

Interim decision No. 34/1994 (Indonesia)

Communication addressed to the Government of Indonesia on
6 December 1993.

Concerning: Xanana Gusmao, on the one hand, and the Republic of
Indonesia, on the other.

1. The Working Group on Arbitrary Detention, in accordance with the methods of work adopted by it and in order to carry out its task with discretion, objectivity and independence, forwarded to the Government concerned the above-mentioned communication received by it and found to be admissible, in respect of allegations of arbitrary detention reported to have occurred.
2. The Working Group notes with appreciation the information forwarded by the Government concerned in respect of the case in question within 90 days of the transmittal of the letter by the Working Group.
3. (Same text as para. 3 of Decision No. 10/1994.)
4. In the light of the allegations made the Working Group welcomes the cooperation of the Government of Indonesia. The Working Group transmitted the reply provided by the Government to the source, which has forwarded its comments in response. The Working Group believes that though it is not in a position to take a decision on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto the special features of this case require the Working Group to take an interim decision as indicated hereinafter.
5. Certain relevant facts may be stated. Xanana Gusmao was allegedly arrested on 20 November 1992. He was charged with leading an armed rebellion against the Indonesian Government, disrupting national stability and with illegal possession of fire arms in alleged violation of article 1 (1) of Law No. 12 of 1951. After being tried in Dili, East Timor from 1 February to 21 May 1993 Xanana Gusmao was sentenced by the Dili District Court to imprisonment for life. He was found guilty of attempted putsch (art. 106 of the Indonesian Penal Code (IPC)), of armed rebellion (art. 108 IPC) and conspiracy to commit a crime as stated in articles 104, 107 and 108 of the IPC.
6. It is alleged that Xanana Gusmao was held in secret military custody for 17 days before the International Committee of the Red Cross (ICRC) representatives were permitted to see him. During Gusmao's interrogation no lawyer was allegedly allowed access to him. This is apparently in violation of article 54 of the Indonesian Code of Criminal Procedure. It is further alleged that through the Indonesian Legal Aid Foundation (LBH) obtained on 22 December 1992, a power of attorney from Gusmao's family sources, the authorities prohibited the LBH access to him. In his defence statement, Xanana Gusmao reportedly stated that his defence advocate, Mr. Sudjono, had been appointed by the Strategic Military Intelligence Agency (BAIS); that he

himself wished to be represented by the LBH; that his letter appointing the LBH was intercepted by the military authorities and that he was forced to withdraw it and to give a letter appointing Mr. Sudjono as his defence advocate.

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

8. The Government in its response of 26 January 1994 maintained that the allegations submitted to the Working Group were untenable. According to the Government, while awaiting trial, Xanana Gusmao was treated with consideration in a manner consistent with international standards. The Government's position is that when two legal aid organizations offered their services to Mr. Gusmao he turned them down, accepting instead the services of Mr. Sudjono of the Indonesian Advocates Association. Mr. Sudjono who acted as Mr. Gusmao's defence counsel was apparently assisted by two other lawyers and a legal adviser who is a specialist in criminal law. It is also stated that during the trial Mr. Sudjono had been given full access to meet Mr. Gusmao.

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

10. The Government concludes that Xanana Gusmao's trial was carried out in full conformity under the Indonesian applicable laws. That it was fair and in accordance with the existing criminal procedure. There is, according to the Government, no legal basis for questioning the verdict of the Indonesian tribunal. Though Mr. Gusmao had a right of appeal to a high court, he chose not to avail of the right and instead appealed to the President for clemency which the Government informs was granted by reducing his prison sentence from life imprisonment to 20 years in accordance with article 14 of the Indonesian Constitution of 1945 and Law No. 3/1950.

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

12. Considering the nature of the allegations made and the response of the Government, it is difficult for the Working Group to find a certain set of facts which can be said to be undisputed. The Working Group cannot be persuaded to proceed to arrive at a decision merely on the basis of suspicion. There is no mechanism available within the Working Group to ascertain the veracity of the allegations made or for that matter to doubt the truthfulness of the Government's response. In this situation, any decision by the Working Group would have to be based on assumptions, conjectures and surmises. The communications of Xanana Gusmao subsequent to his trial and conviction if their contents represent the correct state of affairs, give rise to misgivings which can only be resolved pursuant to a detailed investigation. Individual liberty is too precious to be jeopardized by obfuscating issues by allegations and denials. It is therefore imperative that the true facts be investigated. For that the cooperation of the Government of Indonesia is essential. We are sure that it will on its part have no hesitation to permit the Working Group to ascertain the true and correct facts.

13. It may be recalled that the Commission on Human Rights, by its resolution 1993/97, urged, inter alia, the Government of Indonesia to invite the Special Rapporteur on the question of torture, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances to visit East Timor and to facilitate the discharge of their mandates, and that, of the four above-mentioned mechanisms, only the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has so far been invited by the Government of Indonesia to visit East Timor.

14. It is therefore desired that the Government of Indonesia be requested to permit a visit by the Working Group to Indonesia and East Timor to enable it to ascertain the facts, in cooperation with the Government of Indonesia for the purpose of arriving at a decision in the case of Xanana Gusmao. This will be a step in the direction of enabling the Working Group to fulfil its mandate and report to the Commission about the nature of Xanana Gusmao's detention.

Adopted on 30 September 1994.
