**OPINION No. 7/2007 (AUSTRALIA)**

**Communication: addressed to the Government on 27 October 2006.**

**Concerning: Amer Haddara, Shane Kent, Izzydeen Attik, Fadal Sayadi, Abdullah Merhi, Ahmed Raad, Ezzit Raad, Hany Taha, Aimen Joud, Shoue Hammoud, Majed Raad, Bassam Raad, and Abdul Nacer Benbrika.**

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

1. (Same text as paragraph 1 of Opinion No. 32/2006.)

2. (Same text as paragraph 3 of Opinion No. 32/2006.)

3. The Working Group welcomes the cooperation of the Government, which provided the Working Group with information concerning the allegations of the source. The reply of the Government was brought to the attention of the source, which made observations on it.

4. The case summarized below was reported to the Working Group as follows: Amer Haddara, aged 26; Shane Kent, aged 29; Izzydeen Attik; Fadal Sayadi, aged 25; Abdullah Merhi, aged 21; Ahmed Raad, aged 22; Ezzit Raad, aged 24; Hany Taha, aged 31; Aimen Joud, aged 21; Shoue Hammoud, aged 26; Majed Raad, aged 22; Bassam Raad, aged 24; and Abdul Nacer Benbrika, a 45-year-old dual Algerian-Australian citizen, also known as Abu Bakr, were arrested and charged with forming a terror cell following a series of coordinated anti-terror raids by New South Wales Police, Victorian and Federal Police in Sydney and Melbourne. Ten of them were arrested on 8 November 2005 and Majed Raad, Bassam Raad and Shoue Hammoud, the remaining three, were detained on 31 March 2006.

5. The 13 detainees have been charged with different terrorist offences under the anti-terror provisions of the Criminal Code of 1995. The offences are related to membership and support of an unnamed terrorist organization. None of the detainees has been charged with engaging in a terrorist act or committing an act in preparation of a terrorist act. According to their defence lawyers, the case against their clients is weak, based in part on hearsay and rumours, slim and peripheral.

6. The detainees are being held on remand and have been classified by the State correctional authority, Corrections Victoria, to be kept at the Acacia Unit of Barwon maximum security prison, near Geelong, in Victoria. According to the source, the conditions of their detention are oppressive and in clear contrast with regimes normally accorded to unconvicted prisoners, established by the Minimum Standard Guidelines for Australian Prisons (2004). Some of the accused have been held in solitary confinement for several months. According to the source the high-security detention of all the detainees has occurred as a result of a blanket decision relating to terrorist offences per se, without consideration of their individual circumstances.

7. In December 2005, a bail application hearing was held in Melbourne for Hany Taha and Abdullah Merhi. Their request was dismissed. In January 2006, an application for bail was filed on behalf of Mr. Haddara before the Supreme Court of Victoria. The request was also dismissed on the basis that his case did not give rise to “exceptional circumstances” as required by Section 15AA of the Crimes Act 1914. In his decision, Justice Osborn considered that Mr. Haddara’s conditions of detention were especially difficult. He stated that if such confinement continued for a protracted period pending trial, it might be regarded as constituting “exceptional circumstances” according to the referenced law.

8. In April 2006, an application for bail was filed on behalf of Mr. Attik on the basis of his mental health, the impact of the detention on his mental health and the lack of access to adequate health care in custody. The Supreme Court of Victoria rejected the application for bail.

9. In May 2006, another application for bail on behalf of Mr. Haddara was filed before the Supreme Court of Victoria, also on the basis of “exceptional circumstances”. This request was rejected; in spite of Justice Eames’ statement noting that the preparation of his legal defence was difficult to his lawyer because of the remote location of the detention centre and the restrictive conditions of detention in the Acacia Unit at Barwon Prison.

10. The source alleges that the detention of these 13 persons is arbitrary, on the basis of alleged serious violations of their rights as defendants. According to the source, the detainees have a limited and restrictive access to legal representation. Thus, detainees’ lawyers do not have appropriate access to the evidence gathered against the defendants; all their visits to the detainees are videotaped and recorded and all the materials provided to and received by the detainees, including documentation related to their defence, are scanned by prison officers. Very limited legal visits are often shortened. It was also reported that family members of the defendants have complained about verbal harassment and receiving hate mail.

11. In its reply, the Government states that each of the alleged offenders has been charged with one count of being a member of a terrorist organization, contrary to section 102.3 of the Criminal Code. Various additional charges have also been laid against some of the men, including charges of intentionally recruiting a person to join a terrorist organization, intentionally making funds available to a terrorist organization, and possessing an item connected to preparations for a terrorist act.

12. The Government confirmed that the above-mentioned offenders are being held on remand in the Acacia High Security Unit at Barwon Prison in Victoria, a unit that houses both remand and convicted prisoners. However, the two categories of prisoners do not mix. According to the Government, the above-mentioned defendants have never been held in solitary confinement and

if each prisoner has an individual cell, he spends approximately six hours out of his cell each day and normally exercises with one other prisoner. Each cell contains standard equipment, including a computer with a DVD/CD-ROM drive to access the electronic brief of evidence against them. They are able to make applications for any special arrangements they may require to assist them in preparation of their defence, consistent with article 14, paragraph 3 (b) of the International Covenant on Civil and Political Rights (ICCPR).

13. The Government also states that remand prisoners are permitted one non-contact visit per week of one hour duration and one contact visit per month with any children they may have under the age of 16 years. They however remain shackled and manacled during the contact visit with children for security reasons. Remand prisoners have also telephone access and are permitted to make 25 personal telephone calls per week.

14. As far as visits by legal counsel are concerned, the Government states that remand prisoners do not have limits on the number of visits from professionals, except by the conflicting demands of other prisoners to have access to the contact room available for professional visits. Accordingly, there is a system of booking the contact room to guarantee access. It also states that lawyers may visit their clients in the Acacia Unit between 8.45 a.m. and 3.30 p.m. Visits are video monitored for security purposes, but there is no audio sound or recording. Remand prisoners are also allowed to make an unlimited number of legal professional calls.

15. Referring to allegations of the source concerning the dismissal of the application for bail of Mr. Haddara by Justice Eames whilst noting: “that the preparation of [the alleged offender’s] legal defence was difficult to his lawyer because of the location and restrictive conditions of detention in Acacia Unit at Barwon Prison”, the Government clarifies that the Judge went on to add: “Nonetheless, I am not persuaded that the applicant has been unreasonably denied access to his lawyer. Indeed the evidence is that he has made frequent contact with his lawyer.”

16. According to the Government all the above-mentioned detainees have been through committal proceedings, at which a Magistrate found that there was a case against each on which a reasonable jury could convict. On 1 September 2006, 11 of the alleged offenders were committed to stand trial in the Supreme Court of Victoria on the charges under the Criminal Code. On 20 September 2006, the remaining two were also committed to the Supreme Court to stand trial and all matters have been listed for a directions hearing in the Supreme Court on 1 December 2006.

17. In its reply, the Government also provided detailed information addressing the allegations of lack of access to adequate health care in custody and the violation of the exercise of freedom of religion, especially during Ramadan. The Government informed that the allegations that the detainees were served pork meals have been referred to the Corrections Inspectorate for investigation. The Government also informed that complaints concerning the lack of access to adequate health care have been lodged by the detainees and are being investigated.

18. The Government considers that arbitrary detention occurs where the detention is not reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. The alleged offenders, according to the Government, have been charged with serious offences and remanded in custody in a facility that the Victorian government considers appropriate, given the nature of the offences with which they have been charged. Further, they have had their

applications for bail reviewed and rejected by judges of the Supreme Court of Victoria. They have reasonable access to their lawyers and facilities for preparing their defence consistent with both international standards and Australian Guidelines. Moreover, the Victorian government has also thoroughly investigated all allegations of mistreatment.

19. Commenting on the Government's reply, the source reiterates that the above-mentioned detainees were held in solitary confinement at least for more than 70 days in Unit 4, which has single-occupancy cells, each with its own enclosed yard, and no common areas. During their stay in Unit 4, the detainees have no contact with any other prisoners at all. The source insisted on the unnecessary restrictions on personal visits and the very intrusive measures imposed during the contact visits with children under 16. The source also provides detailed information concerning the alleged violations of the religious observances and diet, and on the violation of the right to health consequent to the detainees' conditions of detention and the lack of access to health care, particularly mental health care. According to the source, the level of mental health care available to the detainees falls short of that explicitly required by article 12 of the International Covenant on Economic Social and Cultural Rights and impliedly required by articles 7, 9 and 10 of ICCPR.

20. As a final matter, the source notes that the detainees have now all been committed to stand trial in the Supreme Court of Victoria at a date yet to be fixed. It is unlikely, however, that the trial will commence before late 2007, at the earliest. It may then continue for a period of 6 to 12 months. This means that the detainees may be held in their current oppressive conditions as unconvicted remand prisoners for up to three years, which, according to the source, raises particular issues in relation to the guarantee that persons charged with a criminal offence must be tried without undue delay. The source is of the view that the detention is not reasonable, necessary, just or proportionate, as required by article 9, paragraph 1, of ICCPR.

21. The Working Group notes that the allegations submitted by the source basically refer to conditions of detention, allegations which, consequently, do not fall within the Working Group's mandate, which refers to the lawfulness of the detention. The Working Group also notes that the source has submitted the same allegations to other United Nations human rights mechanisms, such as the Special Rapporteur on Freedom of Religion or Belief; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health and the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism.

22. The Working Group considers that the conditions of detention of the above-mentioned persons, as described by the source and not contested by the Government, are particularly severe, especially taking into account that they have been imposed upon persons who have not yet been declared guilty and who must, accordingly, be presumed innocent. Conditions of detention are relevant for the Working Group solely in the case that their severity or harshness reaches such magnitude that they affect, compromise or impede the right to an adequate preparation and exercise of the defence in conditions that guarantee the principle of equality of arms. The Working Group pays particular attention, in this context, to the possibility to communicate, in private and without interferences, with the defence lawyer.

23. In his communication, the source has invoked allegations that if they came to be established would constitute grave violations of the right to defence. The Government has refuted most of these allegations and furnished detailed information on the means put at the disposal of the defendants to prepare their defence and to communicate without major interferences with their lawyers. The information submitted by the Government was not commented on or refuted by the source. However, the Government has not refuted the allegation that correspondence between defendants and their lawyers are scanned by prison officers as well as the allegation that all the interviews between defendants and lawyers are videotaped, although without audio sound or recording, for security reasons.

24. With regard to the allegation that the detention is not reasonable, necessary, just or proportionate as required by article 9, paragraph 1, of ICCPR, the Working Group recognizes that the Committee on Human Rights has considered, in the framework of a temporary or pretrial detention of a judicial nature, that: "The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances. Further, remand in custody must be necessary in all circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime".[15] The Working Group notes that if several general criteria can be identified from the Committee's jurisprudence, such as legality, legitimacy (of the detention's goal), necessity, proportionality, and protection of human rights, every kind of deprivation of liberty may require additional and/or specific criteria.

25. In the case under consideration, the persons concerned are charged with serious offences; the investigation of the case was terminated in September 2006, less than a year after their arrest and detention, and all of them are now committed to stand trial before the Supreme Court of Victoria. The Working Group notes that even if the date of the trial is yet to be fixed, the period spent in pretrial detention could not be, at least at this stage, considered excessive.

26. Neither the source nor the Government have provided the Working Group with copies of the judicial decisions rejecting the applications for bail. While both the source and the Government have quoted some passages from these decisions, the Working Group is not in a position to make a definite assessment of the reasoning behind the dismissal by the Court of the defendants' applications for bail. It appears clear that the judges have given serious consideration to the arguments provided by the defence for release of some of the detainees or at least a relaxation of the conditions of their detention. The Working Group remains concerned, however, that the law appears to make the detention under extraordinarily restrictive conditions the rule for any person charged with a terrorist offence, without sufficient room for consideration of the specific charges against the detainees and their individual circumstances or dangerousness. The submissions of the parties suggest that the judges deciding on bail applications might not have sufficient discretion to consider these matters either, at least in the absence of "exceptional circumstances".

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[15] *A (name deleted) v. Australia* (CCPR/C/59/D/560/1993), para. 9 (2).

27. Despite these concerns (and in the absence of more detailed submissions by the source and the Government thereon), in the light of the charges brought against the defendants and the length of time they have spent, at this stage, in custody, their pretrial detention does not seem to be disproportionate. The Working Group reiterates that the allegedly oppressive conditions of their detention per se and the consequences of these conditions on the mental health of the defendants do not fall within its mandate.

28. In conclusion, the Working Group considers that the material before it does not disclose such a lack of observance of international norms relating to a fair trial which would confer on the detention of Amer Haddara, Shane Kent, Izzydeen Attik, Fadal Sayadi, Abdullah Merhi, Ahmed Raad, Ezzit Raad, Hany Taha, Aimen Joud, Shoue Hammoud, Majed Raad, Bassam Raad, and Abdul Nacer Benbrika, an arbitrary character.

Adopted on 9 May 2007.