

OPINION No. 41/2005 (TUNISIA)

Communication: addressed to the Government on 20 April 2005.

Concerning: Mr. Mohammed Abbou.

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

1. (Same text as paragraph 1 of Opinion No. 38/2005.)
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. 38/2005.)
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, which made comments on it. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the case, in the context of the allegations made and the response of the Government thereto.

5. According to the information received, Monsieur Mohammed Abbou, born on 10 May 1966, of Tunisian nationality, a lawyer and member of human rights organizations and an opposition political party, was arrested on leaving a café in the evening of 1 March 2005 by persons in plain clothes who were probably police officers. No arrest warrant or other official document was produced at the time. It was only the following day, after several requests from his lawyers, that a rogatory commission dated 28 February 2005 issued by the examining magistrate of the Second Chamber of the Tunis Court of First Instance and signed by a police commissioner from the Criminal Affairs Section was produced.

6. Mr. Abbou was initially held in the “9 April” civil prison in Tunis; on 11 March 2005 he was transferred to the civil prison in El Kef, 170 km from Tunis. The source alleges that the transfer was contrary to domestic law since the Code of Criminal Procedure required that Mr. Abbou be held in a prison within the jurisdiction of the competent court, viz. that of Tunis. Furthermore, the examining magistrate’s warrant of commitment stipulated that Mr. Abbou should be held in the 9 April prison in Tunis. Mr. Abbou is apparently still detained in El Kef.

7. The source alleges that the reason for Mr. Abbou’s prosecution was his publication of two articles on the Internet: one, on 25 August 2005, in which he compared conditions in Tunisian prisons to those in the Abu Ghraib prison in Iraq, and the other, on 28 February 2005, in which he criticized the fact that the Israeli Prime Minister, Ariel Sharon, had been invited to attend the World Summit on the Information Society in Tunis in November 2005. He is charged under articles 42, 44, 49, 51, 68 and 72 of the Press Code and article 121-3 of the Criminal Code with publication and dissemination of false information causing or likely to cause public disorder, defamation of the judiciary and incitement to break the law.

8. The source states that at the time of submission of the communication Mr. Abbou was in preventive detention and that no date had been set for his trial. The only document in the case file is the rogatory commission dated 28 February 2005.

9. The source deems Mr. Abbou’s arrest and detention arbitrary because they resulted from the exercise of the freedom of expression and opinion. It further alleges that there have been numerous irregularities that vitiate the entire proceedings. Firstly, the arrest was illegal because it was not made *flagrante delicto*. Mr. Abbou should have been summonsed to appear by an examining magistrate, who, after having heard his testimony, could have issued a warrant of commitment. If proceedings had then been opened, the Bar Council should have been informed of them, since Mr. Abbou had been exercising his profession of lawyer normally.

10. Second, the rogatory commission produced on 2 March 2005 is defective in several respects: it is dated 28 February, but was not given to Mr. Abbou’s lawyers until 2 March; it mentions neither the order whereby, nor the date on which the prosecutor had authorized the opening of proceedings; it refers to a letter from the Criminal Affairs Section dated 31 September, although September only has 30 days; Tunisian procedure does not require

cases to be referred to examining magistrates in writing, even if the document in question is endorsed by the Attorney-General; pursuant to article 199 of the Code of Criminal Procedure, the fact the case file contains no request from a prosecutor for the start of action by an examining magistrate nullifies the entire investigation.

11. Third, the source states that, although they have gone there frequently in attempts to see him, Mr. Abbou has not been allowed to meet his lawyers since his transfer to the El Kef prison on 11 March 2005. That constitutes a breach of article 70 of the Code of Criminal Procedure. Mr. Abbou refuses to be questioned by the examining magistrate unless his lawyers are present and there has therefore been no such hearing.

12. The source further states that when, on 2 March 2005, Mr. Abbou was to be questioned by the examining magistrate, his lawyers were prevented from attending: they were physically assaulted by police officers, who barred their way to the magistrate's office. The hearing was then postponed to 16 March 2005 despite the fact that article 79 of the Code of Criminal Procedure provides that suspects must be questioned by an examining magistrate within three days of their arrest. On 16 March 2005, the day chosen for the postponed hearing, only the Bar President was allowed to meet the examining magistrate and the latter informed him that, of the 815 lawyers who had signed formal notices of appointment as their colleague's defence counsel, only ten would be allowed to discharge that function. When the Bar President tried to discuss that decision, he was insulted and forcibly expelled from the magistrate's office. Mr. Abbou was not present that day for a hearing.

13. The Government states in its response that the judicial authorities in Tunis instituted proceedings against Mr. Abbou, a lawyer and member of the bar, following the filing against him by a female lawyer of a complaint for an assault that occasioned physical injury and necessitated urgent medical attention followed by one month's sick leave. Mr. Abbou was also charged with defamation of the judiciary, dissemination of false information and incitement to break the law.

14. It further states that on 2 March 2005 Mr. Abbou appeared, together with his lawyers, before the examining magistrate of the Tunis Court of First Instance, who granted his request for a postponement to enable his lawyers to prepare his defence.

15. On 16 March 2005 Mr. Abbou again appeared before the examining magistrate, who authorized 17 of his lawyers to attend the hearing. Mr. Abbou contested this decision and refused to be questioned, on the ground that not all his lawyers were present. There not being room for all Mr. Abbou's lawyers and Mr. Abbou refusing to be questioned unless they were all present, the examining magistrate reminded the accused of the provisions permitting continuation of the proceedings notwithstanding his refusal to answer. In disregard of article 73 of the Code of Criminal Procedure, which expressly authorizes the prosecution service to be present during the questioning and confrontation of accused persons, one of the lawyers attending this meeting objected to the presence of the prosecution service.

16. On 23 April 2005, the examining magistrate decided to close the investigation and to commit the accused for trial by the criminal chamber of the Tunis Court of First Instance on a charge of assault and battery resulting in a level of permanent disability not exceeding 20 per cent.

17. Regarding the other charges, the Government states that the examining magistrate met with an absolute refusal on the part of Mr. Abbou, who, by his writings and attitude, rendered himself guilty of disseminating false information and defaming the judiciary. On 28 April 2005, the above criminal chamber sentenced Mr. Abbou to two years' immediate imprisonment for having assaulted a female colleague so as to occasion a level of permanent disability not exceeding 20 per cent and to 18 months' imprisonment for defamation of the judiciary, dissemination of false information and incitement to break the law.

18. Mr. Abbou appealed the verdict and appeared before the criminal chamber of the Tunis Court of First Instance on 10 June 2005 as a detainee. During the consideration of the first charge he reportedly refused to respond to the court's questions, leading to the application by the president of the court of article 148 of the Code of Criminal Procedure, under which a defendant's silence can be disregarded and the floor given to one of the defence counsel. Later, when the president tried to call on another of the defence lawyers, one of them objected, each of the two wishing to be the first to speak. In view of this disagreement and the subsequent disturbance, the president decided, at the request of the prosecution, to suspend the hearing until order was restored. As soon as that had been achieved, the hearing was resumed in the presence of Mr. Abbou's lawyers, who made a number of formal requests. When these were refused, the defence lawyers withdrew; two of them and a number of observers remained in the courtroom. The court then considered the second case and Mr. Abbou admitted disseminating the text in question. The two lawyers who had remained in the courtroom declined to plead. After deliberating, the court upheld the verdict of the court of first instance both as to civil and as to criminal law and, in the absence of an appeal from either the defendant or the prosecution service, the judgement became final.

19. The Government concludes that Mr. Abbou's detention is not arbitrary, since the proceedings giving rise to his conviction were conducted in accordance with the valid rules of procedure and the rights of the defence. It states that Mr. Abbou has enjoyed all his rights since his imprisonment, including those to medical examination, discussions with his lawyers and visits from relatives.

20. In response to the Government, the source observes that Mr. Abbou was arrested without a warrant and that neither he nor his family was told of the reasons for his arrest. The security service agents who arrested him were not entitled to do so, since article 10 of the Code of Criminal Procedure bars them from performing such acts (this being the opinion of Tunisian lawyers who consider that, not being members of the judicial police, security service agents are incompetent to make arrests, their authority having been linked to the State security courts that were abolished in 1987). The source also states that, contrary to article 45 of Law 87 of 1989, the Bar President was not informed of Mr. Abbou's arrest or incrimination.

21. According to the source, Mr. Abbou was detained in the 9 April prison after being brought before the examining magistrate on 2 March and then transferred to the prison in El Kef 200 km from Tunis and far from his family. The source alleges that this was done to keep him away from his lawyers, who are based in Tunis and several of whom, particularly those considered "activists", have been refused permission to visit him in the El Kef prison.

22. Regarding the investigation initiated by the judicial authorities in Tunis on the ground of a complaint by a female lawyer of assault that occasioned physical injury, the source states that the case file contained only a single sheet of paper, an unsigned medical report dated 2005 and referring to an incident alleged to have taken place in 2002.

23. The source concludes by stating that the article by Mr. Abbou that was used to incriminate him condemned the use of torture in Tunisia. In the source's opinion, however, the reason for Mr. Abbou's arrest was another article he wrote in which he compared the Israeli Prime Minister, Ariel Sharon, to the President of Tunisia, Zine el Abidine Ben Ali.

24. It is apparent from the foregoing that the allegations of the source and those of the Government differ. In the source's view, Mr. Abbou's arrest was contrary to Tunisian law and his conviction was reached after an unfair trial and intended to penalize his exercise via the Internet of the freedom of expression. In the Government's view, the investigation that led to Mr. Abbou's conviction arose out of the filing of a complaint against him by a female member of the bar and he was subsequently charged with defamation of the judiciary, dissemination of false information and incitement to break the law.

25. The Working Group notes that on 1 March 2005, Mr. Abbou, a lawyer and member of several human rights organizations and an opposition political party, was arrested for having, on 28 February, posted on the website tunisnews.net an article strongly criticizing the Government. It also notes that the rogatory commission that purportedly provided the legal basis for the arrest is flawed in several respects. For example, it bears the signature not of the examining magistrate but of a police commissioner. In this rogatory commission, Mr. Abbou is accused of offences in connection with an article he posted on the above website on 25 August 2004, namely "dissemination and propagation of false and malicious information likely to disturb public order, defamation of the judiciary, incitement of citizens to break the law of the Republic and presentation to the public of writings likely to disturb public order". There is no mention in the document of a complaint against Mr. Abbou by a female colleague.

26. The Group concludes from the foregoing and from the circumstances of Mr. Abbou's trial, from the fact that he was transferred to El Kef prison although the investigation and trial took place in Tunis, and from the support he received from the Tunisian Bar and numerous national and international non-governmental organizations that it was indeed the articles he published on the Internet, and not the complaint from a female colleague, that were the reason for his arrest and conviction. According to the source, 815 lawyers agreed to defend him.

27. With respect to the exercise of the freedom of expression via the Internet, the Working Group reaffirms that the freedom of expression and opinion guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights includes the right to impart ideas of all kinds in any form and by any means except when, in exercising that right, the person or persons concerned incite to crime or racial hatred, use violence or, in breach of the law, threaten national security, public order, public health or morals or the rights or reputation of others, which does not seem to have been the case in the present instance. In the article entitled *Abou Ghraib d'Iraq et Abou Ghraib de Tunisie* (Abou Ghraib in Iraq and Abou Ghraib in Tunisia) for which he was sentenced to 18 months'

rigorous imprisonment, Mr. Abbou expresses political opinions critical of the Head of State and his Government's policy without overstepping the allowable limits of the exercise of freedom of expression.

28. The Working Group's position is that the freedom of expression protects not only opinions and ideas that are favourably received or considered inoffensive or of no account, but also opinions and ideas that may offend public figures, including political leaders. The peaceful expression of an opinion via the Internet is, if the opinion is not couched in violent terms or does not constitute an incitement to national, racial or religious hatred or to violence, within the allowable limits of the exercise of freedom of expression.

29. In view of this position, the Working Group felt it unnecessary to examine the source's allegation that the trial was unfair.

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

The detention of Mr. Mohammed Abbou is arbitrary, being in contravention of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to both of which instruments the Tunisian Republic is a party, and falls under category II of the categories applicable to the consideration of cases submitted to the Working Group.

31. Consequent upon the Opinion rendered, the Working Group 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 28 November 2005.