

OPINION No. 15/2003 (TUNISIA)

Communication addressed to the Government on 11 December 2002.

Concerning: Mr. Yahyaoui.

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

1. (Same text as paragraph 1 of opinion No. 15/2002.)
2. The Working Group conveys its appreciation to the Government for having provided the requested information in good time.
3. (Same text as paragraph 3 of opinion No. 15/2002.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments thereon. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case.
5. The case was referred to the Working Group on arbitrary detention as indicated below.
6. Mr. Zouhair Yahyaoui, born on 8 December 1967, of Tunisian nationality, the founder and webmaster of the TUNeZINE Internet site, was arrested at Ben-Arous at around 7 p.m. on 4 June 2002 by six plain-clothes members of the criminal investigation police in the cybercafé where he worked and managed his Internet site. He was then taken to his home, some 100 metres from the cybercafé, where the police officers conducted a search, and seized and confiscated his computer equipment.
7. On 20 June 2002 Mr. Yahyaoui was sentenced by the Fourth Criminal Chamber of the Tunis Court of First Instance to two years and four months' imprisonment under article 306 of the Criminal Code (dissemination of false information) and article 84 of the Telecommunication Code (unauthorized use of telephone lines). On 10 July 2002 the conviction was upheld by the Fourth Chamber of the Tunis Court of Appeal (two years' imprisonment).
8. Mr. Yahyaoui was first incarcerated in a holding cell in the basement of the Ministry of the Interior, and then at the El Gourjani detention centre, followed by the civilian prison on the boulevard 9 avril in Tunis, and lastly in the prison at Borj El Amri, where he remains in custody.
9. The source considers the arrest and detention of Mr. Yahyaoui arbitrary since they were the result of the exercise of the freedoms of expression and political opinion as editor and webmaster of the TUNeZINE web site, which disseminates information on the situation of human rights in Tunisia and runs two chat rooms. This web site has been censored in Tunisia.
10. The source also indicates that Mr. Yahyaoui was sentenced in first instance by a court that was not competent, namely the Tunis court, rather than the court at Ben-Arous, to a custodial sentence, without any of the 50 or so lawyers who organized in his defence being able to speak or file written submissions. The lawyers were denied the right to visit, and their application before the Court of Appeal for the right to visit has not been acted on. Further, no

one has been able to attend the trial, not even Mr. Yahyaoui's family. The appeals for annulment filed immediately after the most recent judgement have also met with no response. According to the source, the infringements of the right to due process taken together represent a very serious violation of the principle of equity.

11. The source also reports on the torture suffered by Mr. Yahyaoui after his arrest, while he was held at the Ministry of the Interior from 4 to 6 June 2002 and on 8 September 2002, when, complaining of severe kidney pain, as he was being taken to the sick bay two guards beat him severely. Mr. Yahyaoui filed a complaint, which was not recorded until 17 September 2002, and to which there has been no response.

12. The source also indicates that Mr. Yahyaoui's uncle, Judge Mokhtar Yahyaoui, was stricken off by the judicial disciplinary council in December 2001 for having denounced the lack of independence of the Tunisian justice system; the source also states that he has been subjected to intimidatory measures for some months. The source is concerned lest the arrest and conviction of Mr. Yahyaoui result in further harassment of his uncle and family.

13. In its reply, the Tunisian Government notes that a complaint for theft was lodged with the criminal investigation police by the owners of a cybercafé to the effect that their office telephone lines had been used without their knowledge by their employee Zouhair Yahyaoui, which had resulted in additional costs having an unanticipated and significant impact on their budget. Investigations revealed that the employee was indeed responsible for the fraudulent use of the special telephone lines. The investigation established that the individual concerned made fraudulent use of the Internet network to set up a site to disseminate flagrant disinformation, this constituting the offence of dissemination of false information such as to undermine public order.

14. The disinformation included a report of a foreign commando raid on a strategic site in the country which supposedly led to the deaths of seven police officers. Another false report alleged that there had been attacks on individuals and buildings in certain tourist sites, including a bombing of a hotel in Sousse, and appeals for the boycotting of tourism in Tunisia and Tunisian products.

15. The Public Prosecutor's Office attached to the Tunis Court of First Instance, before which the case was brought, issued a warrant for the arrest of the accused. On 8 June 2002 he appeared before the Tunis Criminal Court to answer two separate charges under article 84 of the Telecommunication Code and article 264 of the Criminal Code in respect of the first charge, and article 49 of the Press Code and article 306 bis of the Criminal Code in respect of the second. On the first charge (fraud) the court convicted the accused to one year and four months' imprisonment, and on the second (undermining public order) to one year in prison. Both the accused and the public prosecutor appealed, pursuant to which the court, on 10 July 2002, reduced the sentence handed down on the first count to one year's imprisonment, and confirmed the sentence handed down on the second count.

16. The Government notes that the accused's family was immediately informed of his arrest and place of detention, pursuant to article 13 of the Code of Criminal Procedure, and that his lawyers, in accordance with the law, were authorized to visit him.

17. In conclusion, the Government asserts that the detention of Mr. Zouhair Yahyaoui is not arbitrary, as he was prosecuted as a result of his involvement in criminal activities and not for the exercise of his right to freedom of expression, which is guaranteed under Tunisian legislation, and as his conviction was by means of a judicial decision rendered by a competent court at the conclusion of a fair trial, at which all the guarantees provided for by law were respected.

18. Commenting on the Government's reply, the source specified that the complaint of fraud by the owners of a cybercafé referred to by the Government does not appear in any of the documentation in the file, and that the two owners of the Internet café at which the arrest took place on 4 June 2002 were also arrested and tortured at the headquarters of the Ministry of the Interior. The source adds that the two reports (Nos. 648 and 649) on the two counts on which Yahyaoui was sentenced clearly state that the initiation of proceedings was the result of "information concerning connections by an unknown party under the pseudonym Ettounsi managing a site for the dissemination of information ... who was tracked down and arrested and proved to be the accused Zouhair Yahyaoui".

19. Regarding the dissemination of disinformation, the source rejects the Government complaints and states that no mention of these facts was contained in the records of the trial, adding that the call for a boycott was not made on the web site but by Tunisian youngsters who had taken part in a debate in the chat room. The source also reiterates its comments regarding the conditions of arrest, the acts of torture, the failure to respect the legal duration of police custody, the poor conditions of detention and the violations of the norms relating to a fair trial which on three occasions induced Zouhair Yahyaoui to begin a hunger strike as a protest against the deplorable conditions under which he was held.

20. It is clear from the foregoing that the allegations by the source and those made by the Government are flatly contradictory. For the source, the conviction of Zouhair Yahyaoui was in violation of the norms relating to a fair trial and was intended to punish him for exercising freedom of expression on a web site, which he operated in secret. For the Government, the inquiry that led to the conviction of Zouhair Yahyaoui was launched following a complaint of fraudulent use of telephone lines filed by his employers against him, and it was that investigation that revealed the use by the party concerned of a web site propagating disinformation such as to undermine public order. The source asserts that there was never any complaint and that the so-called complainants were themselves arrested and tortured, and that their premises remain closed to this day.

21. On this point, the Government's reply lacks conviction. On the one hand, it asserts that the inquiry was undertaken pursuant to the filing of a commonplace complaint of fraudulent use of telephone lines while, on the other hand, it maintains that Zouhair Yahyaoui operated a web site propagating false information, announcing bombings, raids by foreign commandos and other events that allegedly created false alerts, sowed panic and seriously undermined public order. The Working Group has received press releases and urgent appeals from several non-governmental organizations that confirm the allegations by the source and testify that the TUNeZINE site disseminates information on the situation of fundamental freedoms in Tunisia and has two chat rooms. Moreover, PEN American Center awarded Zouhair Yahyaoui the PEN/Barbara Goldsmith Freedom to Write Awards prize. It is also alleged that

Zouhair Yahyaoui was tortured to reveal the password for the TUNeZINE web site, and that the site disappeared after his arrest, and that it was subsequently censored in Tunisia. These allegations have been completely ignored in the Government's reply.

22. As for exercise of the freedom of expression via the Internet, the Working Group reaffirms that the right to freedom of opinion and expression, guaranteed in article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, encompasses the freedom to disseminate ideas of all kinds, in any form and by all means, unless, in exercising this right, the person or persons concerned instigate crime or racial hatred, resort to violence, or threaten, in violation of the law, national security, public safety, public order, or public health or morality, as well as the rights or reputation of others, which, in the present case, does not seem to be so.

23. The Working Group also notes with regard to the violation of the right to a fair trial that whereas the source affirms that no one was able to attend the trial and that Zouhair Yahyaoui's lawyers were not authorized to visit him and were unable to make statements or written submissions, either before the court handing down the sentence, or before the court of appeal, or before the court of cassation, the Government simply described the conduct of proceedings and maintained that the conviction was a result of a judicial decision rendered by a competent court at the conclusion of a fair trial at which all guarantees provided for by law were respected, without adducing any arguments to counter the allegations by the source.

24. The Working Group considers that in the present case a public hearing and the right to have the necessary time and facilities to prepare a defence and communicate with counsel chosen by the defendant are fundamental guarantees, the violation of which makes the deprivation of liberty arbitrary in that it contravenes the provisions of article 14 of the International Covenant on Civil and Political Rights.

25. From these various circumstances the Working Group concludes that Zouhair Yahyaoui is in reality being detained for having exercised his right to freedom of expression and opinion, in violation of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which Tunisia is a party.

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

The deprivation of liberty of Zouhair Yahyaoui is arbitrary, being in contravention of article 19 of the Universal Declaration of Human Rights and of articles 14 and 19 of the International Covenant on Civil and Political Rights, to which Tunisia is a party, and falls within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

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

Adopted on 5 September 2003