

OPINION No. 27/2010 (SYRIAN ARAB REPUBLIC)

Communication addressed to the Government on 28 January 2010.

Concerning: Mr. Haytham al-Maleh

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. Its mandate was clarified and extended by the Commission's resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102, extended it for a further three-year period by resolution 6/4 of 28 September 2007 and subsequently by resolution 15/18 of 30 September 2010 for a period of three years. 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 provided the requested information.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - I. When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (Category I);
 - II. When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);
 - III. When the complete or partial non-observance of the relevant international standards set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned relating to the right to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (Category III).
4. In the light of the allegations made, the Working Group would have welcomed the cooperation of the Government.
5. This case concerns Mr. Haytham al-Maleh, 79 years old, a lawyer and the former head of the Human Rights Association in Syria.
6. In its letter of 28 January 2010, the Working Group provided the Government of the Syrian Arab Republic with the summary of the case and requested any information which the Government would wish to provide regarding the allegations. No response has been received from the Government.

7. According to the source, Mr. Haytham al-Maleh was detained on 14 October 2009 on charges of "weakening nationalist sentiment" (article 285 of the Syrian Penal Code), "conveying within Syria false news" (article 286) and "slandering governmental body" (article 376).

8. In the source's view, the charges against Mr. Haytham al-Maleh relate to an interview he gave to the London-based Syrian opposition television channel, Barada TV, and also to the articles and reports he published over three years about government corruption and human right abuses in Syria.

9. In particular, according to the source, during his interview with Barada TV, Mr. Haytham al-Maleh spoke of the imprisonment of fellow human rights activists, including the recent case of prisoner of conscience Muhannad al-Hassani. The source notes that Mr. Haytham al-Maleh had been one of Muhannad al-Hassani's defence lawyers.

10. The source submits that Mr. Haytham al-Maleh also stated in the interview that, although the Syrian authorities "have at their disposal huge resources in the form of the army, intelligence, police and arms and all means of oppression, they hide behind laws which have no logical or legal or just basis" and went on to say that Syrian security forces are able to "commit crimes with impunity". He criticized the "state of emergency" laws, in force since 1964, which are used to curtail freedom of expression and association. He also spoke about government corruption and the increasing gap between the rich and poor in Syria.

11. The interview, according to the source, took place by phone on 12 October 2009 and the next day, 13 October 2009, an officer from Political Security telephoned Haytham al-Maleh and told him to report to the Political Security's branch in Damascus. Haytham al-Maleh refused to go. He was then arrested on 14 October by State Security and held incommunicado in a detention centre in the Kafr Sousa area of Damascus. The authorities refused to acknowledge that they were holding him until they moved him, on 19 October, to a branch of the Military Police in Qaboun, a district of Damascus, where he met with his lawyers. The next day, he was brought before the Military General Prosecutor, who read out the charges against him and then was returned to detention in the Military Police in Qaboun. On 3 November, he was brought before a military judge in Damascus who decided to charge Haytham al-Maleh with the same charges mentioned above.

12. According to the source, during the questioning by members of the Central Intelligence and during his hearing before the Military General Prosecutor, Mr. Haytham al-Maleh was questioned solely about his human rights work and the criticism of the government he had expressed in various interviews and articles. Specifically, he was repeatedly asked about his phone interview to Barada TV in which he criticized the Syrian authorities' continued repression of freedom of expression within the country and about an article he had written regarding his client and fellow human rights defender Muhanad al Hassani which was published in various magazines and newspapers. This, in the source's view, confirms that his detention results from the exercise of his right to the freedom of expression, as guaranteed by article 19 of the ICCPR.

13. The source submits that Mr. Haytham al-Maleh was tried before a military court. Following

this trial, during which he was denied legal counsel, he was sentenced on 4 July 2010 to three years' imprisonment.

14. The source notes that Mr. Haytham al-Maleh holds no military status and was convicted for a crime which has no military nature: "disseminating false information which could harm the nation" article 287 of the Penal Code. Despite this, he was sentenced to 3 years imprisonment by Syria's Military Tribunal. The proceedings against him were not conducted in accordance with the Code of Criminal Procedures; instead, the Code of Military Procedures was applied, which fails to offer many of the guarantees to a fair trial stipulated in the ICCPR and Syrian Code of Criminal Procedures.

15. The source informs, that the appeal lodged by Mr Al Maleh's lawyers following his sentence on 25 July 2010, was rejected.

16. The source alleges that the detention of Mr. Al-Maleh is arbitrary because it results from his exercise of his right to freedom of expression which is in violation of Article 19 of the International Covenant on Civil and Political Rights.

17. The source also alleges that Mr. Al-Maleh was deprived of his right to a fair trial. It argues that Mr. Al-Maleh, despite being in no way connected to the military, was tried before a military court which offers none of the guarantees of independence and impartiality which are essential to guarantee a fair trial in accordance with international norms.

18. The source recalls that Mr. Haytham al-Maleh has already been the subject of two joint urgent appeals by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the then Special Representative of the Secretary-General on the situation of human rights defenders on 23 February 2004; and by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, or punishment on 21 October 2009, respectively. According to the source, from 1980 to 1986, Mr. Haytham al-Maleh was imprisoned for his work for the Freedom and Human Rights Committee of the Syrian Lawyers' Union.

19. The source notes that Mr. Haytham al-Maleh suffers from diabetes and an overactive thyroid gland. Both conditions require the regular intake of appropriate medication, special diet and medical supervision to ensure that his health remains sound.

20. The source concludes that the Syrian authorities shall either release Mr Al Maleh or give him a fair trial before a competent court.

21. The Working Group considers it is in a position to provide an Opinion on the deprivation of liberty of Mr. Haytham al-Maleh.

22. The Working Group considers that Mr. Al-Maleh was arrested and convicted due to exercise of his right to freedom of expression through publication of articles and reports critical of the

Syrian authorities. The Working Group also noted that he was arrested in October 2009 immediately after his interview critical of the Syrian authorities to Barada TV.

23. The fact that Mr. Al-Maleh was charged with “weakening nationalist sentiment,” “conveying within Syria false news,” and “slandering governmental body” confirms that Mr. Al-Maleh’s arrest and the subsequent conviction were due to his exercise of his right to freedom of expression.

24. The Working Group recalls that the holding and expression of opinions, including those which are not in line with official government policy, are protected by Article 19 of the International Covenant on Civil and Political Rights. The deprivation of liberty of Mr. Al-Maleh solely for expression of his opinions, thus, falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

25. Mr. Al-Maleh, despite being a civilian, was tried before a military court and convicted for the crimes which are not of military nature.

26. In its Annual Report A/HRC/13/30 of 18 January 2010, the Working Group reiterated that the trial of civilians by military tribunals usually has an adverse effect on the enjoyment of the right to liberty of person, the right to a fair trial, to appeal against detention and to be tried in public by a legally established, independent, competent and impartial court, the right to a presumption of innocence, to equality of arms and to access to evidence, the right to a free and adequate defence, etc.

27. In the same Report, the Working Group noted that the mere fact that a military court which decides over a person’s liberty is in the hands of judicial authorities, one of whose most characteristic principles is obedience of superiors, clearly affects the right to security of person under Article 9 of the International Covenant on Civil and Political Rights.

28. In the Report contained in E/CN.4/1999/63, the Working Group expressed the opinion that, if some form of military justice is to continue to exist, it should be incompetent to try civilians.

29. In general comments No. 13 on the administration of justice (para. 4) and No. 32 on the right to equality before courts and tribunals and to a fair trial (para. 22), the Human Rights Committee warned of the difficulties which military jurisdiction causes for the enjoyment of human rights and pointed out “that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned...Trials of civilians by military or special courts should be exceptional i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.” (general comment No. 32, para. 22)

30. Pursuant to principle No. 5 of the Draft Principles Governing the Administration of Justice through Military Tribunals ((E/CN.4/2006/58), military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts. Principle No. 8 adds that “the

jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel.”

31. Therefore, the deprivation of liberty of Mr. Al-Maleh, being in contravention of Articles 9 and 14 of the International Covenant on Civil and Political Rights, falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

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

(a) The deprivation of liberty of Mr. Haytham al-Maleh, being in contravention of Articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, falls under categories II and III of the categories applicable to the consideration of cases submitted to the Working Group

(b) Consequent upon the Opinion rendered, the Working Group requests the Government of the Syrian Arab Republic to take necessary steps to bring Mr. Haytham al-Maleh's situation into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Haytham al-Maleh and accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights.

Adopted on 22 November 2010