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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its seventy-seventh session, 21-25 November 2016

#### Opinion No. 53/2016 concerning Laçin Akhmadjanov (Afghanistan and United States of America)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/30/69), on 20 June 2016 the Working Group transmitted a communication to the Governments of Afghanistan and the United States of America concerning Laçin (also known as Musa) Akhmadjanov. The Government of Afghanistan has not replied to the communication, while the Government of the United States replied on 13 September 2016. Both Afghanistan and the United States are parties to the International Covenant on Civil and Political Rights.

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

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

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

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

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(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

## **Submissions**

### *Communication from the source*

4. Mr. Akhmadjanov, born on 25 November 1980, is a national of Uzbekistan. He is a merchant and a devout Muslim. It is alleged that Mr. Akhmadjanov, his friends and his family were persecuted by the Uzbek authorities because of Mr. Akhmadjanov's religious studies. To save his family from further oppression, Mr. Akhmadjanov fled Uzbekistan at the age of 21.

5. Mr. Akhmadjanov initially travelled to the Russian Federation, where he worked in car wash facilities and on construction sites. He then travelled to the Islamic Republic of Iran, believing it to be a safer and easier place to make a living. There, he kept a stand at a market where he resold clothes bought wholesale. While on a trip to Istanbul, he met his future wife, whom he married in her hometown of Afyon, Turkey, in December 2007. The couple then moved together to the Islamic Republic of Iran.

6. The source alleges that in December 2009 the Iranian authorities deported Mr. Akhmadjanov to the border station near Herat, Afghanistan, where he remained for several months. The commander of the border station demanded that Mr. Akhmadjanov pay him money, but Mr. Akhmadjanov asserted his innocence and refused. Shortly thereafter, the Afghan authorities transferred Mr. Akhmadjanov, who was then placed under the custody of the United States authorities.

7. The source further alleges that Mr. Akhmadjanov was detained by the United States authorities at Bagram Theatre Internment Facility from 23 May 2010 to December 2014. During that time, Mr. Akhmadjanov was held mostly incommunicado, without charges and with no meaningful opportunity to challenge his detention. According to the source, the only body that could review his detention was the detainee review board, which assigned personal representatives who were not legally trained and were not bound by the attorney-client duty of confidentiality or loyalty to the detainee. Non-Afghan detainees like Mr. Akhmadjanov requested permission for their lawyers to be allowed to participate in the process. Those requests were denied, however. As a result, Mr. Akhmadjanov was imprisoned for five and a half years without charge or trial and on the basis of allegations that he was unable to refute.

8. The source states that Mr. Akhmadjanov was subjected to physical abuse while under the custody of the United States authorities. On 6 September 2013, during a video call arranged by the International Committee of the Red Cross, Mr. Akhmadjanov's spouse noticed that her husband had bruises around his left eye. He indicated that he had been beaten.

9. In 2014, the United States Department of Defense decided to end its detention operations at Bagram Theatre Internment Facility and to transfer all the remaining prisoners not facing charges under United States law. The United States repatriated or resettled most non-Afghan detainees. By December 2014, however, six non-Afghan detainees remained, including Mr. Akhmadjanov, who had consistently expressed credible fear that he would be

tortured upon return to his country of origin. United States officials assured him that he would not be repatriated. At the end of 2014, Mr. Akhmadjanov was returned to Afghan custody.

10. According to the information received, the Afghan authorities have held Mr. Akhmadjanov at the Afghan National Detention Facility since 6 December 2014. The source states that authorities from the Ministry of Foreign Affairs of Uzbekistan visited Mr. Akhmadjanov and tried to convince him to accompany them to Uzbekistan. When Mr. Akhmadjanov refused, the Uzbek authorities told Mr. Akhmadjanov that they nonetheless expected to see him soon after he had been tried under Afghan law. The source alleges that the Uzbek authorities have also actively tried to persuade the Government of Afghanistan to transfer Mr. Akhmadjanov under their custody.

11. On 11 February 2015, the Primary Court of Parwan acquitted Mr. Akhmadjanov of all charges under Afghan law. That court concluded that there was no evidence to indicate that Mr. Akhmadjanov was a member of an anti-government group, as charged. On 14 June 2015, the Public Safety Office of Parwan Appellate Court issued a final decision affirming Mr. Akhmadjanov's acquittal. The Appellate Court found that Mr. Akhmadjanov had not committed any crimes against Afghan citizens or the interests of Afghanistan, adding that Mr. Akhmadjanov's presence in Afghanistan may have been involuntary because he had been unwillingly deported to Afghanistan from the Islamic Republic of Iran. Therefore, the Appellate Court ruled that Mr. Akhmadjanov should be released from the Afghan National Detention Facility and extradited in accordance with international law to guarantee his safety and security. The source has provided the text of the Appellate Court's ruling supporting that allegation.

12. The source states that, despite having been cleared for release, Mr. Akhmadjanov remains at the Afghan National Detention Facility, where the conditions of his confinement are rapidly deteriorating. The source also states that in April 2015 Mr. Akhmadjanov was subjected to five days of solitary confinement and that he has suffered ill-treatment at the Facility. More specifically, in at least one instance, the guards removed Mr. Akhmadjanov from his cell and beat him, screaming at him and accusing him of coming to Afghanistan to wage jihad. As a result of that beating, Mr. Akhmadjanov suffered a broken finger, a bloodied mouth and nose, and bruises. The source concludes that Mr. Akhmadjanov is at significant risk of being subjected to torture or physical harm by the Afghan officials at the Facility.

13. In January 2016, Mr. Akhmadjanov began a hunger strike to protest his continued imprisonment and treatment. The hunger strike lasted nearly two weeks and led to a significant deterioration in Mr. Akhmadjanov's health. According to the information received, during the hunger strike the Afghan authorities transferred Mr. Akhmadjanov and two other detainees, also on hunger strike, to the "death row" cell block at the Afghan National Detention Facility. That block allegedly houses the most violent and non-compliant convicted prisoners, including those with severe mental illnesses and those awaiting execution. As a result, Mr. Akhmadjanov faces daily threats from other prisoners and fears for his life. The prison authorities have allegedly made it clear to Mr. Akhmadjanov that they will not protect him should those threats be acted upon.

14. The source further alleges that the prison authorities continue to deny Mr. Akhmadjanov adequate food, clothing and access to medical care. The prison guards routinely cut food rations as a form of collective punishment whenever a prisoner in the cell block is uncooperative. In addition, Mr. Akhmadjanov has had only one set of clothes and one pair of shoes for the past seven months and no access to laundry facilities. He has repeatedly requested, and been denied, access to medical care for physical injuries suffered while in custody. His health is rapidly deteriorating and he is allegedly in imminent danger of being injured or killed in prison.

15. The source asserts that there are compelling reasons to believe that, if repatriated to Uzbekistan, Mr. Akhmadjanov will be tortured and possibly killed by the authorities. As a young adult, Mr. Akhmadjanov was targeted by Uzbek officials as a religious dissident because he studied with an unofficial mullah. Government officials arrested and tortured Mr. Akhmadjanov's friends who studied with the same mullah. The officials also targeted Mr. Akhmadjanov's family: his father was fired from his government job and his mother received threats from government officials. It is that sustained persecution that led Mr. Akhmadjanov to flee Uzbekistan at the age of 21.

16. The source adds that the recent actions of the Government of Uzbekistan show its continued interest in Mr. Akhmadjanov. Uzbek law enforcement authorities have visited Mr. Akhmadjanov throughout his detention and are allegedly actively trying to persuade the Government of Afghanistan to repatriate him. The source sustains that forcibly repatriating Mr. Akhmadjanov to Uzbekistan would virtually guarantee that Mr. Akhmadjanov would suffer severe mistreatment. It would furthermore violate the non-refoulement obligations of Afghanistan set out in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Afghanistan is a party.

17. The source submits that the continued detention of Mr. Akhmadjanov constitutes arbitrary deprivation of his liberty under categories I, III and V of the Working Group.

18. In relation to category I, the source indicates that Mr. Akhmadjanov's detention is arbitrary under international law because it is indefinite, prolonged and lacking in justifiable purpose. There is no legitimate purpose for his continued detention because the Afghan courts at both the primary and appellate levels have acquitted him of all charges. The detention of Mr. Akhmadjanov therefore is contrary to article 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, which underline that deprivation of liberty must be carried out in accordance with domestic law and procedures.

19. Furthermore, the source indicates that Mr. Akhmadjanov's detention is arbitrary because it is both indefinite and prolonged. It is indefinite because Mr. Akhmadjanov is not serving a criminal sentence and Afghanistan has given no justification for his detention or indicated when he will be released. His detention is prolonged because it is excessive in duration. Mr. Akhmadjanov has been detained in Afghanistan for over six years, five of which were spent under the custody of the United States, with no charge or trial. As of June 2016, he has spent 16 months under Afghan custody. Although confinement may be justifiable while a detainee is awaiting trial, Afghanistan is obliged to promptly release Mr. Akhmadjanov following his acquittal. Failure to do so constitutes prolonged detention under the present circumstances and renders his detention arbitrary.

20. The source points out that Mr. Akhmadjanov's detention serves no legitimate purpose, as he is not awaiting trial or any other government proceeding, nor is he serving a criminal sentence. To the extent that Afghanistan might claim that it has the authority to administratively detain Mr. Akhmadjanov pursuant to its security powers, that claim is at odds with both international humanitarian law and international human rights law. Under international human rights law, States bear the burden of proving that administrative detention is justified given the existence of the most exceptional circumstances, in other words the existence of a present, direct and imperative threat that cannot be addressed through alternative measures. Mr. Akhmadjanov's case does not present such exceptional circumstances because he has already been tried and acquitted in the Afghan criminal system. Furthermore, during the six years he has been detained in Afghanistan, the United States and Afghan authorities have had ample opportunities to produce evidence that Mr. Akhmadjanov poses a security danger. The fact that the Appellate Court found no evidence of wrongdoing demonstrates that he poses no imperative threat. Thus, the circumstances do not warrant administrative detention.

21. The source adds that the non-refoulement obligations of Afghanistan cannot, under international law, form a basis for Mr. Akhmadjanov's continued detention in Afghanistan. The source draws attention to the findings of the Human Rights Committee indicating that the inability of a State to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention. Allegations of threats against Mr. Akhmadjanov from the Uzbek authorities present grounds against Mr. Akhmadjanov's repatriation but cannot justify his continued detention in Afghanistan.

22. In relation to category III, the source claims that Mr. Akhmadjanov's detention is arbitrary because he lacks access to a fair trial to challenge his continued detention. Various procedural deficiencies surround Mr. Akhmadjanov's continued detention. More specifically, the Government of Afghanistan has allegedly denied judicial review, as well as access to legal counsel to challenge his continued detention following his acquittal. The authorities have also purportedly failed to inform him of the basis for his continued detention. Those deficiencies demonstrate significant non-observance of the international norms relating to the right to a fair trial and therefore constitute deprivation of liberty under category III of the Working Group, rendering his detention arbitrary.

23. The source asserts that the Government of Afghanistan has denied Mr. Akhmadjanov the right to a prompt judicial review of his detention. No court has reviewed his continued detention following his final acquittal by the Parwan Appellate Court on 14 June 2015. The source attests that a 12-month delay in obtaining judicial review is unjustifiable under any circumstances but is especially egregious in the light of Mr. Akhmadjanov's acquittal. His inability to obtain judicial review prevents him from challenging his detention in a fair trial.

24. In addition, according to the information received, the authorities have denied Mr. Akhmadjanov access to counsel to address his continued detention and to advocate for his resettlement. The source draws attention to the fact that international law guarantees to all detainees the right to access to counsel. The Government of the United States denied Mr. Akhmadjanov all access to counsel from 2010 to 2014. The Government of Afghanistan provided counsel for the limited purpose of criminal defence; since he was acquitted of all criminal charges, however, Mr. Akhmadjanov has been denied representation for the purpose of challenging his continued detention and repatriation. He has had no confidential communication with his counsel, despite the counsel's request to speak to Mr. Akhmadjanov. To date, the authorities have left the request unanswered.

25. The source also states that the Government of Afghanistan has failed to provide Mr. Akhmadjanov with justification for his continued detention following his acquittal, contrary to article 9 (2) of the Covenant. He therefore cannot meaningfully challenge his detention without knowing the Government's reasons for detaining him.

26. The source concludes that, individually or combined, these three procedural deficiencies — denial of judicial review, denial of access to counsel and lack of an explanation for his post-acquittal detention — constitute significant non-observance of the international norms relating to Mr. Akhmadjanov's right to a fair trial. Those circumstances render Mr. Akhmadjanov's detention arbitrary according to category III.

27. Finally, the source claims that the harsh treatment that Mr. Akhmadjanov has endured under Afghan custody is due to his status as a foreign national. To the extent that the treatment accorded Mr. Akhmadjanov by Afghanistan depends on his nationality, such treatment constitutes unlawful discrimination and is itself a basis for declaring his detention arbitrary under category V.

*Response from the Government of Afghanistan*

28. On 20 June 2016, the Working Group transmitted the allegations from the source to the Government of Afghanistan under its regular communications procedure. The Working Group requested the Government to provide detailed information by 19 August 2016 about the situation of Mr. Akhmadjanov and any comments about the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify the continued detention of the other two individuals mentioned above and to provide details regarding the conformity of their deprivation of liberty and apparent lack of fair judicial proceedings with domestic legislation and international human rights norms, including those that constitute legal obligations for Afghanistan under the human rights treaties it has ratified.

29. The Working Group regrets that it did not receive a response from the Government to its communication, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

*Response from the Government of the United States*

30. On 20 June 2016, the Working Group transmitted the allegations from the source to the Government of the United States under its regular communications procedure. The Working Group requested the Government to provide detailed information by 19 August 2016 about the factual and legal grounds invoked by the authorities to justify the detention of Mr. Akhmadjanov at Bagram Theatre Internment Facility from 23 May 2010 to December 2014 and to provide details regarding the conformity of his deprivation of liberty and apparent lack of fair judicial proceedings with international human rights norms.

31. On 5 August 2016, the Government replied with a request to extend the time limit for its reply, which was granted. On 13 September 2016, the Government submitted its reply, in which it states that the individual in question was lawfully detained by the United States under the Authorization for Use of Military Force (United States Public Law 107-40), as informed by international humanitarian law, in the ongoing armed conflict. The Government argues that international humanitarian law constitutes *lex specialis* vis-à-vis human rights law in situations of armed conflict and, as such, is the controlling body of law with regard to the conduct of hostilities and the protection of victims of war.

32. The Government further submitted that, at the end of 2014, the United States transferred the remaining third-country-national detainees who were being held in its custody in Afghanistan. The Government explained that its policy on humane transfers was based on the consideration of all relevant facts and circumstances concerning each individual to determine an appropriate course of action, which includes refraining from transferring an individual to any country where he or she is more likely than not to face torture. The Government argued that the decision to transfer Mr. Akhmadjanov to Afghan custody was considered the best available option under the circumstances but did not furnish any further details concerning that decision.

33. While referring the Working Group to the Government of Afghanistan for any further questions relating to Mr. Akhmadjanov, the Government of the United States stated that it continued to engage with the Government of Afghanistan regarding the welfare of Mr. Akhmadjanov and continued to urge the Government of Afghanistan to uphold its obligations with regard to ensuring humane treatment. The Government of the United States also stated that it continued to discuss with the Government of Afghanistan options regarding the detainee's long-term disposition, taking into account the domestic laws and international legal obligations of Afghanistan.

*Comments from the source to the response of the Government of the United States*

34. On 29 September 2016, the Working Group transmitted the reply received from the Government of the United States to the source and requested a reply by 1 November 2016.

35. On 8 November 2016, the source submitted its reply to the information provided by the Government of the United States. That reply was received by the Working Group on 16 November 2016.

36. In its response, the source rebuts the argument by the Government of the United States that the Working Group's mandate should not extend to Mr. Akhmadjanov because international humanitarian law constitutes *lex specialis* and is thus the controlling body of law in the present case. The source refers to a previous opinion of the Working Group, in which it noted that the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are complementary and not mutually exclusive.<sup>1</sup>

37. The source further argues that the invocation of international humanitarian law is especially inappropriate given the circumstances of the present case and since the United States transferred Mr. Akhmadjanov to Afghan civilian custody for criminal prosecution. Under regular criminal processes, Afghan authorities acquitted Mr. Akhmadjanov of all charges.

38. The source also rebuts the argument by the Government of the United States that it continues to engage with the Government of Afghanistan regarding Mr. Akhmadjanov's welfare. While noting that such efforts are welcome, the source submits that they have not produced any concrete results for Mr. Akhmadjanov. The source contends that, having been detained for years under United States custody at Bagram Theatre Internment Facility, Mr. Akhmadjanov carries the stigma of having been suspected as a terrorist by the United States. According to the source, it is that stigma that keeps him in indefinite detention. The source notes that the Government of Afghanistan lacks the financial resources to provide Mr. Akhmadjanov with humane living conditions. Noting also the lack of political capital held by the Government of Afghanistan to find him a third country where he could be resettled, the source points out that over the years the United States has successfully resettled hundreds of individuals detained at Guantanamo. The source therefore argues that support from the Government of the United States could finally bring an end to the arbitrary detention of Mr. Akhmadjanov.

39. The source therefore requests the Working Group to recommend that the Government of the United States engage with the Government of Afghanistan with a view to providing it with support in seeking a safe third country for resettlement. In order to protect Mr. Akhmadjanov from non-refoulement violations, the source asks the Working Group to work closely with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to oversee Mr. Akhmadjanov's resettlement to a safe third country. The source also asks the Working Group to find that the prolonged and indefinite detention of Mr. Akhmadjanov is arbitrary under categories I and III. Lastly, it asks that the Working Group recommend that Mr. Akhmadjanov be provided with meaningful access to counsel and that he be immediately released from Afghan custody.

<sup>1</sup> See opinion No. 44/2005 (Iraq and the United States of America), para. 13.

## Discussion

### *In relation to the United States*

40. The Working Group recalls that, in accordance with paragraph 17 (a) of its methods of work, it may render an opinion on whether or not the deprivation of liberty has been arbitrary notwithstanding the release of the person concerned. In the present case, the Working Group will deliver its opinion on the detention of Mr. Akhmadjanov by the United States notwithstanding the fact that the United States handed over the individual concerned to the Afghan authorities, as his detention has continued since the handover.

41. The source alleges that Mr. Akhmadjanov was detained by the United States authorities at Bagram Theatre Internment Facility from 23 May 2010 to December 2014 and that, during that time, he was held mostly incommunicado, without charges and with no meaningful opportunity to challenge his detention. According to the source, the only body that could review his detention was the detainee review board, which assigned personal representatives who were not legally trained and were not bound by the attorney-client duty of confidentiality or loyalty to the detainee. In its reply of 13 September 2016, the Government of the United States stated that the detention of Mr. Akhmadjanov was in accordance with the Authorization for Use of Military Force (United States Public Law 107-40), as informed by international humanitarian law, in the ongoing armed conflict. The Government further argued that, in the present situation, international humanitarian law constitutes *lex specialis* vis-à-vis human rights law.

42. The Working Group reiterates that, in accordance with its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, the prohibition of arbitrary detention is part of customary international law and, in fact, constitutes a *jus cogens* norm.<sup>2</sup> That means that no derogations on behalf of States are permissible and no exceptional circumstances, be they a state of emergency or armed conflict, may be invoked to justify restrictions to an individual's liberty through arbitrary detention. Moreover, as correctly pointed out by the source, the Working Group has already noted that the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are complementary and not mutually exclusive.<sup>3</sup>

43. The Working Group also wishes to recall the concluding observations of the Human Rights Committee on the fourth periodic report of the United States, in which the Committee stated that the United States should end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantanamo and in military facilities in Afghanistan are dealt with through the criminal justice system rather than military commissions, and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant.<sup>4</sup>

44. The domestic legislation referred to by the Government of the United States as a basis for the detention in the present case is a general law that gives the United States President power over military operations. That law cannot be considered as a ground for the detention of anyone without cause. In the present case, and in its response, the Government of the United States has failed to provide legitimate grounds for the arrest and detention of Mr. Akhmadjanov. Hence, both the arrest and the subsequent detention, which lasted some four years, are without basis and therefore arbitrary within category I.

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<sup>2</sup> See A/HRC/22/44, para. 51.

<sup>3</sup> See opinion No. 44/2005 (Iraq and the United States of America), para. 13.

<sup>4</sup> See CCPR/C/USA/CO/4, para. 21.



45. Furthermore, the Working Group notes that the Government of the United States did not reply to any of the specific allegations made by the source regarding the detention of Mr. Akhmadjanov and only stated that his detention was in accordance with the Authorization for Use of Military Force (United States Public Law 107-40). The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>5</sup> In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

46. As the Human Rights Committee has stated in paragraph 24 of its general comment No. 35 (2014) on liberty and security of person, article 9 (2) of the Covenant imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. Second, they shall be promptly informed of any charges against them. In the case of Mr. Akhmadjanov's detention by the United States authorities, both elements of article 9 (2) have been violated. Furthermore, the right under article 9 of the Covenant to be brought before a judge so as to determine the legality of the detention has been violated.

47. The Working Group is particularly alarmed by the source's allegation that Mr. Akhmadjanov has been held incommunicado. As the Human Rights Committee notes in paragraph 35 of its general comment No. 35, incommunicado detention that prevents prompt presentation before a judge inherently violates article 9 (3).<sup>6</sup> It is thus clear that, by holding Mr. Akhmadjanov incommunicado, the United States has violated his rights under article 9 (3) of the Covenant.

48. Consequently, the detention of Mr. Akhmadjanov in the custody of the United States from May 2010 to December 2014 was arbitrary and falls within category III.

#### *In relation to Afghanistan*

49. In the absence of a response from the Government of Afghanistan, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

50. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>7</sup> In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

51. The Working Group, in its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, has unequivocally stated that the prohibition of arbitrary detention is part of customary international law and, in fact, constitutes a *jus cogens* norm.<sup>8</sup> That means that no derogations on behalf of States are permissible and no exceptional circumstances, be they a state of emergency or armed conflict, may be invoked to justify restrictions to an individual's liberty through arbitrary detention. As the Working Group has stated, a State can never claim that illegal, unjust or

<sup>5</sup> See A/HRC/19/57, para. 68.

<sup>6</sup> See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.7.

<sup>7</sup> See A/HRC/19/57, para. 68.

<sup>8</sup> See A/HRC/22/44, para. 51.

unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end.<sup>9</sup>

52. Equally, in its deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, the Working Group recognized the right to bring proceedings before a court in order to challenge the legality of the detention as a non-derogable right.<sup>10</sup> The Working Group has further confirmed as much in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, in which it states that the right to challenge the lawfulness of detention is a self-standing human right and a judicial remedy that is essential to preserve legality in a democratic society.<sup>11</sup>

53. The position of the Working Group is in full conformity with that of the Human Rights Committee, which, in its general comment No. 35 stresses that the right to review by a court of the legality of detention applies to all persons deprived of liberty. In the same general comment, the Committee adds that the unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful (paras. 4 and 11).

54. In the present case, Mr. Akhmadjanov exercised his right to challenge the legality of his detention before a court. Thus, on 11 February 2015, the Primary Court of Parwan acquitted Mr. Akhmadjanov of all charges under Afghan law and concluded that there was no evidence to indicate that Mr. Akhmadjanov was a member of an anti-government group, as charged. On 14 June 2015, the Public Safety Office of the Parwan Appellate Court issued a final decision affirming Mr. Akhmadjanov's acquittal. The Appellate Court found that Mr. Akhmadjanov had not committed any crimes against Afghan citizens or the interests of Afghanistan, adding that Mr. Akhmadjanov's presence in Afghanistan may have been involuntary because he had been unwillingly deported to Afghanistan from the Islamic Republic of Iran. Therefore, the Appellate Court ruled that Mr. Akhmadjanov should be released from the Afghan National Detention Facility and extradited in accordance with international law to guarantee his safety and security. The Government of Afghanistan has not rebutted the allegations. Consequently, as of the date of the coming into legal force of the decision of the Appellate Court, the continued detention of Mr. Akhmadjanov no longer has any legal basis and is contrary to article 9 of the Covenant. It therefore constitutes arbitrary detention under category I.

55. Moreover, Mr. Akhmadjanov's rights under article 14 (3) (b) and (d) of the Covenant have also been violated since, despite being provided with legal counsel for the limited purpose of criminal defence, Mr. Akhmadjanov has been denied, since his acquittal of all criminal charges, any legal representation for the purpose of challenging his continued detention and repatriation. As the Human Rights Committee has stated in paragraph 10 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.

56. Furthermore, the Human Rights Committee states in paragraph 24 of its general comment No. 35 that article 9 (2) of the Covenant imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. Second, they shall be promptly informed of any charges against them. The Afghan authorities have not furnished any reasons for the continued detention of Mr. Akhmadjanov, thus violating his rights under article 9 (2) of the Covenant.

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<sup>9</sup> Ibid., para. 48.

<sup>10</sup> Ibid., para. 49.

<sup>11</sup> See A/HRC/30/37, paras. 2 and 3.

57. The failure of the Afghan authorities to provide Mr. Akhmadjanov with the reasons for his continued detention is not only a violation of article 9 (2) of the Covenant: it also renders the right of Mr. Akhmadjanov to challenge his detention before a court entirely ineffective. Without knowing the charges against him or the reasons for his continued detention, Mr. Akhmadjanov is unable to challenge his detention. That serious breach of a non-derogable right, combined with the failure to provide access to legal counsel, renders the continued detention of Mr. Akhmadjanov arbitrary under category III.

58. Finally, the source claims that the harsh treatment that Mr. Akhmadjanov has endured while under Afghan custody is due to his status as a foreign national and on that basis the source has argued that Mr. Akhmadjanov has been discriminated against on the basis of nationality. The Working Group is unable to establish with the requisite degree of certainty that the facts presented by the source disclose a particular targeting of Mr. Akhmadjanov on the basis of nationality and concludes that the facts presented by the source are insufficient to substantiate such an allegation. The Working Group therefore is of the opinion that the continued detention of Mr. Akhmadjanov does not fall under category V.

#### *Non-refoulement*

59. The source has also submitted that the ultimate release of Mr. Akhmadjanov by the Afghan authorities must take into account the prohibition of non-refoulement and noted that the United States too cannot absolve itself of responsibility in the matter. The source has made credible allegations, which neither of the two Governments have addressed, based on the fact that Mr. Akhmadjanov is a national of Uzbekistan. The Working Group also notes the submission by the source that, when Mr. Akhmadjanov was transferred to Afghan custody, he was provided with assurances by the United States authorities that he would not be repatriated to Uzbekistan. The Working Group notes that the Government of the United States has not replied to that submission.

60. The Working Group reiterates the position it adopted in its legal opinion on preventing arbitrary detention in the context of international transfer of detainees, particularly in countering terrorism, on the need for Governments to include the risk of arbitrary detention in the receiving State per se among the elements to be taken into consideration when asked to extradite, deport, expel or otherwise hand a person over to the authorities of another State.<sup>12</sup>

61. Accordingly, in order to remove a person to a State where there is a genuine risk that the person will be detained without legal basis, or without charges over a prolonged time, or tried before a court that manifestly follows orders from the executive branch, cannot be considered compatible with the obligation in article 2 of the Covenant, which requires that States parties respect and ensure the Covenant rights for all persons in their territory and under their control.<sup>13</sup>

62. In relation to the Government of the United States, the Working Group wishes to recall the above-mentioned concluding observations of the Human Rights Committee, in which the Committee stated that the State party should strictly apply the absolute prohibition against refoulement under articles 6 and 7 of the Covenant.<sup>14</sup> Similarly, the Committee against Torture, in its concluding observations on the combined third to fifth periodic reports of the United States, called upon the State party to ensure that no individual, including persons suspected of terrorism, who is expelled, returned, extradited

<sup>12</sup> See A/HRC/4/40, para. 49.

<sup>13</sup> Ibid.

<sup>14</sup> See CCPR/C/USA/CO/4, para. 13.

or deported, is exposed to the danger of torture or other cruel, inhuman or degrading treatment or punishment.<sup>15</sup>

63. The Working Group urges the Government of Afghanistan and the Government of the United States to comply with their obligations concerning non-refoulement. The Working Group also notes the serious allegations of torture and ill-treatment made by the source. The Working Group therefore refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

64. Finally, the Working Group notes that the source alleged that the Iranian authorities had arrested Mr. Akhmadjanov and deported him to the border station near Herat, Afghanistan, where he was held for several months before being transferred to the United States authorities and then back to the Afghan authorities. The Working Group recalls that it is possible for another State to share responsibility for human rights violations where its actions contribute to the arbitrary deprivation of liberty. In the present case, however, no evidence was submitted in relation to the conduct of the Iranian authorities and the Working Group has decided not to pursue the matter.

### **Disposition**

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

The deprivation of liberty of Laçin Akhmadjanov by Afghan and United States authorities being in contravention of articles 2, 3 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

66. The Working Group requests the two Governments jointly to take the steps necessary to remedy the situation of Mr. Akhmadjanov without any further delay and to bring that situation in conformity with their international obligations under the Universal Declaration of Human Rights and the Covenant.

67. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to immediately release Mr. Akhmadjanov and to accord to him an enforceable right to compensation in accordance with article 9 (5) of the Covenant. The Working Group reminds both Governments to abide by their obligations concerning non-refoulement in relation to Mr. Akhmadjanov.

68. Finally, the Working Group considers it necessary and appropriate to refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate measures in relation to the allegations of torture.

### **Follow-up procedure**

69. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the two Governments concerned to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Akhmadjanov has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Akhmadjanov;
- (c) Whether an investigation has been conducted into the violation of Mr. Akhmadjanov's rights and, if so, the outcome of the investigation;

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<sup>15</sup> See CAT/C/USA/CO/3-5, para. 16.

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the two Governments with their international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

70. The two Governments are invited to inform the Working Group of any difficulties they may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through visits by the Working Group.

71. The Working Group requests the source and the two Governments to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

72. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>16</sup>

*[Adopted on 23 November 2016]*

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<sup>16</sup> See Human Rights Council resolution 24/7, paras. 3 and 7.