

OPINION No. 11/2007 (AFGHANISTAN and UNITED STATES OF AMERICA)

Communication: addressed to the Government on 11 December 2006.

Concerning: Amine Mohammad Al-Bakry.

The States are parties to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 32/2006.)
2. The Working Group regrets that neither the Government of Afghanistan nor the Government of the United States of America have replied.
3. (Same text as paragraph 3 of Opinion No. 32/2006.)
4. According to the source, Amine Mohammad Al-Bakry, born on 29 December 1968, of Yemeni nationality, residing at Old Airport Road in the city of Al Medinah, Saudi Arabia, is the director of a private company specialized in the import and export of diamonds and precious stones. The company is owned by Djamel Ahmed Khalifa, husband of a sister of Osama bin Laden.
5. The source reports that Mr. Al-Bakry was abducted on 28 December 2002 in Thailand, during a business trip to Bangkok, allegedly by agents of the intelligence services of the United States or of Thailand. During the whole year 2003, his whereabouts were unknown. The Thai authorities confirmed to Mr. Al-Bakry's relatives that he had entered Thailand's territory but denied knowing his whereabouts. In January 2004, Mr. Al-Bakry's relatives received a letter from him through the International Committee of the Red Cross (ICRC), informing them that he was kept in detention at the United States Air Force Base of Baghram, near Kabul, Afghanistan.
6. The source states that Mr. Al-Bakry was detained due to his commercial connections with Mr. Khalifa. Mr. Khalifa himself was arrested in San Francisco, United States of America, and, after four months in detention, expelled to Jordan. In Jordan he was detained during two months without charges or trial. He is back in Saudi Arabia in freedom. The source considers that Mr. Khalifa was detained due to his family connection with Osama bin Laden.
7. The source alleges that Mr. Al-Bakry has been detained for (at the time of submission of the communication) more than 41 months in the military base of Baghram without any charge laid against him. No trial date has been set. Furthermore, he has been refused access to defence lawyers and the only visits he may receive are those from representatives of ICRC. Mr. Al-Bakry is not able to challenge the lawfulness of his detention or to appear before a competent, independent and impartial judicial authority.
8. According to the source, States are obliged to apply the norms of the International Covenant on Civil and Political Rights to all persons under their jurisdiction. The Covenant thus applies in all territories under the effective control of the Afghan and the United States Governments and to all persons under their jurisdiction. The United States has not temporarily derogated from of its obligations under the International Covenant on Civil and Political Rights in conformity with article 4 of the Covenant and with general comment No. 31 (2004) of the Human Rights Committee (CCPR/C/21/Rev.1/Add.13, para.10).

9. The source argues that Mr. Al-Bakry has been denied the right to a fair trial recognized by articles 105 and 106 of the Third Geneva Convention and article 75 of its Additional Protocol I. Both Governments deny prisoner-of-war status to the persons detained at Baghram military base. Consequently, international human rights law should be applied. The source adds that the right to a fair trial is inalienable and constitutes a guarantee necessary to the effective enjoyment of all human rights and the preservation of legality in a democratic society.

10. The Working Group would have welcomed the cooperation of the two Governments concerned. In the absence of any reply from them, the Working Group considers that the allegations of the source have not been disputed.

11. The Working Group notes that Mr. Al-Bakry was deprived of his freedom in Thailand. There is no indication that the circumstances under which he was arrested in any way involved an armed conflict which could trigger the applicability of international humanitarian law. In this context, the Working Group recalls that it has previously noted “that the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law”.¹⁷ As stated also by ICRC: “When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern. [...] The designation ‘global war on terror’ does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict.”¹⁸ The rules of international law governing Mr. Al-Bakry’s detention are therefore to be found in international human rights law, in particular in the International Covenant on Civil and Political Rights, to which both the United States of America and Afghanistan are parties (as well as, it might be added, Thailand).

12. Article 9 of the Covenant provides in paragraph 1 that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. Paragraph 4 of article 9 enshrines the right to judicial review of the legality of detention. It reads: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

¹⁷ Situation of detainees at Guantánamo Bay, report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt (E/CN.4/2006/120), paragraph 9 and note 20.

¹⁸ Official Statement of the International Committee of the Red Cross (ICRC) dated 21 July 2005 regarding “The relevance of IHL in the context of terrorism” (available at < <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/terrorism>).

13. Mr. Al-Bakry was secretly arrested by unidentified agents probably belonging to United States information services, or to their Thai counterparts acting on instructions from the United States services, in Bangkok, where - according to the undisputed account of the source - he was carrying out his habitual business. Nobody, not even his close family, was informed of this detention. In January 2004, his family learned - only through ICRC - that he has been detained since a date unknown at the Baghram United States Airbase in Afghanistan. Except for ICRC visits and the possibility to transmit letters through them, he is held there completely incommunicado. He has not been informed of any charges raised against him. He has not had any possibility to challenge the lawfulness of his situation before a judicial authority, as article 9, paragraph 4 of ICCPR requires for all cases of detention, whether criminal charges are raised in judicial proceedings or detention remains administrative. No lawyer has been able to visit him. Accordingly, the deprivation of liberty suffered by Mr. Al-Bakry since December 2002, i.e. for the last four-and-a-half years, is in violation of article 9, paragraphs 1 and 4, of ICCPR which are the applicable provisions of international law, and constitutes a very serious form of “arbitrary detention” and an extremely grave violation of his human rights.

14. This arbitrary detention is directly perpetrated by the United States, who is therefore responsible for it. The Working Group notes, however, that, at least since January 2004, Mr. Al-Bakry has been detained on Afghan soil. All the information in the public domain and available to the Working Group indicates that the Government of Afghanistan is well aware of the fact that the United States Government is holding detainees in situations such as Mr. Al-Bakry’s at Baghram Air Base, a military base the United States runs with the consent of the Government of Afghanistan since the end of the international armed conflict at the end of the year 2001. The Government of Afghanistan has not informed the Working Group of any measures taken to address this matter. The Working Group recalls that under article 2 of ICCPR, each State party assumes not only the obligation not to actively engage in violations, but also “... to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”.¹⁹ This obligation is incompatible with the acceptance of situations of year-long arbitrary detention of individuals on one’s territory by a foreign power. The Working Group can therefore only conclude that Afghanistan also bears responsibility for the arbitrary detention of Mr. Al-Bakry.

15. The Working Group notes that the role of the authorities of Thailand in the transfer of Mr. Al-Bakry to United States custody is not clear. In any event, Mr. Al-Bakry having been only briefly in the custody of the Thai authorities - if at all - and this detention having occurred more than four years ago, the Working Group did not consider it necessary to bring the communication to the attention of the Government of Thailand and to seek its observations. The Working Group notes, however, that in its most recent report (A/HRC/4/40) it called attention with great concern to the question of irregular extraditions referred to as “extraordinary renditions”, of which Mr. Al-Bakry’s case would appear to be an example. In this respect, the

¹⁹ The Working Group recalls that the Human Rights Committee has clarified that “States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.” (General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, paragraph 10.)

Working Group reiterates that “[t]he practice of “renditions”, i.e. the informal transfer of a person from the jurisdiction of one State to that of another on the basis of negotiations between administrative authorities of the two countries (often the intelligence services), without procedural safeguards is irremediably in conflict with the requirements of international law. When a Government eludes procedural safeguards, in particular the affected person’s right to be heard, it cannot in good faith claim that it has taken reasonable steps to protect that person’s human rights after removal, including the right not to be arbitrarily detained. As a consequence, it will share responsibility for ensuing arbitrary detention”. (A/HRC/4/40, para. 50).

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

The deprivation of liberty of Mr. Al-Bakry is arbitrary, being in contravention of articles 2 and 9 of the International Covenant on Civil and Political Rights and falls within category I of the applicable categories to the consideration of cases submitted to the Working Group. Both the Government of the United States of America and the Government of Afghanistan bear responsibility for the violation of his right to liberty.

17. Consequent upon the opinion rendered, the Working Group requests both Governments to take the necessary steps to remedy the situation, and to 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 11 May 2007.