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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. 56/2016 concerning Abdul Fatah and Sa'id Jamaluddin (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 of the United States of America concerning Abdul Fatah and Sa'id Jamaluddin. The Government of Afghanistan has not replied to the communication while the Government of the United States replied to it on 13 September 2016. Both 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. Fatah and Mr. Jamaluddin are biological brothers and nationals of Tajikistan. They were both born in Dushanbe, Mr. Fatah on 1 January 1982 and Mr. Jamaluddin on 5 April 1990. Mr. Fatah is married and has four children. His family still resides in Tajikistan.

5. Mr. Fatah and Mr. Jamaluddin are devout practicing Muslims. In around 2007 Mr. Fatah escorted Mr. Jamaluddin to a religious school in Mashhad, Islamic Republic of Iran, to study the Koran. The brothers travelled together through northern Afghanistan and Mr. Fatah safely delivered Mr. Jamaluddin to the school. Mr. Fatah then went back to Tajikistan, while Mr. Jamaluddin stayed in the Islamic Republic of Iran to study for two years.

6. The source informs the Working Group that after the two years had lapsed, Iranian authorities arrested Mr. Jamaluddin for having overstayed his visa and deported him to Afghanistan. Finding himself in Kabul with no housing or support, Mr. Jamaluddin called Mr. Fatah to ask for assistance. Mr. Fatah joined his brother in Afghanistan, where he found temporary lodging with a friend in Kunduz Province. Shortly thereafter, United States forces raided the house in which the two brothers were staying. Upon discovering that neither of them had a valid residence permit or a visa to stay in Afghanistan, the United States forces detained the two brothers at Bagram Theatre Internment Facility.

7. The United States authorities held Mr. Fatah and Mr. Jamaluddin at Bagram Theatre Internment Facility from March 2009 to December 2014. During interrogations, it allegedly became clear that the authorities had mistaken Mr. Jamaluddin and Mr. Fatah for other men. The brothers were repeatedly interrogated as to the whereabouts of high-level figures belonging to the Al-Qaida network. The source reports that Mr. Fatah and Mr. Jamaluddin were never given an explanation for their detention, were held incommunicado and were not granted access to a legal counsel. At one point, the prison guards allegedly admitted to Mr. Jamaluddin that his detention seemed to be the result of a case of mistaken identity.

8. After months of questioning, the United States authorities have allegedly not found any grounds for charges. In February 2010, the detainee review board — a United States military panel responsible for the periodic review of all detainees held at Bagram Theatre Internment Facility — determined that the detention of the two men was no longer warranted. However, despite the consecutive sessions of the detainee review board affirming the decision to release Mr. Fatah and Mr. Jamaluddin, the authorities continued to hold them until late 2014.

9. In December 2014, the United States authorities transferred Mr. Fatah and Mr. Jamaluddin to Afghan custody at the Afghan National Detention Facility. On 25 February 2015, the Afghan court of first instance tried the brothers on charges of failing to provide proper documentation to enter Afghanistan and sentenced them to three years of imprisonment. However, in the light of the fact that the brothers had already served five years in the custody of the United States at Bagram Theatre Internment Facility, the court

ordered their release. On 17 May 2015, an Afghan appeals court upheld that ruling. Finally, on 19 December 2015, the Afghan Supreme Court affirmed the ruling again and ordered the immediate release of the brothers. The source informs the Working Group that despite those rulings Mr. Fatah and Mr. Jamaluddin continue to be held at the Afghan National Detention Facility.

10. The source reports that the situation for non-Afghan prisoners at the Afghan National Detention Facility is deteriorating. On at least one occasion, the guards have allegedly removed non-Afghans from their cells without any grounds and beaten them. Mr. Fatah and Mr. Jamaluddin were spared on that occasion. The source adds that one of the non-Afghan prisoners was injected with a substance that caused him to faint. The source concludes that such events indicate that Mr. Fatah and Mr. Jamaluddin face a significant risk of being subjected to physical abuse by the officials at the Facility.

11. According to the information received, Mr. Fatah suffers from kidney disease, which has worsened owing to the lack of medical care, poor nutrition and the heat at the prison. The source claims that, in recent months, the brothers' uncertain fate has taken an enormous toll on their well-being. In January 2016, Mr. Fatah and Mr. Jamaluddin started a hunger strike to protest their continued imprisonment and mistreatment at the Afghan National Detention Facility. The hunger strike lasted nearly two weeks and ended when the prison authorities promised to improve their conditions of confinement until they could be resettled to a third country. However, shortly afterwards, the prison authorities transferred them to a cell block housing death row inmates and violent convicted prisoners. There, the brothers currently face daily threats from other prisoners; the prison guards have allegedly indicated that they would not protect them from such threats.

12. In addition, the prison authorities are currently denying Mr. Fatah and Mr. Jamaluddin adequate food and clothing as a form of a collective punishment. The authorities allegedly routinely cut food rations when anyone in the cell block violates the prison rules. Mr. Jamaluddin and Mr. Fatah are neither provided with adequate shoes and clothing, nor are they permitted access to proper laundry or hygiene facilities. Despite their repeated requests, they have had no access to medical care or treatment. Their health is rapidly deteriorating and they face a substantial risk of physical harm in their current environment.

13. Mr. Fatah and Mr. Jamaluddin are extremely fearful of being repatriated to Tajikistan since they formally renounced their Tajik citizenship in December 2015, which has rendered them officially stateless. Because there are "substantial grounds for believing" that the brothers face a risk of torture in Tajikistan, repatriating them would violate the non-refoulement obligations of Afghanistan.

14. The source states that the brothers have been specifically targeted for persecution by the Government of Tajikistan because of their association with their father, Amriddin Tabarov. Mr. Tabarov is a former political activist who has been accused of being a member of the Islamic Movement of Uzbekistan and of Jamaat Ansarullah, allegedly an extremist group. The source expresses concern that, in its quest to obtain further information about Mr. Tabarov, the Government of Tajikistan will subject Mr. Fatah and Mr. Jamaluddin to harsh interrogation techniques that may result in death. It is alleged that Tajik intelligence officials have threatened the brothers during numerous visits carried out in the course of their detention, beginning in 2011 and as recently as October 2015. They have attempted to persuade the Afghan authorities to repatriate Mr. Fatah and Mr. Jamaluddin. The source notes that the actions of the Government of Tajikistan, including prison visits and threats to Mr. Fatah and Mr. Jamaluddin, as well as the efforts to encourage the Government of Afghanistan to repatriate them, show the continued interest of the Tajik authorities in the individuals concerned. The source concludes that repatriating

Mr. Fatah and Mr. Jamaluddin to Tajikistan would virtually guarantee that they would be subject to abuse, which could result in their deaths.

*Submissions regarding arbitrary detention*

15. The source submits that the continued detention of Mr. Fatah and Mr. Jamaluddin constitutes the arbitrary deprivation of their liberty under categories I, III and V.

16. In relation to category I, the source notes that the Government of Afghanistan cannot invoke any legal basis for justifying their deprivation of liberty. The highest court of Afghanistan has ordered Mr. Fatah and Mr. Jamaluddin to be released from detention, yet the brothers remain at the Afghan National Detention Facility. The lack of domestic justification for the two men's detention renders that detention unlawful under international law.

17. The source also asserts that Mr. Fatah's and Mr. Jamaluddin's detention is arbitrary because it is both indefinite and prolonged. It is indefinite because Mr. Fatah and Mr. Jamaluddin are not serving a criminal sentence and the Government of Afghanistan has allegedly given no justification for their continued detention or any indication of when they will be released. Their detention is prolonged because it is excessive in duration, as Mr. Fatah and Mr. Jamaluddin have been detained in Afghanistan for seven years, including nearly six years under United States custody, with no charge or trial. Mr. Fatah and Mr. Jamaluddin have spent over one year under the custody of the Afghan authorities. The source observes that, although confinement is justifiable while a detainee is awaiting trial, Afghanistan has become obliged to promptly release Mr. Fatah and Mr. Jamaluddin following their sentence and release order. The failure of Afghanistan to comply with the judicial order constitutes prolonged detention under these circumstances and renders the brothers' detention arbitrary.

18. The source adds that Mr. Fatah's and Mr. Jamaluddin's detention is arbitrary under category I because their detention serves no legitimate purpose. They are not awaiting trial, nor are they currently serving a criminal sentence. Furthermore, they are being denied access to the courts and to legal counsel to challenge their continued detention.

19. It is further alleged that, to the extent that Afghanistan might claim authority to administratively detain Mr. Fatah and Mr. Jamaluddin pursuant to its security powers, that claim would be at odds with both international humanitarian law and human rights law. Under international human rights law, States engaging in administrative detention bear the burden of proving the existence of the most exceptional circumstances, in other words that a present, direct and imperative threat exists that cannot be addressed through alternative measures. The source observes that Mr. Fatah and Mr. Jamaluddin do not present such exceptional circumstances because they have already been tried, sentenced to time already served and ordered for release under the Afghan criminal system. Furthermore, during the seven years of their detention in Afghanistan, the United States and Afghan authorities have allegedly failed to produce evidence that Mr. Fatah and Mr. Jamaluddin pose a danger to security. The criminal charges brought against them were only for their unlawful presence in Afghanistan. Therefore, the source concludes that they do not pose an imperative threat and that their administrative detention, or any detention at all, is not justified.

20. The source observes that the non-refoulement obligations of Afghanistan cannot justify Mr. Fatah's and Mr. Jamaluddin's continued detention in Afghanistan. Their statelessness and the related non-refoulement concerns pose an obstacle to resettlement, but that obstacle cannot justify their continued detention in Afghanistan. The source notes that although Afghanistan is not a party to the Convention relating to the Status of Stateless Persons, the status of a stateless person under national law must also reflect applicable provisions of international human rights law. Their stateless status does not justify their

continued detention by the Government of Afghanistan. Moreover, the Human Rights Committee has stated 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.<sup>1</sup>

21. The source further submits that Mr. Fatah's and Mr. Jamaluddin's detention is arbitrary under category III, as the Government of Afghanistan has allegedly denied them a judicial review of their continued detention and meaningful access to or communication with independent counsel to challenge their continued detention. It has also failed to inform them of the basis for their continued detention following the Afghan courts' rulings.

22. With regard to the above-mentioned allegations, it is noted that no court has reviewed the continued detention of Mr. Fatah and Mr. Jamaluddin following the final ruling from the Supreme Court in December 2015. Their inability to obtain judicial review prevents them from challenging their detention in a fair trial. The Government of Afghanistan has failed to provide Mr. Fatah and Mr. Jamaluddin with a justification for their continued detention following the Afghan courts' rulings, contrary to article 9 (2) of the Covenant, which Afghanistan ratified on 24 January 1983. Mr. Fatah and Mr. Jamaluddin therefore cannot meaningfully challenge their detention without knowing the reason why they have been detained or, indeed, if there is any reason. The source concludes that, individually or combined, these procedural deficiencies constitute significant non-observance of the international norms relating to the right to a fair trial.

23. With regard to category V, the source notes that the foreign status of Mr. Fatah and Mr. Jamaluddin cannot justify the harsh treatment they have endured under Afghan custody as detainees in a maximum security section. It is submitted that the treatment endured by Mr. Fatah and Mr. Jamaluddin, insofar as it depends on their nationality or lack thereof, constitutes unlawful discrimination and is itself a basis for declaring their detention arbitrary under category V.

#### *Response from the Government of Afghanistan*

24. On 20 June 2016, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide detailed information by 19 August 2016 about the situation of Mr. Fatah and Mr. Jamaluddin, as well as 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 two individuals 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.

25. The Working Group regrets that it did not receive a response from the Government, which did not request an extension of the time limit for its reply, a possibility provided for in the Working Group's methods of work.

#### *Response from the Government of the United States*

26. On 20 June 2016, the Working Group transmitted the allegations from the source to the Government 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. Fatah and Mr. Jamaluddin at Bagram Theatre Internment Facility from March 2009 to December

<sup>1</sup> See general comment No. 35 (2014) on liberty and security of person, para. 18.

2014 and to provide details regarding the conformity of their deprivation of liberty and apparent lack of fair judicial proceedings with international human rights norms.

27. On 5 August 2016, the Government replied with a request to extend the time limit for its reply, which was granted by the Working Group; on 13 September 2016, the Government submitted a reply. In its reply, the Government stated that the two individuals in question were 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.

28. 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. Fatah and Mr. Jamaluddin to Afghan custody was considered the best available option under the circumstances but did not furnish any further details concerning that decision.

29. While referring the Working Group to the Government of Afghanistan for any further questions relating to Mr. Fatah and Mr. Jamaluddin, the Government of the United States also stated that it continued to engage with the Government of Afghanistan regarding the welfare of Mr. Fatah and Mr. Jamaluddin 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 detainees' 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*

30. 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.

31. 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.

32. 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. Fatah and Mr. Jamaluddin 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 complimentary and not mutually exclusive.<sup>2</sup>

33. 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. Jamaluddin and Mr. Fatah to Afghan civilian custody for criminal prosecution. The two men were sentenced under normal criminal proceedings, served their time and are now entitled to release.

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<sup>2</sup> See Opinion No. 44/2005 (Iraq and the United States of America), para. 13.

34. The source also rebuts the argument by the Government of the United States that it continues to engage with the Government of Afghanistan regarding the welfare of Mr. Fatah and Mr. Jamaluddin. While noting that such efforts are welcome, the source submits that they have not produced any concrete results for the two individuals concerned. The source contends that, having been detained for years under United States custody at Bagram Theatre Internment Facility, Mr. Jamaluddin and Mr. Fatah carry the stigma of having been suspected as terrorists by the United States. According to the source, it is that stigma that keeps them in indefinite detention. The source notes that the Government of Afghanistan lacks the financial resources to provide Mr. Fatah and Mr. Jamaluddin with humane living conditions. Noting also the lack of political capital held by the Government of Afghanistan to find them a third country where they could be resettled, the source points out that over the years the United States has successfully resettled hundreds of individuals detained as 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. Jamaluddin and Mr. Fatah.

35. The source therefore requests the Working Group to recommend that the Government of 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. Jamaluddin and Mr. Fatah 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 the resettlement of Mr. Jamaluddin and Mr. Fatah to a safe third country. Lastly, it asks the Working Group to find that the prolonged and indefinite detention of Mr. Jamaluddin and Mr. Fatah is arbitrary under categories I and III and to recommend both meaningful access to counsel and immediate release from Afghan custody.

## Discussion

### *In relation to the United States*

36. The Working Group recalls that, in accordance with paragraph 17 (a) of its methods of work, it may render an opinion on whether 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. Fatah and Mr. Jamaluddin by the United States notwithstanding the fact that the United States handed over the individuals concerned to the Afghan authorities, as their detention has continued since the handover.

37. The source alleges that Mr. Fatah and Mr. Jamaluddin were initially detained by the United States forces following a raid of their residence during which it was established that neither had a valid residence permit or a visa to stay in Afghanistan. The brothers were then held by the United States authorities at Bagram Theatre Internment Facility from March 2009 to December 2014. The source alleges that, during interrogations, it became clear that the authorities had mistaken Mr. Jamaluddin and Mr. Fatah for other men, a fact that was also allegedly admitted by the prison guards. The source informs the Working Group that Mr. Fatah and Mr. Jamaluddin were never given an explanation for their detention, were held incommunicado and were not granted access to a legal counsel. In February 2010, the detainee review board at the Facility determined that their detention was no longer warranted. However, despite the consecutive sessions of the detainee review board affirming the decision to release Mr. Fatah and Mr. Jamaluddin, the authorities continued to hold them until late 2014.

38. 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 law and, in fact,

constitutes a *jus cogens* norm.<sup>3</sup> That means that no derogations on behalf of States are permissible and no exceptional circumstances, be they a state of emergency or an armed conflict, may be invoked to justify restrictions to an individual's liberty through arbitrary detention.

39. 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>

40. The Working Group notes that the Government of the United States, in its reply to the allegations, only stated that the two individuals in question were lawfully detained by the United States under the Authorization for Use of Military Force (United States Public Law 107-40). This domestic legislation, referred to by the Government as a basis for detention in the present case, is a general law that gives the power of military operations to the President of the United States. It 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 the grounds for the arrest and the detention.

41. Moreover, the Government of the United States did not address the submission made by the source that in February 2010 the detainee review board determined that the detention of Mr. Fatah and Mr. Jamaluddin was no longer warranted. The Working Group therefore concludes that the Government is not disputing the submission that the board ordered the release of Mr. Fatah and Mr. Jamaluddin and that, as of the date of the review by the board ordering the release of Mr. Fatah and Mr. Jamaluddin, the continued detention of those two individuals by the United States authorities had no legal basis and was contrary to article 9 of the Covenant. It therefore constitutes arbitrary detention falling within category I.

42. 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. Secondly, they shall be promptly informed of any charges against them. In the case of Mr. Fatah's and Mr. Jamaluddin'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.

43. The Working Group is particularly alarmed by the source's allegation that Mr. Fatah and Mr. Jamaluddin have 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>5</sup> It is thus clear that, by holding Mr. Fatah and Mr. Jamaluddin incommunicado, the United States has violated their rights under article 9 (3) of the Covenant.

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

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<sup>3</sup> See A/HRC/22/44, para. 51.

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

<sup>5</sup> See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.7.



*In relation to Afghanistan*

45. 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.

46. 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>6</sup> In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

47. 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 in international human rights law is part of customary international law and, in fact, constitutes a *jus cogens* norm. That means that no derogations on behalf of States are permissible and no exceptional circumstances, be they a state of emergency or an 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 unpredictable deprivation of liberty is necessary for the protection of a vital interest or proportionate to that end.<sup>7</sup>

48. 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>8</sup> The Working Group has further confirmed as much in its 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>9</sup>

49. 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).

50. In the present case, Mr. Fatah and Mr. Jamaluddin exercised their right to challenge the legality of their detention before a court. On 25 February 2015, the Afghan court of first instance tried the brothers on charges of failing to provide proper documentation to enter Afghanistan and sentenced them to three years of imprisonment. However, in the light of the fact that the brothers had already served five years in United States custody at Bagram Theatre Internment Facility, the court ordered their release. On 17 May 2015, an Afghan appeals court upheld that ruling. Finally, on 19 December 2015, the Afghan Supreme Court affirmed the ruling again and ordered the immediate release of the brothers. The source informs the Working Group that, despite those rulings, Mr. Fatah and Mr. Jamaluddin continue to be held at the Afghan National Detention Facility. The Government of Afghanistan has not rebutted the allegations, which means that, while the initial detention of Mr. Fatah and Mr. Jamaluddin by the Afghan authorities could have been justified due to

<sup>6</sup> See A/HRC/19/57, para. 68.

<sup>7</sup> See A/HRC/22/44, para. 48.

<sup>8</sup> *Ibid.*, para. 49.

<sup>9</sup> See A/HRC/30/37, para. 3.

a breach of immigration laws, as of the date of the coming into legal force of the decision of the appellate court the continued detention of Mr. Fatah and Mr. Jamaluddin no longer has any legal basis. It is contrary to article 9 of the Covenant and therefore constitutes arbitrary detention falling within category I.

51. The Working Group further notes numerous violations of Mr. Fatah's and Mr. Jamaluddin's rights after the final determination of the case concerning their irregular immigration status. The rights of Mr. Fatah and Mr. Jamaluddin under article 14 (3) (b) and (d) of the Covenant have been violated since they were denied any legal representation for the purpose of challenging their continued detention since the appellate court ordered their release. 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.

52. Moreover, the Working Group also notes that Mr. Fatah and Mr. Jamaluddin have not been provided with any reason for their continued detention since the appellate court ordered their release. That is not only a violation of article 9 (2) of the Covenant, it also renders the two men's right to challenge their continued detention before a court entirely ineffective. Without knowing the charges against them or the reasons for their continued detention, Mr. Fatah and Mr. Jamaluddin are unable to challenge their detention. That serious breach of a non-derogable right, coupled with the denial of access to legal counsel, renders the continued detention of Mr. Fatah and Mr. Jamaluddin arbitrary under category III.

53. The Working Group wishes to express its grave concern about Mr. Fatah's deteriorating health since his detention in 2014 by the Afghan authorities. The Working Group refers, in particular, to the allegations made by the source that Mr. Fatah suffers from kidney disease and that his condition has deteriorated owing to the lack of medical care, poor nutrition and the heat at the prison. Moreover, the source reports that Mr. Fatah and Mr. Jamaluddin went on a hunger strike for two weeks in January 2016 to protest their continued detention. The Working Group considers that such treatment violates Mr. Fatah's and Mr. Jamaluddin's rights under article 10 (1) of the Covenant to be treated with humanity and respect for their inherent dignity, and falls significantly short of the requirements of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).<sup>10</sup>

54. Finally, the source claims that the harsh treatment that Mr. Fatah and Mr. Jamaluddin have endured while under Afghan custody is due to their status as foreign nationals. The source argues that Mr. Fatah and Mr. Jamaluddin have been discriminated against on the basis of their 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. Fatah and Mr. Jamaluddin 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. Fatah and Mr. Jamaluddin does not fall under category V.

#### *Non-refoulement*

55. The source has also submitted that the ultimate release of Mr. Fatah and Mr. Jamaluddin by the Afghan authorities must take into account the prohibition of non-

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<sup>10</sup> See General Assembly resolution 70/175 and, in particular, rules 1, 11-13, 15-16, 21-22, 24-27, 30-33 and 35.

refoulement and noted that the United States too cannot absolve itself of responsibility in the matter. Neither of the two Governments have addressed the issue.

56. The Working Group notes the credible allegations made by the source regarding the obligation of non-refoulement on the basis of the Tajik nationality of the two brothers, a nationality which they revoked for fear of being returned to Tajikistan. The source has stated that the brothers have been specifically targeted for persecution by the Government of Tajikistan because of their association with their father, Mr. Tabarov, a former political activist. The source has expressed concern that, in its quest to obtain further information about Mr. Tabarov, the Government of Tajikistan will subject Mr. Fatah and Mr. Jamaluddin to harsh interrogation techniques that may result in death. It is alleged that Tajik intelligence officials have threatened the brothers during numerous visits over the course of their detention, beginning in 2011 and as recently as October 2015. It is also alleged that Tajik intelligence officials have attempted to persuade the Afghan authorities to repatriate Mr. Fatah and Mr. Jamaluddin.

57. 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>11</sup>

58. Accordingly, the removal of 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 that the person will be 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>12</sup>

59. 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>13</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 or deported, is exposed to the danger of torture or other cruel, inhuman or degrading treatment or punishment.<sup>14</sup>

60. 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 allegations of torture and ill-treatment made by the source, which have not been rebutted by either Government. The Working Group therefore refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

<sup>11</sup> See A/HRC/4/40, para. 49.

<sup>12</sup> Ibid.

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

<sup>14</sup> See CAT/C/USA/CO/3-5, para. 16.

### **Disposition**

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

The deprivation of liberty of Abdul Fatah and Sa'id Jamaluddin by the 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.

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

63. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to immediately release Mr. Fatah and Mr. Jamaluddin and to accord to them 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. Fatah and Mr. Jamaluddin.

64. 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**

65. 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. Fatah and Mr. Jamaluddin have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Fatah and Mr. Jamaluddin;

(c) Whether an investigation has been conducted into the violation of Mr. Fatah's and Mr. Jamaluddin's rights and, if so, the outcome of the investigation;

(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.

66. 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.

67. 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.

68. 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>15</sup>

*[Adopted on 24 November 2016]*

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<sup>15</sup> See Human Rights Council resolution 24/7, paras. 3 and 7.