zhe) is arbitrary as it contravenes article 19 of the Universal Declaration of Human Rights and falls within category II of the principles applicable in the consideration of the cases submitted to the Working Group;

(b) Takes note with satisfaction of the fact that Xiong Jinren (alias Xiong Xiang) has been released without trial but considers that, for the same reasons, the detention to which he was subjected between 26 January 1998 and the date of his release was of an arbitrary character, as being in contravention of article 19 of the Universal Declaration of Human Rights and thus falling within category II of the principles applicable in the consideration of the cases submitted to the Working Group.

10. Having declared the detention of the above-mentioned persons to be arbitrary, the Working Group requests the Government of the People's Republic of China to:

(a) Take the necessary measures to remedy the situation in order to bring the articles of the Penal Code on the endangering of national security into conformity with the standards and principles contained in the Universal Declaration of Human Rights, and particularly, with reference to this case, those contained in article 19;

(b) Complete at the earliest possible date the process of ratification of the International Covenant on Civil and Political Rights.

Adopted on 20 May 1999

OPINION No. 2/1999 (CHINA)

Communication addressed to the Government on 14 October 1998

Concerning Ngawang Choephel

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. 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 the observations by the source.

5. According to the source, a Chinese citizen of Tibetan origin in exile, Ngawang Choephel, travelled to Tibet in July 1995 to do research on traditional Tibetan music. He disappeared following his arrival in Tibet. In May 1998, the Chinese authorities confirmed to European Union ambassadors that Ngawang Choephel had been tried on 6 September 1995 and sentenced, on 13 November 1996 to 15 years' imprisonment on charges of espionage and to 3 years' imprisonment for counter-revolutionary activities. Two sources, however, reported that Chinese

authorities had stated on Tibetan radio on 26 December 1995, one year before Mr. Choephel's formal sentencing that he was sentenced for having allegedly carried out "espionage activities".

6. Mr. Choephel appealed, and a second hearing was supposed to be held in February 1997. According to the source, the Chinese Government provided no information on the evidence used to convict Mr. Choephel or on his appeal. Ngawang Choephel is reportedly being held at the Nyari detention centre in Shigatse while he awaits the result of his appeal.

7. In its reply, the Government provided the following details, among others:

(a) Ngawang Choephel, male, ethnic Tibetan, born in India in 1967, university educated, was a dance instructor with the dance troupe belonging to the "Government in exile" of the Dalai Lama before his arrest. In July 1995 he was commissioned by the Dalai's (entourage) to enter the country carrying foreign-supplied funds and materials and engage in spying on the pretext of gathering ethnic Tibetan songs and dances. While in Tibet, in accordance with his brief, he gathered intelligence from Lhasa, Shannan, Nyingchi, Xigaze and elsewhere for delivery, when he left the country, to the Dalai Lama's entourage and a foreign agency, and fomented separatism. The Chinese security organs seized evidence of his illegal activities, which Ngawang confessed;

(b) Since the case related to State secrets, the case was tried in closed hearing under the relevant provisions of the Code of Criminal Procedure. The Xigaze Intermediate People's Court tried Ngawang under the relevant provisions of the Penal Code, the State Security Act and the regulations issued pursuant to the State Security Act, sentencing him for spying and fomenting separatism to 18 years' imprisonment and stripping him of his political rights for four years. Ngawang Choephel appealed; the Tibet Autonomous Region Higher People's Court constituted a collegiate bench to hear the case. The bench found that the facts in the original judgement were clear, the evidence was ample, the trial procedure had been lawful and the law had been correctly applied. On 24 September 1997 it issued a final judgement rejecting the appeal and upholding the lower court's decision;

(c) By engaging in espionage while giving out his motivation as being to collect folk songs and dances, Ngawang imperilled State security and broke Chinese law. That the Chinese judicial organs dealt with him severely, in accordance with the law, is not a matter for reproach. During his trial the judicial organs abided strictly by Chinese legal procedure, giving him a fair hearing, and all the rights that properly belonged to him were fully respected and upheld.

8. According to the Working Group, the foregoing gives rise to the following conclusions:

(a) It is undisputed that Ngawang Choephel was a dance instructor who in exile directed a dance troupe of the Dalai Lama;

(b) He is accused of having sought, in those circumstances, to gather information on ethnic Tibetan songs and dances;

(c) The Government alleges that the security services seized evidence of illegal activities and that Ngawang Choephel openly admitted to such activities;

(d) On those grounds, he was tried for espionage and separatist activities, sentenced to 18 years' imprisonment and stripped of his political rights for four years (a conviction upheld on appeal), although the Government's reply makes no specific reference to the articles of the Criminal Code concerning breaches of State security under which he was charged;

(e) The Working Group emphasized, in the report on the visit it made to the People's Republic of China (E/CN.4/1998/44/Add.2, para. 43) that "unless the application of these crimes is restricted to clearly defined areas and in clearly defined circumstances, there is a serious risk of misuse";

(f) That appears to be the case in the present instance, inasmuch as the Government, in its reply, does not specify the nature of the activities of which he is accused - other than collecting ethnic songs and dances - and mentions no evidence in support of the charges;

(g) According to the authorities, all his personal rights were respected during the trial, but no details are given of the rights guaranteed;

(h) It is not disputed that his trial was held in camera;

(i) The Government does not indicate where he is serving his sentence.

9. In the light of the foregoing, the Working Group gives the following opinion:

The deprivation of liberty of Ngawang Choephel is arbitrary, as being in contravention of article 19 of the Universal Declaration of Human Rights, according to which freedom of opinion and expression includes freedom to hold opinions without interference and - as in the instant case - to "receive and impart information and ideas through any media and regardless of frontiers", and falls within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

10. Consequent upon the opinion rendered, the Working Group requests the Government:

(a) To take the necessary steps to remedy the situation and to ensure that application of the articles of the Criminal Code relating to State security takes account of the guarantees enshrined in the Universal Declaration of Human Rights, particularly article 19 thereof in the present case;

(b) And to take appropriate initiatives with a view to becoming a State party to the International Covenant on Civil and Political Rights.

Adopted on 19 May 1999

OPINION No. 3/1999 (MYANMAR)

Communication addressed to the Government on 8 July 1998

Concerning U Tun Win, Kyi Min, U Hlaing Aye, U Myint Aung, U Aung Soe, U Kyaw Myint, U Thein Kyi, U Than Naing, U Myint Thein, U Aung Myint Thein, U Tha Aung, U Aung San Myint, U Aung Naing and U Tar

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group regrets that the Government did not reply to the Group's request for information within the imparted deadline.

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. 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 communication, the above-mentioned leaders of the National League for Democracy (NLD) party were elected in popular elections for various posts in several

different regions of the country. They were detained in the night of 25 June 1998 and warned that they could not leave their districts or municipalities, except for those elected in the Yangon area. In order to secure their release under these restrictive conditions they were required to guarantee that they would fulfil the obligation not to leave their municipalities, and they were warned that if they did so they would be sentenced to a year's imprisonment under the Emergency Powers Act. They are required to present themselves twice daily to the police or judicial authorities and in some cases to the military authorities.

6. In accordance with orders from the Party, some of the elected representatives have left the "restricted" areas.

7. The Government did not answer the Working Group's communication.

8. In the Working Group's opinion, the restriction on leaving a specific area imposed by an administrative authority and not based on a court sentence handed down in a fair trial on the basis of an offence attributed to an individual constitutes an arbitrary deprivation of liberty falling within category III of the Working Group's methods of work, when the injured party has not been given the right to exercise his right of defence.

9. On the other hand, the grounds on which the liberty of the above-mentioned persons has been restricted in the case in question is simply the legitimate exercise of a political option, which has furthermore received support from the electors in elections.

10. The source does not indicate whether the persons referred to in the communication still have their freedom "restricted", or are among those who disobeyed the order not to leave their municipality and as a result are prisoners.

11. The Group notes however that, on the basis of the source's information which has not been contested by the Government, that the above-mentioned individuals and other elected NLD representatives were taken to police stations and held there overnight for two nights. This deprivation of liberty is violative of articles 19 and 21 of the Universal Declaration of Human Rights and falls under category II of the categories applicable to the examination of cases by the Working Group. If these individuals were to be deprived of their liberty if they trespass the terms of the restraining order, this would constitute an arbitrary deprivation of liberty also violative of articles 19 and 21 of the Universal Declaration of Human Rights.

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

> The deprivation of liberty of U Tun Win, Kyi Min, U Hlaing Aye, U Myint Aung, U Aung Soe, U Kyaw Myint, U Thein Kyi, U Than Naing, U Myint Thein, U Aung Myint Thein, U Tha Aung, U Aung San Myint, U Aung Naing and U Tar is arbitrary, as being in contravention of articles 19 and 21 of the Universal Declaration of Human Rights and falls within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

13. Consequent upon the opinion rendered, the Working Group requests the Government:

(a) To take the necessary steps to remedy the situation, and bring it in conformity with the standards and principles set forth in the Universal Declaration of Human Rights;

(b) And to take the adequate initiatives with a view to becoming a State Party to the International Covenant on Civil and Political Rights.

Adopted on 20 May 1999

OPINION No 4/1999 (ISRAEL)

Communication addressed to the Government on 6 July 1998

Concerning Bilal Dakrub

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group regrets that the Government has not replied within the 90-day deadline.

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. 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 allegation, Bilal Dakrub, a Lebanese citizen, was detained in Lebanon in 1986 by Israeli agents and taken to Israel, where he was tried on the charge of being a member of an illegal organization and sentenced to two and a half years' deprivation of liberty. After completing has sentence, he was kept in prison, allegedly, according to the source, in order to be used in possible negotiations on an exchange of detainees for Israeli citizens captured in Lebanon.

6. As the Government of Israel has not replied to the Working Group, the latter will render an opinion on the basis of the information available to it.

7. In the light of the information before it, the Working Group considers:

(a) That there is no information indicating that Bilal Dakrub has committed acts of violence;

(b) That membership of an "illegal organization", on which no information is provided and in respect of which there is nothing to suggest that it has committed illicit acts, is simply the legitimate exercise of the right of association enshrined in article 20 of the Universal Declaration of Human Rights and article 22 of the International Covenant on Civil and Political Rights, to which Israel is a party;

(c) Furthermore, the extension of deprivation of liberty for more than 11 years after the completion of the sentence imposed without any court order is a classic case of arbitrary detention, because it lacks any legal basis that might justify it.

8. From the foregoing, it must be concluded that the deprivation of the liberty of the aforementioned person, even though it might be considered to be in compliance with domestic legislation, is not justified. Indeed, it is the legislation which contravenes the provisions of the above-mentioned articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

9. In view of the above, the Working Group renders the following opinion:

The deprivation of liberty of Bilal Dakrub is arbitrary, as being in contravention of article 20 of the Universal Declaration of Human Rights and article 22 of the International Covenant on Civil and Political Rights, and falls within Category III (during completion of his sentence of two and a half years) and Category I (after completion of the sentence) of the categories applicable to the consideration of cases submitted to the Working Group.

10. Consequent upon the opinion rendered, the Working Group requests the Government:

(a) 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;

(b) To consider the possibility of amending its legislation in order to bring it into line with the Declaration and the other relevant international standards accepted by Israel.

Adopted on 20 May 1999

OPINION No. 5/1999 (TUNISIA)

Communication addressed to the Government on 4 May 1998 (urgent appeal dated 2 October 1997)

Concerning Khemais Ksila

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

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

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

4. In the light of the allegations made, the Working Group welcomes the Government's cooperation. It transmitted the Government's reply to the source of the communication, which has made known its comments thereon.

5. According to the complaint, Khemais Ksila, Vice-President of the Human Rights League, on 29 September 1997, published a proclamation denouncing the policy of the Tunisian Government and calling for extreme vigilance because of the situation in Tunisia at that time; the establishment of a "security arsenal" and serious violations of human rights. He also denounced the harassment to which he had been subjected, notably the threats against him and his family, the loss of his job, the confiscation of his passport and surveillance. For those reasons, he announced that he would begin a hunger strike. On the same day he was arrested and - according to the complaint - taken to an unknown location.

6. The complaint also refers to various violations of guarantees established by law, such as the absence of an arrest warrant, the change in the composition of the court without a new trial, the non-public nature of the trial because of the police presence, and the disappearance of the person concerned.

7. The Working Group is grateful to the Government for its very comprehensive reply and notes that full information was sent promptly following the urgent action which the Working Group initiated as soon as it learned of the arrest. The Working Group also notes all the guarantees which Mr. Ksila has enjoyed during the proceedings: as soon as the proclamation became known, proceedings were initiated and the Government Procurator issued an arrest warrant; Mr. Ksila was immediately brought before the Procurator; he was tried and sentenced at first instance to three years' imprisonment for defamation of public order, one year's imprisonment for publishing in bad faith false information liable to disturb public order, and one year's imprisonment for inciting citizens to break the law of the land. The penalties were ordered to be served concurrently in a single three-year sentence, together with a fine. He appealed against the verdict, but the court of appeal confirmed it. He then applied for a judicial review, but the application was rejected by the Court of Cassation.

8. In the Government's view, the criminal acts committed by Mr. Ksila necessitate his dismissal from the post of Vice-President of the Tunisian Human Rights League. They constitute an ordinary offence, dishonest and defamatory allegations against the public authorities and appeals to citizens to disobey the law of the land, to engage in rebellion and resort to violence.

9. In the opinion of the Working Group, the alleged violations of the legally established guarantees have not been proved and, even if they were, they would not be of sufficient gravity to confer an arbitrary character on the deprivation of liberty. Account should also be taken of the fact that the trial suspensions were accepted at the request of the defendant's own defence counsel. Similarly, the claim that the prisoner disappeared is nullified by the fact that he was brought before the Procurator on the day he was arrested.

10. As to the substance relating to the acts committed, which the Government describes as "ordinary offences", the Working Group considers that the action for which Mr. Ksila was sentenced to three years' imprisonment was the publication of a proclamation in which he announced his intention to go on hunger strike because of the situation in Tunisia, the violations of human rights, and the persecution and threats to which he and his family had been subjected. He ended by making an appeal for civil disobedience. On that point, the complaint and the Government's reply concur.

11. The acts which gave rise to the court sentence cannot, either individually or jointly, be considered to constitute incitement to violence and were not in themselves liable to provoke a breach of public order. The defamation of public order is simply one of the most traditional forms of peaceful protest, and the same may be said of the publication in bad faith of false information liable to disturb public order and of incitement to citizens to break the law of the land. What was involved was simply the expression, by one or more of the mass media, of a

thought or opinion and, consequently, the lawful exercise of the right to freedom of expression and opinion which are established by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

12. The announcement of a hunger strike, too, cannot be regarded as unlawful or as such a harmful act that it constitutes a breach of public order.

13. The Working Group has carefully read the document in question and, contrary to the information given by the Government, it has found in it no appeal for violence; it has, on the contrary, found that it amounted to nothing more than vigorous political criticism and an appeal for peaceful protest.

14. The Working Group's mandate provides that it must inquire into cases of arbitrarily imposed detention, provided that the national courts have not reached a final decision concerning conformity with national legislation, and the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned.

15. In the opinion of the Working Group, as it has maintained in previous opinions (see Opinion No. 1/1998), if the final judgement of a country's judicial body of final instance is consistent with internal legislation but not with international human rights instruments, it must be regarded as arbitrary within the terms of Commission on Human Rights resolutions 1997/50 and 1998/41.

16. In the light of the foregoing, the Working Group renders the following opinion:
The detention of Khemais Ksila is arbitrary since it constitutes an infringement of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, and falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

17. Having rendered this opinion, the Working Group requests the Government:

(a) To take the necessary steps to remedy the situation, in conformity with the standards and principles set forth in the Universal Declaration of Human Rights; and

(b) To consider the possibility of amending its legislation in order to bring it into line with the Declaration and the other relevant standards of international law which it accepts.

Adopted on 20 May 1999

OPINION No. 6/1999 (NIGERIA)

Communication addressed to the Government on 2 June 1998

Concerning Niran Malaolu

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group regrets that the Government has not replied within the 90-day deadline.

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);

(i) 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. 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. The communication, of which a summary was transmitted to the Government concerned, relates to the situation of Mr. Niran Malaolu, the editor of an independent Nigerian daily newspaper ("The Diet"), who was arrested at the editorial offices of the newspaper on 28 December 1997, allegedly by armed soldiers of the Military Intelligence Directorate (DMI). Three other staff members of the newspaper (Mr. Wale Adele, Mr. Emeka Egerue, Ms. Emma Avwara) were also arrested.

6. While Mr. Malaolu's colleagues were released after some hours in custody, Mr. Malaolu was held without charges until 14 February 1998, when he was brought before a Special Military Tribunal constituted under the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986, on secret charges. Prior to his arraignment before the tribunal, Mr. Malaolu was denied access to a lawyer, a doctor and members of his family, and remanded at a military detention facility in Lagos, until he was moved to the northern city of Jos, where the trial took place. After a secret trial, the tribunal's president announced on 28 April 1998 that Mr. Malaolu had been found guilty of concealment of treason and sentenced him to life imprisonment.

7. According to the source, Mr. Malaolu was punished by the Nigerian military authorities for news stories published by his paper, concerning an alleged coup plot involving Lt. Gen. Oladipo Diya, as well as other military officers and civilians who also were convicted by the tribunal and given sentences ranging from prison terms to death by firing squad.

8. According to the source, the following violations of the right to a fair trial occurred in Mr. Malaolu's case:

(a) The agents who arrested him on 28 December 1997 did not inform him of the reasons for his arrest (in violation of article 33 (6) of the Nigerian Constitution);

(b) Niran Malaolu was tried in camera. In the light of the intense pre-trial publicity to persuade the public that a coup attempt had occurred and that the senior military officers arrested were guilty of treason, possible claims of threats to national security in excluding the public and the press from the trial cannot be upheld;

(c) It is said that Mr. Malaolu was denied the right to be defended by a lawyer of his choice and instead assigned a military lawyer (in violation of article 33 (6) (c) of the Nigerian Constitution);

(d) The Special Military Tribunal which tried Mr. Malaolu was neither independent nor impartial, in that its members were handpicked by the head of State and the Provisional Ruling Council (PRC), against whom the alleged offence was committed. The president of the tribunal himself is also a member of the PRC, which in turn is empowered to confirm the sentences passed by the tribunal (in violation of article 33 (1) of the Nigerian Constitution);

(e) Mr. Malaolu, a civilian, was tried before a military tribunal using special procedures.

9. According to the source, Mr. Malaolu was denied adequate time and facilities to prepare his defence, in clear violation of article 33 (6) (b) of the Nigerian Constitution. Finally, under the provisions of the Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1996, the right to appeal to a higher judicial body is eliminated, and convicts may only appeal to the PRC, an executive body, which constituted the tribunal in the first place, ordered the trial of the suspects and had a clear interest in their conviction.

10. The Working Group notes again that the Government has not replied to the allegations, although an opportunity to do so had been given to it. The Group has examined the allegations submitted by the source and considers them to be sufficiently substantiated. In the absence of a Government reply, due weight must be given to them.

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

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

12. Further to the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation, and bring it in 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 20 May 1999

OPINION No. 7/1999 (INDIA)*

Communication addressed to the Government on 2 June 1998

Concerning five Latvian pilots: Aleksander Klishin (commander); Oleg Gaidash (second pilot); Igor Moscvitin (navigator); Igor Timmerman (flight engineer); Yevgeny Antimenko (flight operator)

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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 fully 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. 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 did not comment on the Government's reply. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto.

5. According to the source, the five pilots mentioned above were arrested in India in November 1995 and remained in custody at the prison of Calcutta, on charges of having delivered weapons to India and engaging in anti-State activity.

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* Mr. Kapil Sibal did not participate in the deliberations on and the adoption of this Opinion.

6. Although the detained individuals argue that they were merely acting upon the orders of superiors, they continue to face the death penalty. The source submits that all five are subjected, in prison, to cruel and inhuman treatment, and that they are detained under conditions that do not comply with the United Nations Standard Minimum Rules for the Treatment of Prisoners.

7. According to the source, who relies on the statements of defence counsel for the prisoners, the prisoners' rights under article 14 of the International Covenant on Civil and Political Rights have been violated. Thus, it is claimed that they were not given adequate time and facilities to prepare their defence, in violation of article 14, paragraph 3 (b), of the Covenant, and their right to be provided with the assistance of an interpreter (art. 14, para. 3 (f)) was equally violated. Other procedural guarantees under article 14 are also said to have been violated.

8. In its detailed reply, the Government refutes the allegations and provides the following version of the facts of the case:

(a) On 17 December 1995, at around 23.00 hours, an aircraft dropped a very large consignment of arms and ammunition in the area of Jhalda, in the district of Purulia, West Bengal State. On hearing of the incident, the police took action and recovered from the area AK-series rifles, pistols, empty magazines, ammunition, hand grenades, anti-tank grenades, etc.;

(b) The Central Bureau of Investigation (CBI) immediately commenced an investigation into the incident. Its inquiries revealed that a private AN-26 aircraft belonging to "Carol Air Services", which had flown from Karachi to Varanasi and then onward to Calcutta, was responsible for dropping the consignment. The aircraft had, in the meantime, left Indian territory for Thailand, instead of its original destination of Yangon. It however re-entered Indian territory and was intercepted by the Indian authorities. It was forced to make a landing at Bombay International Airport on the morning of 22 December 1995. The aircraft was seized by customs authorities and six foreign nationals on board the aircraft, including five Latvian nationals and one British national, were arrested by the police;

(c) Sufficient evidence has been discovered during the course of the investigation which clearly indicates the complicity of the five Latvian crew members in conspiring to air-drop arms and ammunition inside India. Investigation has proved beyond any doubt that without the full knowledge and complicity of the crew members, it would not have been possible for any person to air-drop the arms and ammunition inside Indian territory. The claims of innocence on the part of the Latvian crew members are therefore without any basis;

(d) The accused are receiving full legal assistance and there is constant liaison and interaction between them and their lawyers. There is no basis for the allegation that they do not have legal assistance;

(e) There has been no delay in the conduct of the investigation. A charge sheet was laid against 13 persons, including the Latvian crew members, as early as 27 March 1996, i.e. within exactly three months of the arrest of the accused persons. It may be mentioned that the accused, after submission of the charge sheets by the CBI, applied to different courts for bail. They also approached the Calcutta High Court as well as the Supreme Court of India. Because

of these applications pending in the higher courts, the trial could not start. The 4th City Sessions Judge framed the charges against the accused persons on 6 June 1997, after hearing prolonged arguments by the lawyers appearing on behalf of the accused. The accused then filed a petition before the High Court of Calcutta in August 1997, challenging the decision of the Sessions Judge. The matter came up in the High Court on many occasions and was finally disposed on 17 December 1997. The High Court upheld the charges framed by the 4th City Sessions Judge. The Supreme Court and the High Court have further directed that a speedy trial be conducted. However, due to filing of appeal petitions, revision petitions, etc. in different higher courts on various successive occasions, the trial has been further delayed;

(f) Qualified Russian interpreters have been available throughout the examination of the Latvian crew members during CBI custody. An interpreter was also arranged at the direction of the Judicial Court during court proceedings. The accused have not so far raised any objections to the use of documents in English nor made any request to the court for the translation of the documents into Russian. If they had submitted such a request, the court would have immediately acceded to the same. The allegation that they are not being provided the assistance of Russian translators is therefore without foundation;

(g) The investigation of the case shows that it has international ramifications and links to criminal activities in a number of places outside India. Inquiries are therefore being conducted with the help of Interpol. The assistance of technical experts specialized in civil aviation, forensic experts, ballistic experts, fingerprint experts, etc. is also being utilized to ensure that the investigation is conducted in a proper and efficient manner. Allegations that Indian experts have an inadequate understanding of the technicalities of civil aviation and that the Government is trying to save the real culprits at the cost of the accused are baseless and without any foundation. In any case, these are matters for the trial court to examine and decide upon.

9. The Government's reply was transmitted to the source for comments on 31 August 1998. To date, no observations from the source have been received.

10. In its communication, the source makes a number of allegations pertaining to ill-treatment of the five pilots. The alleged violations of the right to a fair trial only concern the allegedly insufficient time accorded to the pilots for the preparation of their defence, and the alleged absence of Russian interpreters.

11. The Working Group considers:

(a) That the first allegation is without basis, to the extent that the five pilots have always benefited from legal assistance (including, as transpires from the correspondence addressed to the Group, in the drafting of the present communication) and have interposed numerous appeals at all levels of the judicial system;

(b) That the allegation of lack of assistance of Russian interpreters is insufficiently substantiated. Indeed, the five pilots had the assistance of interpreters at the beginning of the inquiry, and subsequently did not object to the introduction and use of English documents; furthermore, they were assisted by an interpreter before the court.

12. As a result, the Group is in a position to render the following Opinion:

> In the light of the procedural guarantees afforded to the five pilots, as explained above by the Government, and which have not been contested by the source, the Group declares not arbitrary the detention of Aleksander Klishhin, Oleg Gaidash, Igor Moscvitin, Igor Timmerman and Yevgeny Antimenko.

13. The Working Group wishes to recall that:

(a) On the one hand, the fact that a deprivation of liberty is declared not arbitrary does not imply any pronouncement on the guilt of the individuals deprived of their liberty; and

(b) On the other hand, given that the five pilots mentioned above may be subject to a capital verdict, the United Nations General Assembly has invited Member States to abolish capital punishment and, pending its abolition, to suspend its application.

Adopted on 20 May 1999

OPINION No. 8/1999 (CHAD)

Communication addressed to the Government on 23 June 1998

Concerning Ngarléjy Yorongar

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regrets that the Government did not reply within the 90-day time limit.

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

4. In the light of the allegations made, the Working Group would have welcomed the Government's cooperation. 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 mentioned and the allegations contained in the communication have not been contested by the Government.

5. According to the communication, a summary of which was submitted to the Government, Mr. Yorongar is an opposition deputy in the Chad National Assembly. He expressed public criticism of the way in which a petroleum project undertaken by an international consortium in his constituency was being handled by the Head of State and his family. He also criticized the President of the National Assembly, alleging that he had improperly received certain sums of money paid by oil companies, and the Head of State, maintaining that his election campaign and

that of the President of the National Assembly, during the presidential elections of 1996, had been financed by the ELF petroleum group, a member of the above-mentioned consortium.

6. By a letter of 4 August 1997, the Minister of Justice requested the Procurator General to initiate proceedings against Mr. Yorongar for contempt and abuse of the Head of State (Penal Code, arts. 118 et seq.). For his part, in a letter dated 1 August 1997, the President of the National Assembly lodged a complaint of defamation with the Procurator General.

7. The Procurator General accordingly notified the President of the National Assembly that he was initiating dual proceedings for the removal of Mr. Yorongar's parliamentary immunity. On 26 May 1998, the National Assembly voted for the removal of Mr. Yorongar's parliamentary immunity, and on 3 June 1998 he was arrested and held in detention. On 20 July 1998, he received an enforceable sentence of three years' imprisonment and a fine of 50,000 CFA francs. His appeal was rejected.

8. The source states that the judicial proceedings against Mr. Yorongar were characterized by several incidents and irregularities, such as to confer an arbitrary character on his detention.

9. The Working Group notes that, according to the source itself, Mr. Yorongar benefited from a presidential pardon which was notified orally to the source by the Chad Minister of Justice, and that Mr. Yorongar was released on 4 February 1999 and authorized to resume his seat in the National Assembly. He was subsequently able to address the United Nations Commission on Human Rights at its fifty-fifth session.

10. In view of the foregoing, and having considered all the information in the file brought to its attention, and without determining whether or not the detention of Mr. Yorongar was arbitrary, the Working Group decides, in conformity with paragraph 17 (a) of its methods of work, to file the case.

Adopted on 20 May 1999

OPINION No. 9/1999 (RUSSIAN FEDERATION)

Communication addressed to the Government on 15 July 1998

Concerning Grigorii Pasko

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group regrets that the Government has not replied within the 90-day deadline.

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. 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 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.

5. According to the source, Mr. Grigorii Pasko, 38 years old, a commander in the Russian navy, is also a correspondent for the newspaper of the Russian Pacific Fleet ("Boyevaya Vakhta"), Vladivostok. For several years he has written about the continued breakage for recycling of old nuclear submarines, and the failure of Russian authorities to process radioactive waste material resulting from the breakage of these submarines. Despite

resistance, all articles published on these issues were approved by the editor-in-chief of the newspaper, as required. In addition, Mr. Pasko has worked for Japanese mass media, including the newspaper "Asahi", and the TV station NHK.

6. According to subsequent information from the source, the trial, held in camera before the military court of the fleet in Vladivostok, began on 21 January 1999. The court stripped two of Grigorii Pasko's lawyers of their power of attorney on 27 January 1999 on the ground that they had allegedly passed on trial information to the media and obstructed the work of the judges. Grigorii Pasko is accused of spying and disclosing State secrets, offences carrying a maximum of 20 years' imprisonment.

7. The Working Group concludes from the above that:

(a) Regarding the charges against Grigorii Pasko:

- He was motivated only by a concern to alert national and international opinion to the risks to the environment from the breakage for recycling of defective nuclear submarines, as a result of their dilapidated condition, and from the clandestine dumping of their nuclear waste into the Pacific Ocean by the Russian fleet;

- Damage to or protection of the environment is an issue that knows no boundaries, especially where radioactive pollution is concerned;

- Consequently, it should be possible freely to engage in ecological criticism: this forms part of the right to freedom of expression "regardless of borders", as laid down by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights;

- The accusations of spying and disclosure of State secrets on which the action against Grigorii Pasko is based have no grounds beyond his dissemination of information on environmental protection;

- Article 7 of the Russian Federal Law on State secrets appropriately provides that in no case may information on environmental conditions, emergencies and disasters posing a risk to human life and health be considered a State secret;

- This clearly applies in this case to the charges against Grigorii Pasko.

On this first issue, the Working Group therefore considers that the deprivation of liberty of Grigorii Pasko is in contravention of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

(b) Regarding the conditions of the trial:

- It was held in camera before a military court of the Russian Pacific fleet when it was precisely the nuclear vessels of the Pacific Fleet that Grigorii Pasko had criticized: this situation is bound to cast doubt on the impartiality of this tribunal;

- Two of his lawyers were stripped of their power of attorney by the court;

- The investigating authorities refused Grigorii Pasko's request that they should examine in an independent and impartial manner the documents confiscated from him on 13 November 1997;

- Information obtained in an illegal manner (by wire-tapping) was added to the case file as evidence against Grigorii Pasko.

On this second issue, the Working Group therefore considers that the conduct of the proceedings before the military judicial organs violates the individual's right to a fair trial as guaranteed by 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 violates them so seriously as to render arbitrary the deprivation of liberty.

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

The deprivation of liberty of Grigorii Pasko is arbitrary, as being in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights and articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, and falls within categories II and III of the applicable categories to the consideration of the cases submitted to the Working Group.

9. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary measures to remedy the situation ensuring that the articles of the Penal Code on national security are applied with due regard for the guarantees of freedom of expression laid down by international standards and by the Russian Constitution and laws.

Adopted on 20 May 1999

OPINION No. 10/1999 (EGYPT)

Communication addressed to the Government on 2 June 1998

Concerning Neseem Abdel Malek

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. 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 forwarded the requisite information in good time.

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. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply of the Government to the source and received its comments. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the context of the allegations made and the response of the Government thereto.

5. In 1993, Dr. Neseem Abdel Malek, formerly the director of the El-Khanka mental hospital in Cairo, issued a certificate of insanity in the case of Saber Farahat Abu Ulla, who had killed four foreign tourists in a Cairo hotel; he was thereafter confined to El-Khanka hospital. In September 1997, Saber Abu Ulla participated in the assassination of nine German tourists and their driver in front of the Egyptian Museum in Cairo. He was convicted, sentenced to death and executed in May 1998.

6. According to the source, Dr. Neseem Abdel Malek was arrested in connection with the Egyptian Museum massacre. On 13 November 1997, he was sentenced to 25 years in prison by a military court. The court found him guilty of having taken bribes from Saber Abu Ulla, and of having illegally released Saber Abu Ulla from the mental hospital on 15 September 1997 (although he was absent from hospital from 15 to 17 September 1997). According to the source, the sole evidence against Dr. Neseem Abdel Malek came from the convicted murderer himself, who had first implicated another doctor who had signed his certificate of insanity in 1993, and then retracted that testimony to accuse Dr. Neseem Abdel Malek, a Copt. Thus, the doctor who had signed the certificate was duly acquitted, and Dr. Neseem Abdel Malek found guilty in his place.

7. It is alleged that the trial against Dr. Neseem Abdel Malek suffered from serious deficiencies. Thus, although a civilian, he was tried by a military court. It is submitted that a bribery charge by a certified insane killer who had previously stated that his acts were part of his crusade ("jihad") for God and that he would target "infidels", was totally insufficient evidence to convict a Coptic hospital doctor to 25 years in prison.

8. The source contends that Dr. Neseem Abdel Malek was kept in solitary confinement for 15 days after 18 September 1997 before being allowed a visit from his lawyer. His detention was then extended for 30 days. Until the start of the trial, the charges against him were not disclosed and his lawyers had no access to the court files concerning the charges and investigations. Throughout this period, Dr. Neseem Abdel Malek was kept in incommunicado detention.

9. The military authorities had 45 days from the day of pronouncement of the sentence to approve or disapprove the military court's verdict. The source submits that a military commander approved the sentence against Dr. Neseem Abdel Malek on 1 January 1998, and that his "approval" of the sentence was not made public, so as to avoid public foreign criticism.

10. The above allegations are said to reveal the existence of a serious miscarriage of justice in the case of Dr. Neseem Abdel Malek, bearing also in mind that bribery charges frequently carry no more than a three-year prison sentence.

11. The Government, in its response dated 27 July 1998, states that Dr. Neseem Abdel Malek, employed as a director of Al-Khanka Hospital for Mental and Neurological Health, along with others in Military Felony Case No. 66/97, was accused of having perpetrated offences between 1993 and 1997 by demanding sums of money from Saber Farahat Abu Ulla, the first accused, as a bribe in return for granting him long furloughs contrary to the law. According to the Government, the first accused testified that he gave Dr. Neseem Abdel Malek and other accused money, in return for violating their work duties by failing to administer his prescribed medication and by granting him long furloughs contrary to the law.

12. The military court, in its judgement on 13 November 1997, relied on the testimonies of the first accused, Saber Farahat Abu Ulla, and the fourth, fifth, seventh, eighth and tenth accused to the effect that Dr. Neseem Abdel Malek, the third accused, had taken sums of money to enable the first accused to obtain special privileges. The court also relied on the testimony of

Sayyid Isa Ibrahim Muhammad and the brother and sisters of the first accused during investigations conducted by the office of the Attorney-General. The court also relied upon a search of the private clinic of Dr. Neseem Abdel Malek.

13. The third, fourth, fifth and seventh accused were also public servants at the time of commission of the offence and admitted that they, along with Dr. Neseem Abdel Malek, had demanded sums of money from Saber Farahat Abu Ulla in return for granting him long furloughs. The eighth accused was at the time the officer in charge of the patients' entrance gate; he had also demanded a bribe from the first accused in return for allowing him out on furloughs of unlimited duration. The tenth accused was the night duty officer who allowed the first accused to leave.

14. The court sentenced Dr. Neseem Abdel Malek to lifelong penal servitude under articles 103 and 104 of the Penal Code. The fifth, eighth, the tenth to thirteenth accused were also sentenced to 10 years or more penal servitude.

15. The Government, therefore, contends that the complaint was both factually and legally unsustainable. The Government also observed that the trial hearings were public and that a lawyer representing the third accused appeared throughout.

16. The source in turn contends that the statement of the first accused could not be relied upon as he had lost "criminal credibility", being a full-time resident of a mental hospital. The source also suggests that Dr. Neseem Abdel Malek was implicated by the first accused because of his hatred for Christians. It refers to the testimony of the mother, who stated that she did not give any money to any of the doctors. According to the source, Dr. Neseem Abdel Malek was not present in the hospital on 15 September 1997, when he was alleged to have received money from the fifth accused, Ali Gad Ibrahiem.

17. The Government has not specifically replied to the following allegations made by the source:

(a) The reason why Dr. Neseem Abdel Malek, although a civilian, was tried by a military court;

(b) That Dr. Neseem Abdel Malek was kept in solitary confinement for 15 days after 18 September 1997 before being allowed a visit from his lawyer;

(c) That until the start of his trial, the charges against him were not disclosed and his lawyers had no access to the court files concerning charges and investigations, and that throughout this period Dr. Neseem Abdel Malek was kept in incommunicado detention.

18. The Working Group, upon consideration of the above facts, finds it difficult to reach any definitive conclusions on the merits of the case. The conflicting nature of the evidence reflected by the allegations of the source and the response of the Government persuade the Group to refrain from entering upon the merits of the testimonies. The Working Group notes, however, that the specific allegations of the source, which have not been responded to by the Government, as indicated above, justify the conclusion that Dr. Neseem Abdel Malek was not accorded a fair

trial, contrary to articles 9 and 10 of the Universal Declaration of Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights. The violation is of such gravity as to confer an arbitrary character to his continued detention.

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

> The deprivation of liberty of Dr. Neseem Abdel Malek is arbitrary, as being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and falls within category III of the applicable categories to the consideration of the 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 in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 20 May 1999

OPINION No. 11/1999 (INDONESIA)

Communication addressed to the Government on 12 June 1998

Concerning Carel Tahiya, Neuhustan Parinussa, Louis Werinussa, John Rea, Poltja Anakota and Dominggus Pattiwaelapia

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group regrets that the Government has not replied within the 90-day deadline.

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. 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, six Indonesian citizens, Carel Tahiya, Neuhustan Parinussa, Louis Werinussa, John Rea, Poltja Anakota and Dominggus Pattiwaelapia, are active members of the organization Badan Pertahana Perjuangan Kemerdekaan Republik Maluku Selatan, an independence movement which has been operating in the South Moluccas since 1950. While it is not specified on what exact date the above-named individuals were arrested, it transpires from the materials submitted by the source that one of the above-named, Louis Werinussa, a police

officer, was arrested on 13 June 1988 in Ambon. He is said to face prosecution at Mahmilu, Tantui, Ambon, and to be detained in isolation at Pom Abri 8/3 Trikora Korem, 174 Pattimura, Batu Gajah Ambon. The other individuals also appear to have been under detention for considerable periods of time, allegedly purely on account of their struggle for South Moluccan self-determination. According to the source, all of the above are subject to daily interrogations, which includes ill-treatment and abuse.

6. It is alleged that in the above case, several provisions of the international legal instruments relied on by the Working Group in its activities have not been respected.

7. Given that the Government had an opportunity to comment on the allegations but did not do so, the Working Group proceeded to render its opinion based on the information supplied by the source. The Working Group believes that the facts as alleged enable it to render an opinion.

8. Carel Tahiya, Neuhustan Parinussa, Louis Werinussa, John Rea, Poltja Anakota and Dominggus Pattiwaelapia have all been detained for long periods, one of them since 13 June 1988, without any charges. The cause of their detention is clearly on account of their belief in South Moluccan self-determination. Allegations of daily interrogations, ill-treatment and abuse have not been denied. Though the source is not forthcoming as to the details of their incarceration, the Working Group would have expected the Government to clarify the facts, as they are within the knowledge of the detaining authorities. Accordingly, the Working Group believes that each of the above individuals has been detained on account of his beliefs and opinions and in violation of article 19 of the Universal Declaration of Human Rights.

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

> The deprivation of liberty of Carel Tahiya, Neuhustan Parinussa, Louis Werinussa, John Rea, Poltja Anakota and Dominggus Pattiwaelapia is arbitrary, as it is contrary to article 19 of the Universal Declaration of Human Rights, and falls within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

10. Accordingly, the Working Group requests the Government to take the necessary steps to remedy the situation, and bring it in conformity with the standards and principles set forth in the Universal Declaration of Human Rights and to take the adequate initiatives with a view to becoming a State party to the International Covenant on Civil and Political Rights.

Adopted on 20 May 1999

OPINION No. 12/1999 (INDONESIA)

Communication addressed to the Government on 6 December 1993

Concerning José Alexander ("Xanana") Gusmao

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. 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 additional comments.

5. Xanana Gusmao was arrested on 20 November 1992 and charged with leading an armed rebellion against the Government of Indonesia, disrupting national stability, and with illegal possession of firearms in alleged violation of article 1 (1) of Law No. 12 of 1951. Upon conclusion of his trial in Dili, East Timor, held from 1 February to 21 May 1993, Xanana Gusmao was sentenced by the Dili District Court to imprisonment for life. He was found guilty of attempted coup d'état (art. 106 of the Indonesian Penal Code (IPC)), of armed rebellion (art. 108 IPC) and conspiracy to commit a crime within the meaning of articles 104, 107 and 108 of IPC.

6. According to the source, Xanana Gusmao was held in secret military custody for 17 days before representatives of the International Committee of the Red Cross (ICRC) were permitted to see him. During Mr. Gusmao's interrogation, no lawyer was allegedly allowed access to him, in violation of article 54 of the Indonesian Code of Criminal Procedure. It is further alleged that though the Indonesian Legal Aid Foundation (LBH) obtained, on 22 December 1992, a power of attorney from Mr. Gusmao's family, the authorities prohibited LBH from having access to him. Subsequently, Xanana Gusmao declared that his lawyer, Mr. Sudjono, had been appointed by the Strategic Military Intelligence Agency (BAIS), whereas he wished to be represented by LBH, and that the letter mandating the latter had been intercepted by the military authorities and that he was forced to withdraw it and to sign a letter appointing Mr. Sudjono as his lawyer.

7. In the concluding stage of the trial, the court interrupted Mr. Gusmao soon after he started reading out his defence statement in Portuguese, despite the presence of interpreters in the court, thus preventing him from speaking in his own defence. It is further alleged that several witnesses for the prosecution were persons under detention, either awaiting trial or convicted for their role in the November 1991 demonstrations in Dili, which led to suspicions that they may have been testifying under pressure, in fear of reprisal against their relatives or themselves, making their testimonies less reliable. Those awaiting trial were said to be in a particularly delicate position, since their statements at Mr. Gusmao's trial could be used against them at their own trials.

8. The Government, in its response of 26 January 1994, argued that the allegations submitted to the Working Group had no foundation. According to the Government, while awaiting trial Xanana Gusmao was treated with consideration in a manner consistent with international standards. The Government's position is that when two legal aid organizations offered their services to Mr. Gusmao he turned them down, accepting instead the services of Mr. Sudjono of the Indonesian Advocates Association. Mr. Sudjono, who acted as Mr. Gusmao's lawyer, was apparently assisted by two other lawyers and a legal adviser who is a specialist in criminal law. It is also stated that during the trial Mr. Sudjono had been given full access to Mr. Gusmao.

9. The Government maintains that at the trial Mr. Gusmao was allowed to read his own defence before the court. The interruption in the reading of the statement was because the court viewed it as irrelevant to the legal argument. The Government's position is that what may be stated before the court as part of the defence of the accused is what is termed a "legal defence" and not any statement which may be called a defence statement. Such a statement must satisfy all the elements of a defence statement before being allowed to be read as such. The court, however, is said to have considered Mr. Gusmao's defence statement before giving its verdict. The allegation that several witnesses for the prosecution had testified under pressure was also denied by the Government. During cross-examination of these witnesses Mr. Gusmao is alleged to have admitted responsibility for various crimes, including murder and robbery committed by him and his men, as well as for illegal possession of arms.

10. The Government concludes that Xanana Gusmao's trial was carried out in full conformity under the Indonesian applicable laws, that it was fair and in accordance with the existing criminal procedure. There is, according to the Government, no legal basis for

questioning the verdict of the Indonesian tribunal. Though Mr. Gusmao had a right of appeal to a higher court, he chose not to avail himself of this right and instead appealed to the President for clemency, which the Government reports was granted by reducing his prison sentence from life imprisonment to 20 years, in accordance with article 14 of the Indonesian Constitution of 1945 and Law No. 3/1950.

11. The source, whose comments were sought on the Government's response, reiterated its position. It reaffirms that Xanana Gusmao was not permitted to be represented by a lawyer of his choice, the Indonesian Legal Aid Foundation. The LBH lawyers were apparently not permitted to visit him, despite having been given a power of attorney by his relatives. In a letter he wrote to LBH on 30 November 1993 he declared: "I was prohibited from accepting your offer of assistance". His alleged acceptance of LBH's offer is said to have been retained by the authorities. Mr. Sudjono is said to have been appointed six days before the trial. Inadequate translation services apparently handicapped Mr. Gusmao's defence. Not being fully conversant with either the Indonesian language or English, he could only understand in a general way the defence mounted by Mr. Sudjono. Even the clemency was apparently not sought by Mr. Gusmao, but by Mr. Sudjono without his instructions. The conduct of Mr. Sudjono as defence lawyer has also been questioned by Mr. Gusmao on the grounds that he colluded with the prosecution.

12. Having discussed the case at its tenth session, the Working Group adopted an interim decision on 30 September 1994 (No. 34/1994; see E/CN.4/1995/31/Add.2), stating that it considered itself to be insufficiently informed and deciding to postpone its decision to a later date so as to enable it to conduct an inquiry to ascertain the veracity of the allegations submitted to it and determine whether the Government's rebuttal was well-founded.

13. Aware that the Commission on Human Rights, by its resolution 1993/97, had urged, inter alia, the Government of Indonesia to invite certain special rapporteurs and the Working Group on Arbitrary Detention to visit East Timor and to facilitate the discharge of their mandates, in a letter dated 8 June 1995 the Working Group requested the Government of Indonesia to authorize one of its members to visit Indonesia and East Timor in order to clarify the case, in particular by visiting Xanana Gusmao.

14. It was ultimately possible to conduct the visit only because of the changes which had taken place since the election of President J.B. Habibie. A mission to Indonesia by a delegation from the Group took place from 31 January to 12 February 1999.

15. At his meeting with the delegation, Xanana Gusmao provided precise and detailed information essentially confirming the allegations submitted to the Group in 1993, especially regarding a point considered by the Group to be essential to the rights of the defence in a fair trial, specifically the role of the lawyer ultimately appointed to defend Xanana Gusmao.

16. He noted that when he had addressed the court in his own defence at the beginning of the trial, he had stated that the counsel who was to assist him had been appointed by the Military Intelligence Agency, whereas his own decision had been to be represented by the Indonesian Legal Aid Foundation, and, especially, that his letter giving the Foundation power of attorney

had been intercepted by the military authorities, who had forced him to withdraw it and to sign a letter appointing Mr. Sudjono instead, in violation of articles 54 to 60 of the Code of Criminal Procedure.

17. When Xanana Gusmao's lawyers met with the delegation, they also confirmed that no other lawyer had been authorized to assist him during questioning. Despite the fact that his family had designated the Foundation for that purpose, the authorities had consistently refused to comply with the request.

18. In the light of the information available and the verifications it has conducted, the Group notes that:

(a) Xanana Gusmao was held in solitary confinement for a period of 17 days after his arrest, which the Government s reply does not deny;

(b) Reasonable doubt exists concerning the reliability of the witnesses for the prosecution, as the Group ascertained through its meeting with Saturnino da Costa Belo, who had been detained for the purpose of testifying against Mr. Gusmao;

(c) Mr. Gusmao's freedom to choose his lawyer, which is one of the essential guarantees of the right to a fair trial, was violated under conditions so serious as to cast doubt on the fairness of the entire trial, infringing articles 1, 13 and 15 of the Basic Principles on the Role of Lawyers.

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

> The deprivation of liberty of Xanana Gusmao is arbitrary, since it is contrary to articles 10 and 11 of the Universal Declaration of Human Rights and falls within category III of the categories applicable in the consideration of the cases submitted to the Working Group.

20. Having given this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in accordance with the standards and principles set forth in the Universal Declaration of Human Rights.

Adopted on 21 May 1999

OPINION No. 13/1999 (VIET NAM)

Communication addressed to the Government on 24 November 1998

Concerning Tran Van Luong (born Truong Van Lân)

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regrets that the Government has not transmitted its observations and information as requested.

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 attention 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 related to 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, or, where States Parties are concerned, in 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 international standards 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. In the light of the allegations made, the Working Group would have welcomed the Government's cooperation. The Working Group believes, however, that it is in a position to give an opinion on the case, based on the following facts.

5. Mr. Tran Van Luong (born Truong Van Lân), former deputy of the Republic of Viet Nam (South), born in 1940 and normally resident in Cam Ranh, was arrested on 9 December 1985 on the road between the district of Go Vâp (Ho Chi Minh Ville) and the church of Notre Dame de Ho Chi Minh Ville by agents of the Công An (Public Security). He was allegedly arrested without being shown an arrest warrant or any other decision issued by a public authority.

6. Mr. Tran Van Luong was sentenced to death, together with two bonzes of the Unified Buddhist Church of Viet Nam, Thich Tue Sy and Thich Tri Sieu, at a trial on 21 and 22 September 1988, by virtue of article 73 of the Vietnamese Penal Code ("attempt to overthrow the power of the people"). His death sentence having been commuted to life imprisonment, he is currently detained in Camp T5, Thanh Cam, Province of Thanh Hoa.

7. Mr. Tran Van Luong had written pamphlets calling for the respect for human rights and had been distributing them on the road between the district of Ho Chi Minh Ville and the church of Notre Dame of Ho Chi Minh Ville. He was arrested on the spot for that activity and his pamphlets were confiscated. According to the source, Mr. Tran Van Luong's arrest and detention are arbitrary, since he was merely exercising his right to freedom of expression, as enshrined in article 19 of the International Covenant on Civil and Political Rights, to which Viet Nam is a party.

8. The source comments that Mr. Tran Van Luong's trial took place almost three years after his arrest, which is not in conformity with the "promptly" rule specified in article 9, paragraph 3, of the International Covenant on Civil and Political Rights. The three-year delay also infringed article 71 of the Vietnamese Code of Criminal Procedure, which allows for a delay of four months, renewable once or twice, between the time of arrest and the time of judgement in the case of "serious offences". The source further states that the trial itself was unfair and did not comply with the guarantees in article 14 of the Covenant: Mr. Tran Van Luong was unable to choose legal assistance; the trial was held in camera and the judges did not offer sufficient guarantees of impartiality, especially in a trial described as political which involved matters of "national security".

9. The source further recalls that the charge brought against Mr. Tran Van Luong, which led to his being sentenced to death, was that of "attempting to overthrow the power of the people". Mr. Tran Van Luong has always denied having committed such a crime and the only evidence supporting the charge was the pamphlets he had distributed. Those pamphlets, however, did no more than call for the respect of human rights and democratic freedoms and were in no way an incitement to any form of violence.

10. In the light of the allegations, which have not been denied by the Government although it had the opportunity to do so, the Working Group finds that Mr. Tran Van Luong was arrested and detained solely on the grounds that he had written and distributed pamphlets calling for the respect for human rights, whereas in so doing he was merely exercising his right to freedom of expression, as enshrined in article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

11. The Working Group points out that article 73 of the Penal Code invoked in the charges against Mr. Tran Van Luong, who was sentenced to death for "attempting to overthrow the power of the people", has already given rise to several comments on the part of the Working Group, both in its report on its visit to Viet Nam (see E/CN.4/1995/31/Add.4, para. 35) and in the opinions issued following allegations of arbitrary detention brought against the country.

12. In the Working Group's opinion, article 73 of the Penal Code, which is part of Viet Nam's national security legislation, draws no distinction as to the use or otherwise of violence or incitement to violence. Moreover, the wording of the article is so imprecise that it could result in penalties being imposed not only on persons using violence for political ends, but also on persons who have merely exercised their legitimate right to freedom of opinion or expression, as in the case of Mr. Tran Van Luong (see paragraph 35 of the above-mentioned report).

13. In the Working Group's opinion, as stated in previous opinions (see opinion No. 1/1998), in a case where the final judgement of a country's court of last resort is in conformity with national legislation but not with international human rights instruments, that judgement must be considered arbitrary within the terms of Commission on Human Rights resolution 1997/50.

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

> The detention of Tran Van Luong is arbitrary, since it is contrary to article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, and falls within category II of the categories applicable in the consideration of cases submitted to the Working Group.

15. Having stated this opinion, the Working Group requests the Government:

(a) To take the necessary steps to remedy the situation, in accordance with the standards set forth in the International Covenant on Civil and Political Rights; and

(b) To consider the possibility of amending its legislation to bring it into line with the relevant international standards it has accepted.

Adopted on 14 September 1999

OPINION No. 14/1999 (PALESTINE)

Communication addressed to the Palestinian Authority on 23 October 1998

Concerning Youssef Al-Rai and Ashaher Al-Rai

Palestine is not a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government of the Palestinian Authority.

2. The Working Group regrets that the Government of the Palestinian Authority has not replied to the request for information.

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

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

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

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

4. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Palestinian Authority. In the absence of any information from the Palestinian Authority, 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.

5. According to the source, two Palestinian cousins, Youssef Al-Rai and Ashaher Al-Rai, were arrested on 3 September 1995 on suspicion of having killed two villagers in Wadi Qalt on 18 July 1995. On 13 September 1995, they were sentenced to seven years' imprisonment for

murder. Their trial allegedly lasted no more than half an hour. It was held in the State Security Court, which was composed of three military judges who appointed a soldier as the legal representative of the accused. The two cousins could not speak with their lawyer, who was unable to defend them during the trial. They have been detained in the Jericho Detention Centre since their arrest.

6. According to the source, the only evidence justifying the two men's sentence was the deposition by Jamal Amin Al-Hindi, another prisoner, who was questioned by the Israeli authorities on 2 September 1995. They transmitted his deposition to the Palestinian security services. After his release in 1995 and again during a press conference on 17 September 1998, Jamal Amin Al-Hindi said that he had lied; in fact, he had never met the two cousins. On 24 September, he publicly admitted that he had been forced to give false evidence against the cousins, under torture.

7. According to the source, the two accused were deprived of their right to a fair trial, contrary to articles 9 and 10 of the Universal Declaration of Human Rights.

8. The allegations by the source have not been refuted by the Palestinian Authority, which had had an opportunity to do so. In accordance with its methods of work, the Working Group is able to consider whether the right to a fair trial provided for in article 10 of the Universal Declaration of Human Rights and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which was adopted by the United Nations General Assembly in resolution 43/173 of 9 December 1988, has been violated in the present case.

9. The Working Group considers that the Al-Rai cousins' sentence was based on a deposition which had been obtained by force. Article 5 of the Universal Declaration of Human Rights provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". In admitting a deposition obtained by force as evidence, the Palestinian judicial authorities violated that provision, as well as articles 9 and 10 of the Universal Declaration guaranteeing the right to a fair trial and principles 21 and 27 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. They also violated principle 17 of the Body of Principles, which provides that "A detained person shall be entitled to have the assistance of a legal counsel", as well as principle 36. This violation is of such gravity as to confer an arbitrary character on the detention of Youssef and Ashaher Al-Rai.

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

> The deprivation of the liberty of Youssef Al-Rai and Ashaher Al-Rai is arbitrary because it is in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and of principles 17, 21, 27 and 36 of the Body of Principles for the Protection of

All Persons under Any Form of Detention or Imprisonment and comes within category III of the categories applicable to the consideration of cases submitted to the Working Group.

11. Consequently, the Working Group requests the Palestinian Authority to take the necessary steps to remedy the situation in order to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

Adopted on 15 September 1999

OPINION No. 15/1999 (EGYPT)

Communication addressed to the Government on 15 June 1998

Concerning Mahmoud Mubarak Ahmad

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regrets that the Government has not replied to its request for information.

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

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

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

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

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.

5. According to the source of the communication, of which a summary was transmitted to the Government, Mahmoud Mubarak Ahmad, a 28-year-old medical doctor, single, who was employed in a hospital in the Cairo district of Kitkata, was arrested on 24 January 1995 by officers of the State Security Investigations Department (SSI) as he was driving from Kitkata to the province of Sohag in Upper Egypt. Initially, he was held at the SSI branch offices in Sohag province, and was then transferred to Sohag prison, before again being transferred to Istiqbal Tora prison.

6. According to the source, no one was informed of Mr. Mubarak Ahmad's arrest until 14 July 1995, when his family learned that he was detained at Istiqbal Tora. Mahmoud Mubarak Ahmad reportedly was accused of membership in a secret organization; it is submitted that towards the end of 1995, an unspecified tribunal ordered his release. Instead of being released, however, he was subjected to a renewed detention order and was transferred to Al-Wadi Al-Gadid prison, where he continues to be held, without any charges and without trial. His health and treatment in prison are not known.

7. It is contended that in the instant case, articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, to which Egypt is a party, have not been respected.

8. The allegations by the source have not been refuted by the Government, which had an opportunity to do so. In accordance with its methods of work, the Working Group is in a position to consider whether the right to a fair trial guaranteed by 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 has been violated in the present case.

9. The Working Group considers that Mahmoud Mubarak Ahmad has been under detention for four years without an arrest warrant or decision by a body vested with public authority justifying this deprivation of liberty. He is detained without charge or trial at Al-Wadi Al-Gadid prison. In addition, from 24 January to 14 July 1995, he was held incommunicado in a secret place. The violation of articles 9 and 10 of the Universal Declaration and articles 9 and 14 of the International Covenant on Civil and Political Rights, as well as principles 35 to 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by General Assembly resolution 43/173 of 9 December 1988, is of such gravity as to confer an arbitrary character on the deprivation of liberty of Mahmoud Mubarak Ahmad.

10. In the light of the foregoing, the Working Group gives the following opinion:

> The deprivation of the liberty of Mahmoud Mubarak Ahmad is arbitrary because it is in contravention of articles 9 and 10 of the Universal Declaration of Human Rights, articles 9 and 14 of the International Covenant on Civil and Political Rights and principles 35 to 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and comes within category III of the categories applicable to the consideration of cases submitted to the Working Group.

11. Consequently, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Mahmoud Mubarak Ahmad and to bring it into conformity with the provisions of the International Covenant on Civil and Political Rights, to which Egypt is a party.

Adopted on 15 September 1999

OPINION No. 16/1999 (CHINA)

Communication addressed to the Government on 11 January 1999

Concerning Liu Nianchun

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Group transmitted the reply of the Government to the source and received its comments. The Group 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 brought to the attention of the Working Group, Liu Nianchun, a labour activist and veteran Democracy Wall campaigner, was arrested on 21 May 1995 after signing several petitions. He was apprehended at his home in Beijing, and allegedly held incommunicado for one year without charges and without trial. In July 1996, he was sentenced to three years of re-education through labour.

6. Liu decided to challenge his administrative sentence by suing the Public Security Bureau and the Re-education Through Labour Committee. His case was heard on 17 September 1996.

Reportedly, no friends or relatives were able to attend the hearing, and Liu was only allowed to meet his lawyer a few hours before the trial. Two months later, his case was rejected. At the time of submission of the case, Liu Nianchun remained detained at Shuanghe Labour Camp, and his health allegedly was poor. According to the source, his sentence was extended by more than 200 days in May 1997, again without a trial.

7. In its reply, the Government confirms that Liu Nianchun was assigned to three years' re-education through labour on 14 May 1996, by decision of the Beijing Municipal Re-education Committee.

8. The Government notes that Liu Nianchun objected and on 16 July 1996 requested his wife, Chu Hailan, to submit an administrative appeal to the courts. On 17 September 1996, the Chaoyang District People's Court in Beijing conducted a public hearing with Chu and the lawyers she had hired. The court determined that the facts in the Re-education Through Labour Committee's decision were clear, that the evidence was ample, that the law had been correctly applied and the proper legal procedure observed. It therefore upheld the Committee's decision assigning Liu Nianchun to re-education. Liu objected and appealed to the Beijing No. 2 Higher People's Court. On 18 March 1997, a collegiate bench constituted by the court conducted a hearing, in which it found that the facts in the decision of the court of first instance were clear, that the law had been correctly applied, and that the trial procedure had been lawful. It accordingly rejected the appeal and upheld the original judgement.

9. Subsequently, considering Liu's appearance and physical condition in the re-education facility, the Chinese law enforcement authorities decided to allow him to seek medical assistance. Liu and his relatives requested that he be allowed to go to the United States to seek treatment and visit his family, and permission was obtained. He and his family left for the United States on 20 December 1998. According to the Government, his period of re-education was never extended.

10. The Working Group has taken note of the release of Liu Nianchun for health reasons. Having examined all the information submitted to it, and without determining whether the detention of Liu Nianchun was arbitrary or not, the Working Group accordingly decides, and pursuant to paragraph 17 (a) of its working methods, to file the case of Mr. Liu Nianchun.

Adopted on 15 September 1999

OPINION No. 17/1999 (CHINA)

Communication addressed to the Government on 11 January 1999

Concerning Liu Xiaobo (43 years old)

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Group transmitted the reply of the Government to the source and received its comments. The Group is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto, as well as the observations by the source.

5. According to the source, Liu Xiaobo was detained in October 1997 after having disseminated two open letters which called upon the Government to guarantee freedom of speech, press and religion. He was allegedly detained without charge or trial and sentenced to three years of re-education through labour. He had already been detained previously, for eight months, between May 1995 and January 1996, for his involvement in a petition campaign.

6. In its reply, the Government confirmed that Liu Xiaobo had been assigned to three years of re-education through labour by the Beijing Municipal Re-education Through Labour Committee.

7. The Government provided the following details:

(a) Liu Xiaobo, sentenced together with others, repeatedly stirred up trouble and disrupted public order. When he was sentenced by the Committee, he objected and hired a lawyer to file an appeal on his behalf;

(b) The Xuanwu District People's Court in Beijing took up the case in March 1997. Before the trial opened, Liu had seen his common-law partner Liu Xia (to whom he is now married) and his appointed lawyers. The court, having determined that the facts of Liu's wrongdoing were clear and the decision to assign him to re-education had been proper, upheld the decision of the Re-education Through Labour Committee by judgement of 4 April. Liu has since submitted a fresh appeal;

(c) According to the Government, in assigning Liu Xiaobo to re-education through labour, the Chinese authorities acted in strict accordance with the appropriate laws and followed thorough and strict procedures. His rights have been fully respected and protected. For these reasons, there can be no question of "arbitrary detention".

8. Without determining the question of whether Liu Xiaobo has benefited from all the guarantees for a fair and impartial trial, the Working Group observes that the Government, in its reply:

(a) Firstly, basically confirms the various steps of the proceedings taken against Liu Xiaobo without refuting in essence the allegation that he was prosecuted and sentenced for disseminating two open letters calling upon the Government to respect freedom of speech, press and religion;

(b) Secondly, only makes mention of the fact that Lui Xiaobo "repeatedly stirred up trouble and disrupted public order" without giving any supporting evidence to back up these charges beyond the two open letters cited above.

9. The Working Group therefore deems that Liu Xiaobo was prosecuted and sentenced to the administrative measure of re-education through labour, and therefore deprived of his liberty, simply for exercising fundamental rights which are laid out in articles 18 and 19 of the Universal Declaration of Human Rights: the right to freedom of conscience and religion (art. 18) and the right to freedom of opinion and expression (art. 19).

10. Noting also that no one denies that Liu Xiaobo exercised these rights peacefully, the Working Group recalls paragraph 94 of its report to the Commission on Human Rights on its visit to the People's Republic of China (E/CN.4/1998/44/Add.2), which reads as follows:

> "During the course of the visit, the members of the Working Group delegation inquired of the authorities whether the measure of re-education through labour was applicable to

persons who disturbed the public order by peacefully exercising their fundamental freedoms guaranteed by the Universal Declaration of Human Rights (such as freedom of opinion and expression, religion, etc.), and who were not prosecuted under the criminal law. The delegation was informed that the measure of re-education through labour was only applied to those who had committed minor offences under the common law and who were not required to be formally prosecuted. The Working Group strongly believes that if the measure is applied to persons who disturb the public order as indicated, the commitment of such individuals to re-education through labour would clearly be arbitrary."

11. It must be concluded from the above that the detention of Liu Xiaobo may be regarded as being in conformity with national legislation. However, the Working Group is of the opinion that this legislation is contrary to the provisions of articles 18 and 19 of the Universal Declaration of Human Rights.

12. In light of the above, the Working Group renders the following opinion:

The re-education through labour sentence of Liu Xiaobo is arbitrary, as it contravenes articles 18 and 19 of the Universal Declaration of Human Rights and falls within category II of the categories applicable to the consideration of the cases submitted to the Working Group.

13. Consequently, the Working Group requests the Government to take all necessary steps to implement its recommendations made after its visit to China, in particular the recommendation that re-education through labour should not be applied to individuals who have merely peacefully exercised their right to freedom of opinion and expression.

Adopted on 15 September 1999

OPINION No. 18/1999 (ETHIOPIA)

Communication addressed to the Government on 12 January 1999

Concerning Moti Biyya, Garuma Bekele and Tesfaye Deressa

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group regrets that the Government has not replied to its request for 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. 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 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.

5. Moti Biyya, a writer and journalist born in 1957, Garuma Bekele, a former journalist and human rights activist born in 1960, and Tesfaye Deressa, a songwriter, poet, journalist and

human rights activist born in 1959, were arrested in October 1997 in Addis Ababa by the Ethiopian police. The source does not know whether they were presented with a warrant or other decision by a public authority upon arrest.

6. It is reported that all three men were arrested as part of a wave of arrests of Oromo journalists and political activists. All three had been working for the newspaper "Urji" ("Star"), a private Amharic-language newspaper which reports primarily on Oromo issues. The newspaper had documented human rights abuses against Oromos suspected of links with the Oromo Liberation Front, a military organization fighting the Government in the Oromo region, and had published interviews with leaders of this organization. On the other hand, the newspaper has never openly endorsed the OLF's armed activities. Garuma Bekele, as well as being the paper's manager, is also general secretary of the banned Human Rights League. Moti Biyya, as well as writing for "Urji", has published two books about Oromo history and culture.

7. The three journalists reportedly were initially held under the Ethiopian Press Law, because of an article published by "Urji" criticizing the police killing of three suspected OLF members in Addis Ababa. In January 1998, the charges of armed conspiracy and providing support to the armed activities of the OLF were reportedly brought against the three, accusing "Urji" of being a "mouthpiece" for the OLF but giving no further details of these charges. Since January 1998, no date for the trial of the three has been set, and there has been no further clarification of the charges against them. It is assumed that the authorities have deemed that the simple reporting of abuses against OLF suspects was sufficient evidence of association with the armed activities of the OLF.

8. According to the source, the unsubstantiated charges against the three men, and the fact that some 15 months after their arrest, no trial date has been set, are enough to qualify their detention as arbitrary. The source suspects that the three men are detained primarily to silence their critical reporting of the Ethiopian Government's human rights violations against the Oromo ethnic community.

9. The source contends that in the instant case, the Government has violated article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, which guarantee the right to freedom of expression, as well as article 9 of the Universal Declaration and of the Covenant, which guarantee an individual's right not to be subject to arbitrary detention. Furthermore, the Government's action is said to violate individual rights set out in Ethiopia's Constitution.

10. The Working Group notes that the above-mentioned journalists were detained basically for writing articles in the newspaper "Urji" criticizing abuses against Oromos suspected of links with OLF and for publishing interviews with leaders of that organization. It has not, however, been proved that they have openly supported OLF activities.

11. The Group is of the opinion that by their actions Moti Biyya, Garuma Bekele and Tesfaye Deressa were merely exercising their right to freedom of expression and that their

detention is therefore arbitrary as being in violation of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights (category II).

12. In the light of this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in accordance with the provisions of article 19 of the International Covenant on Civil and Political Rights, and to consider amending its legislation so as to bring it into conformity with the relevant standards of international law accepted by the State.

Adopted on 15 September 1999

OPINION No. 19/1999 (CHINA)

Communication addressed to the Government on 11 January 1999

Concerning Li Hai

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. Its mandate was clarified and extended by resolution 1997/50. Pursuant to its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Group transmitted the reply provided by the Government to the source, which did not comment on the Government's reply. The Group is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. According to the source, Li Hai had collected the names and the particulars of victims of human rights violations since the late 1980s and had conveyed his information to independent human rights organizations based abroad.

6. He was apprehended on 31 May 1995 but was not formally arrested until 5 April 1996, when he was charged with "leaking State secrets". His trial took place on 21 May 1996. At its conclusion, he was sentenced to nine years' imprisonment and two years' deprivation of all his political rights. Although the sentence declared the trial to be an open one, family members were not allowed to attend the trial. The appeal of Li Hai was rejected in January 1997. It is reported that Li Hai is in poor health.

7. In its reply, the Government confirms that Li Hai was sentenced by the Chaoyang District People's Court in Beijing to nine years' imprisonment for "foraging into State secrets" and that his appeal was rejected by the Beijing Higher People's Court, which upheld the lower court's decision. The Chang'an Legal Office in Beijing assigned Mr. Wan Lindan to conduct Li's defence in both instances. Moreover, the Government provides the following clarifications:

(a) At the beginning of 1993, Li Hai sought out and amassed a large volume of State secrets for foreign organizations, in breach of Chinese law;

(b) Because the case related to State secrets, the two courts each conducted closed hearings, in accordance with article 111 of the Code of Criminal Procedure. Regarding the claim in the communication that "the written judgement states that the trial was public, but Li's family was not allowed into the court", it transpired, upon investigation, that because of a proof-reading error, the original statement in the written judgement passed on Li in first instance that the trial was "not open to the public" was printed as "open to the public". The court of second instance showed the original of the lower court's judgement to defence counsel, and it was acknowledged that there had been a proof-reading error;

(c) According to the Government, Li Hai is now serving his sentence in a Beijing prison and is in normal health.

8. In the opinion of the Working Group, the foregoing shows that, without prejudice to the question whether Li Hai enjoyed guarantees of the right to a fair trial, as stated in the Government's reply, he is accused of having sought out and amassed a large volume of State secrets for foreign organizations, in breach of Chinese law, but no details are given on the nature of such secrets and the source's allegations that he was collecting names and particulars of individual cases of human rights violation is not contested.

9. Before expressing an opinion on this case, the Working Group considers that it should first answer the following question: can information on allegations or, a fortiori, evidence of human rights violations legally be characterized as State secrets?

10. In the light of its experience, the Working Group finds that:

(a) Under article 5 (c) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right "to communicate with

non-governmental or intergovernmental organizations", for the purpose of promoting and protecting human rights and fundamental freedoms. According to article 6 (a) of the Declaration, everyone has the right, individually and in association with others, "to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems";

(b) Many procedures established by the United Nations and, in particular, by the Economic and Social Council and the Commission on Human Rights with a view to guaranteeing the promotion and protection of human rights, encourage and legitimize the collection of such information;

(c) Such a characterization would suggest that the Office of the United Nations High Commissioner for Human Rights, established by General Assembly resolution 48/141 creating the post of United Nations High Commissioner for Human Rights, is a body which keeps a large volume of State secrets;

(d) The International Covenant on Civil and Political Rights and, in particular, its article 41 on the remedy of inter-State communications, invites States themselves, not only individuals, to bring situations of human rights violations to the attention of the Human Rights Committee.

11. On the basis of the foregoing, the Working Group is of the opinion that:

(a) Such a characterization would be contrary to the international procedural standards prescribed in the field of human rights and that it can therefore not be regarded as constituting an offence;

(b) Since such information cannot be characterized as being a State secret, it is information within the meaning of article 19 of the Universal Declaration of Human Rights, which provides that freedom of expression "includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" and, since its dissemination, even outside the territory, is guaranteed by the above-mentioned article 19, such an initiative cannot, of itself, constitute an offence, much less an aggravating circumstance.

12. In other words, the Working Group considers that collecting and disseminating of information relating to allegations and, a fortiori, to evidence of human rights violations are ways of exercising the right to freedom of expression guaranteed by article 19 of the Universal Declaration of Human Rights.

13. In the light of international standards, this legal analysis demonstrates that Li Hai was sentenced to a term of imprisonment for having exercised the right to freedom of expression guaranteed to every person by the Universal Declaration of Human Rights, article 19 of which states that this right includes the right to impart information regardless of frontiers.

14. In view of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Li Hai is arbitrary, since it is contrary to article 19 of the Universal Declaration of Human Rights and falls within category II of the categories applicable in the consideration of cases submitted to the Working Group.

15. Consequently, the Working Group requests the Government to take the necessary measures to remedy the situation in order to bring its legislation on State secrets into line with international standards and principles.

Adopted on 16 September 1999

OPINION No. 20/1999 (ALGERIA)

Communication addressed to the Government on 12 August 1997

Concerning Rachid Mesli

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group expresses its appreciation to the Government for providing timely information.

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

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

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

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

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the Government's reply to the source of the communication and the source made a number of comments.

5. Mr. Rachid Mesli, a human rights lawyer, was arrested on 31 July 1996. An urgent appeal on his behalf was sent to the Government on 15 August 1996. According to information received from the source, he was tried on 16 July 1997 in the court of Tizi-Ouzou (100 km to the east of Algiers) and was sentenced to three years' imprisonment for "encouraging terrorism" (article 87 (bis) 4 of the Algerian Penal Code), following a trial in which international standards concerning the right to a fair trial were allegedly not respected.

6. Allegedly, it was not possible for international observers or his family to attend the trial, which was held in camera, and the defendant's lawyers lodged a complaint about the failure of

the court to call any witnesses for the defence. Rachid Mesli was charged with belonging to a terrorist group (articles 86 and 87 (bis) 3 of the Penal Code), and during the trial both the prosecutor and his lawyers referred to this charge only.

7. However, when the court announced the verdict, Mr. Mesli was acquitted of the charges for which he had been tried but at the same time was found guilty of "encouraging terrorism" (article 87 (bis) 4 of the Penal Code), a charge which did not appear in the indictment against him and which was not mentioned during the trial itself. It is claimed that this contravenes article 14 of the International Covenant on Civil and Political Rights and also article 305 of the Algerian Penal Code, which states that if the court wishes to add a charge to the defendant's original indictment, then the proceedings must be reopened so as to allow both the prosecution and the defence to present their arguments.

8. The source adds that the allegations concerning Mr. Mesli's arrest (his abduction and incommunicado detention during which he was reportedly subjected to ill-treatment and threatened with death) were not taken into consideration by the court. The source believes that Rachid Mesli was sentenced because of his human rights activities.

9. In its response the Algerian Government makes the following main points:

(a) Mr. Rachid Mesli was not abducted but was taken in for questioning by the security services on 31 July 1996 in connection with terrorism-related cases;

(b) He acknowledged that he had been in contact with certain terrorist groups, which he had met with in secret on four occasions;

(c) After his time in custody, which passed without any incident of note, he was brought before the prosecutor and then the examining magistrate, who, in accordance with due procedure, charged him with forming a terrorist group in order to inflict massacre or destruction, sow terror among the population at large and impede the smooth running of public institutions, all of which are offences under articles 77, 84, 87 (bis) and 87 (bis) 1 of the Penal Code;

(d) Although Mr. Mesli did not ask to see a doctor during his custody, the examining magistrate, at the request of his lawyers, did order a medical inspection by a medical examiner. In his report the examiner stated that Mr. Mesli was fully in possession of his mental faculties and that he had an injury to his right eye rendering him unfit to work for two days. On the subject of this injury, neither the party concerned nor his lawyers deemed it appropriate to lodge a complaint;

(e) At the end of the pre-trial proceedings, Mr. Mesli was brought before the correctional court of Tizi-Ouzou, where he was sentenced on 16 July 1997 to three years' imprisonment and fined 10,000 Algerian dinars, after the court had reclassified the charges against him as constituting advocacy of crime, an offence under articles 87 (bis) and article 87 (bis) 4 of the Penal Code by application of article 306 of the Code of Penal Procedure. The criminal court had in fact previously responded in the negative to questions relating to the two charges levelled against him by the committal order of the indictment division;

(f) His trial took place publicly and was widely reported by the media. No one, whether an observer or a member of his family, was denied access to the courtroom;

(g) Mr. Mesli was defended by a group of 39 lawyers, 25 of whom were present in court. After consultation, they decided that nine of them should plead on Mr. Mesli's behalf;

(h) No request to defend him was submitted by a foreign lawyer.

10. The response of the Government of Algeria was transmitted to the source on 11 May 1998 for comments, as well as for answers to detailed questions put by the Working Group. In reply, the source reaffirmed its belief that Rachid Mesli is a prisoner of conscience, who was detained solely because of his activities as a human rights advocate.

11. On 23 December 1998, the Working Group asked the source to provide it with a copy of the Algerian Penal Code, in French if possible, in order to allow it to render an opinion during its twenty-fourth session. The source responded on 2 March 1999 by transmitting to the Group a copy of article 305 of the Algerian Penal Code, the only relevant provision in the source's opinion, and did not send the entire Code.

12. The source regrets that the Group has not yet given a ruling on the case of Mr. Mesli. Furthermore, according to the source, on 8 December 1998, the Supreme Court overturned the sentence of three years' imprisonment handed down against Mr. Mesli, who should therefore be retried. Finally, the source's letter drew the attention of the Group to the urgency of giving an opinion on the detention of Mr. Mesli, who will complete his sentence in July 1999.

13. The Working Group notes that the Government's response was transmitted to the source on 28 April 1998 for observations. Unfortunately, the source, in further comments dated 2 March 1999, merely reiterates the belief that Rachid Mesli is a prisoner of conscience, without providing any other elements which would serve to demonstrate that the detention of Mr. Mesli is attributable to his work as a human rights advocate.

14. In order to establish whether Mr. Mesli belongs to, or collaborates with, a terrorist group, it is essential to know whether any contacts he may have had with persons suspected of belonging to armed groups were in his capacity as defender of individuals detained, persecuted or illegally confined, or in that of a member of, or collaborator with, such groups. Neither the source nor the Government was able to produce information allowing this point to be determined.

15. In the light of the foregoing, the Working Group, in accordance with paragraph 17 (d) of its working methods, has decided to shelve the case of Mr. Rachid Mesli provisionally, since it is not able to obtain sufficient information on the case.

Adopted on 16 September 1999

OPINION No. 21/1999 (CHINA)

Communication addressed to the Government on 3 September 1998

Concerning Wang Youcai, aged 32

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. In accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Group transmitted the Government's reply to the source, which did not comment on the Government's reply. The Working Group is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. According to the source, Mr. Wang Youcai had, on 25 June 1998 and with some other individuals, lodged an application to register a new political party, called the "Chinese Democratic Party". The application was lodged at the provincial Civil Affairs Department, which informed Wang Youcai and the others to return the following Monday, 29 June. On that date, Wang Youcai was taken away from his home by plainclothes policemen and detained for interrogation for a total of eight hours.

6. After releasing him, the police reportedly warned him that it would take further action if the group did not drop its plan to register the party. Later, the police searched the home of Wang Youcai and confiscated some of his and the group's papers, without producing a search warrant.

7. The family of Wang Youcai was reportedly informed later by the police to bring clothing and his daily necessities to the Mishiang Detention Centre in Hangighou, where he was then being held. At some point, probably in August 1998, he was released from detention and placed under house arrest.

8. In its reply, the Government explains that in 1989, Wang Youcai had been sentenced to three years' imprisonment and two years' deprivation of political rights for incitement to subversion of State power. In 1991, he was released on parole. In June 1998, in order to subvert State power, Mr. Wang plotted to set up an illegal organization called the "Democratic Party of China". He established the "Zheijiang Provincial Preparatory Committee of the Democratic Party of China" and drafted "regulations" and "declarations".

9. On 21 December 1998, the Huangzhou Municipal Intermediate People's Court of Zhejiang Province publicly tried Mr. Wang's case in accordance with the law. After hearing statements from both the prosecutor and Mr. Wang's defence counsel, the court decided that, pursuant to the relevant provisions of the Chinese Criminal Code, Wang Youcai's acts were constitutive of the crime of attempted subversion of State power; and since Mr. Wang was a recidivist, he had to be punished according to law. The court sentenced Wang Youcai to 11 years' imprisonment and 3 years' deprivation of political rights.

10. The Government notes that China's Constitution and other laws clearly lay down that Chinese citizens have the right to freedom of speech, publication, assembly and association. The citizens' exercise of their rights is guaranteed by law. Under Chinese law, to hold views different from those of the Government without being engaged in illegal activities is no crime. Wang Youcai was convicted and sentenced not for holding views differing from those of the Government but because of his illegal activities which, according to the Government, had nothing to do with the exercise of his right to freedom of speech.

11. China's Constitution provides that while exercising their rights to freedom of speech and association or other rights, citizens shall not jeopardize the State, social and collective interests or infringe upon other citizens' legitimate rights and freedoms.

12. While providing for such rights and freedoms, articles 19 and 22 of the International Covenant on Civil and Political Rights clearly provide that necessary restrictions may be placed on the exercise of these rights, in the interest of national security, public safety or public order, or for the protection of the rights and freedoms of others.

13. The crime of trying to subvert State power is universally punished. Owing to differences in cultural traditions and development levels, countries have adopted different systems, in the light of their national conditions. It is a primary purpose of the laws of the world's countries to

defend their State systems and protect their national security. Those who instigate, encourage, or carry out subversion of State power and those who undermine the constitutionally established State system are universally punished by law.

14. Before taking a position on the case before it, the Working Group must first respond to the following question of principle: when the Constitution of a particular country:

(a) On the one hand, expressly guarantees the right to freedom of expression, publication, assembly, association, procession and demonstration;

(b) On the other hand, without expressly forbidding the creation of political parties, bases the institutional system on the leadership of one party,

is the applicable law under which the competent authorities deny a group of citizens the right to register a newly established political party compatible with articles 19 and 20 of the Universal Declaration of Human Rights and with article 19 of the International Covenant on Civil and Political Rights which protects freedom of opinion and expression and particularly article 22 of the Covenant, according to which "everyone shall have the right to freedom of association with others"?

15. At first sight, such an internal provision does not seem compatible with the articles cited above, since political parties, in the same way as trade unions (art. 23 of the Universal Declaration of Human Rights), constitute a specific type of association.

16. In support of its contention that its law is in conformity with international standards, the Government refers to the International Covenant on Civil and Political Rights, which it has signed but to which it has not yet acceded:

> "While providing for such rights and freedoms, articles 19 and 22 of the International Covenant on Civil and Political Rights also clearly provide that necessary restrictions may be placed on the exercise of these rights in the interests of national security, public safety or public order or for the protection of the rights and freedoms of others."

In this respect, the Working Group:

(a) Firstly, appreciates the fact that in its reply the Government makes reference to the International Covenant on Civil and Political Rights;

(b) Secondly, notes that in its reply the Government does not mention the specific grounds relating to "protection of national security or of public order" which, under article 19 (2) of the Covenant, could make such a restriction legitimate.

17. The Group believes that the following criteria may be considered admissible:

(a) Any restriction based on reason of State must be interpreted strictly; therefore, any measure limiting the exercise of a freedom must, in order to be admissible according to the

standards of international law and human rights (for example, art. 18 (3) and art. 19 (3) of the Covenant), respect the principle of proportionality between the extent and range of the restriction and the desired objective;

(b) Under these criteria the following could be considered as valid:

– As far as protection of public order is concerned, refusal to register political parties which, inter alia, have the aim or practice of engaging in propaganda for war in violation of the Covenant (art. 20 (1)); or

– A party exercising the right of assembly in a non-peaceful manner (art. 21 of the Covenant).

However, on the basis of the information in its possession, the Working Group sees no indication that the new political party for which registration was requested advocated war, violence, national, racial or religious hatred or discrimination in violation of the above-mentioned articles, and therefore its founders, including Wang Youcai, were simply exercising their right to freedom of association with others in a group (in this case, a political party), in conformity with article 22 (1) of the Covenant.

18. Therefore, the Working Group believes that the initiative of Wang Youcai and others in requesting registration of a political party which has aims that do not run counter to the provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights simply represents the exercise of the right of everyone to freedom of peaceful assembly and association with others, as guaranteed by article 20 of the Universal Declaration of Human Rights and article 22 of the International Covenant on Civil and Political Rights.

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

The deprivation of freedom of Mr. Wang Youcai is arbitrary in that it contravenes article 19 of the Universal Declaration of Human Rights and, insofar as this instrument is invoked by the Government in its reply, article 22 of the International Covenant on Civil and Political Rights, and falls into category II of the categories applicable to the examination of the cases presented to the Working Group.

20. Therefore, the Working Group requests the Government to take the necessary measures to remedy the situation, in order to bring it into conformity with the norms and principles laid down in the Universal Declaration of Human Rights and to take appropriate steps to accede to the International Covenant on Civil and Political Rights.

Adopted on 16 September 1999

OPINION No. 22/1999 (EQUATORIAL GUINEA)

Communication addressed to the Government on 16 November 1998 (previous urgent action of 24 July 1998)

Concerning José Oló Obono

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. 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).

3. The Working Group regrets the lack of cooperation by the Government, which did not reply to its request for information.

4. In a spirit of cooperation with the special procedures of the Commission on Human Rights, it has taken particular account of the report of the Special Rapporteur on the situation of human rights in the Republic of Equatorial Guinea (E/CN.4/1999/41), paragraphs 30 to 36 of which refer to José Oló Obono and the human rights cases he defended.

5. According to the allegations, José Oló Obono, a respected human rights lawyer in his country, was arrested on 21 July 1998. Following the arrest of over 100 members of the Bubi tribe in January 1998, he defended the case of many of the accused in a military court. Fifteen of the defendants were sentenced to death and others to lengthy prison terms. He also denounced the prison conditions and ill-treatment to which his clients were subjected. On 14 July, one of his clients died and Mr. Oló gave a press conference in which he criticized the prison conditions

to which the client had been subjected. Mr. Oló was tried by the Malabo Appeals Court for the undefined offence of "insults" ("insulting the Government", according to the Special Rapporteur) and was sentenced to five months' imprisonment, even though the prosecutor had withdrawn the charges against him.

6. The Government did not reply to the Working Group in connection with the allegations.

7. In the absence of any information from the Government, the Working Group considers that José Oló Obono was arrested for what the Court regarded as "insulting the Government", i.e. nothing more than strong criticism of the prison conditions in his country to which his clients were subjected during the so-called "macro trial" held summarily in a military court against 116 leaders of the Bubi ethnic group.

8. In the opinion of the Working Group, José Oló Obono has legitimately exercised the human right provided for in article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both in the courts and in the press. The Working Group points out that article 9, paragraph 3 (b), of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms provides for the right "to attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments", while article 9, paragraph 3 (c), recognizes the right "to offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms". This is what José Oló Obono did and why he was arrested.

9. The Working Group endorses the above-mentioned Special Rapporteur's statement that the judgement against Mr. Oló called for him "to be punished for having attempted to perform freely his functions as a lawyer acting for the family of his former client, Martin Puye Topete, which was asking for the return of the latter's body (principles 16, 17 and 23 of the Basic Principles on the Role of Lawyers)".

10. The Working Group was informed that Mr. Oló was released on 21 August 1998. In accordance with its methods of work, and since his deprivation of liberty was caused by the exercise of his functions as a lawyer defending persecuted persons, the Working Group has found it necessary to express an opinion on whether or not his arrest was arbitrary.

11. The Working Group's mandate requires it to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by domestic courts in conformity with domestic law, with the relevant international standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned.

12. In the opinion of the Working Group, and as it has maintained in earlier opinions (see Opinion No. 1/1998), if the judgement of a court of last instance in a country is in conformity with national legislation but not with international human rights instruments, it must be regarded as arbitrary under Commission on Human Rights resolution 1997/50.

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

The deprivation of liberty of José Oló Obono is arbitrary, since it is contrary to article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and falls within category II of the categories applicable in the consideration of the cases submitted to the Working Group.

14. Having given this opinion, the Working Group requests the Government:

(a) To take the necessary steps to remedy the situation, in accordance with the standards and principles set forth in the Universal Declaration of Human Rights;

(b) To consider the possibility of amending its legislation to bring it into line with the Universal Declaration and the other relevant international standards it has accepted.

Adopted on 16 September 1999

OPINION No. 23/1999 (DJIBOUTI)

Communication addressed to the Government on 19 February 1999

Concerning Aref Mohamed Aref

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. Its mandate was clarified and extended by resolution 1997/50. Pursuant to its methods of work, the Working Group forwarded to the Government the above-mentioned communication.

2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.

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

5. According to the allegation, Aref Mohamed Aref is a lawyer and human rights activist in his country. As such, he took part in the Rome Diplomatic Conference as a member of the coalition of non-governmental organizations which supported the establishment of an international criminal court. He was arrested on 15 February 1999 without a warrant and taken to an unknown place. The source claims not to know the grounds for the arrest, but states that Aref received a two-year sentence, with six months' rigorous imprisonment, and that the trial took place in unlawful conditions with no possibility of a genuine defence. According to the allegation, his conditions of detention are precarious, since he was taken to a jail far from his home and his family.

6. The Government's reply contains elements of two kinds. First, it maintains that Aref's detention is the result of a criminal charge of defrauding a client, who requested him to collect money owed in Djibouti for wheat imported from the United States. The ship was shelled as it passed the port of Aden - where a civil war was going on - on the way to Djibouti. Mr. Aref was defending the interests of the insurers, the charterers, the shippers and the creditors, who all agreed to a court-ordered sale of the cargo. Later, however, they ordered the lawyer to suspend the sale because of the low price it would have fetched, but he went ahead with it anyway and bought the cargo for himself at a price of US$ 1 million, even though it was worth four times more.

7. The Government's second argument is that Mr. Aref is not a human rights lawyer, but an unscrupulous politician who sets up groups which are supposedly working for human rights, but in fact are only serving his own interests. It denies that he had no defence and is being held incommunicado, noting that he has even given interviews to the international press.

8. Aref was released on 5 May 1999, thanks to an amnesty decreed by the new President-elect of Djibouti.

9. Since the above-mentioned person has been released under the amnesty referred to and the information provided by the source and the Government has not been confirmed, the Working Group considers, pursuant to its methods of work, that the case should be filed.

10. In the light of the foregoing, the Working Group decides to file the case without expressing an opinion on the arbitrary nature of the detention.

Adopted on 16 September 1999
