

Opinion No. 41/2008 (Indonesia)

Communication addressed to the Government on 8 July 2008

Concerning Messrs. Johan Teterisa; Ruben Saiya; Romanus Basteran; Daniel Malwauw; Fredi Akihary; Abraham Saiya; Jefta Saiya; Alexander Tanate; Yusup Sapakoli; Josias Sinay; Agustinus Abraham Apono; Piter Patiasina; Stevanus Tahapary; Jhordan Saiya; Daniel Akchary; Barea Manuputty; Izaak Saimima; Erw Samuel Lesnusa; Renol Ngarbinan; Soni Bonseran; Ferdinan Waas; Samuel Hendrik; Apner Litamahaputty; Philip Malwauw; Alex Malwauw; Marlon Pattiwael; Jhon Saranamual; Yacob Supusepa; Jhonatan Riri; Petrus Rahayaan; Elias Sinay; Piter Latumahina; Johannes Apono; Domingus Salamena and Deni de Fretes

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

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
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, but has not received its comments.
5. The case concerns the arrests and detention of the following 35 persons: Johan Teterisa, aged 46, a school teacher; Ruben Saiya; Romanus Basteran; Daniel Malwauw; Fredi Akihary; Abraham Saiya; Jefta Saiya; Alexander Tanate; Yusup Sapakoli; Josias Sinay; Agustinus Abraham Apono; Piter Patiasina; Stevanus Tahapary; Jhordan Saiya; Daniel Akchary; Barea Manuputty; Izaak Saimima; Erw Samuel Lesnusa; Renol Ngarbinan; Soni Bonseran; Ferdinan Waas; Samuel Hendrik; Apner Litamahaputty; Philip Malwauw; Alex Malwauw; Marlon Pattiwael; Jhon Saranamual; Yacob Supusepa; Jhonatan Riri; Petrus Rahayaan; Elias Sinay; Piter Latumahina; Johannes Apono; Domingus Salamena and Deni de Fretes.
6. It was reported that, on 29 June 2007, a group of Maluccan (Alifuru) dancers (ages from 19 to 49), despite tight security measures, performed a traditional Alifuru war dance in front of the President of the Republic in Ambon, capital of Maluku Province, during an official ceremony marking the National Family Day. The dance had not been programmed and began during a speech by Maluku Governor Karel Albert Ralahu. It was performed as a sign of peaceful protest during the speech by the Governor, and when finished, a flag of the banned South Moluccan Republic (RMS) was shown in front of the stage where the President was sitting. The protest, lasting less than five minutes, was recorded and televised nationally.
7. The Alifuru dancers and others were immediately arrested by agents of Detachment 88, the police counter-terrorism unit, and harshly interrogated, beaten and even tortured. On 1 July 2007, a military chief was quoted in the Indonesian media as saying that the

incident had publicly embarrassed the National Intelligence Agency (BIN) for not anticipating the protest during the official ceremony. It was further reported that the Maluku provincial military authorities and police chief were removed.

8. In March 2008, trials against the Alifuru dancers began at the Ambon District Court. The trials were not open to the public. The accused persons were convicted of plotting against the State and treason, according to articles 106, 107 and 108 of the Penal Code. The Court imposed sentences ranging from 10 years to life imprisonment. Among those tried and sentenced, Mr. Johan Teterisa was condemned to life in prison. The sentence establishes that Mr. Teterisa, as a leader of the protest, had embarrassed the people of Indonesia in the eyes of the world. His sentence was particularly harsh because he had shown no remorse for his action. On 3 April 2008, Mr. Abraham Saiya was sentenced to 15 years in jail.

9. According to the source these persons did not receive legal assistance for their defence. Many of them have not asked for appeal for fear of reprisals and high sentences.

10. All these persons are imprisoned at Lembaga Tahanan Djaksa, situated in Waiheru on the island of Ambon. The source is concerned that they all continue to be subject to beatings and torture in their imprisonment. The source is also concerned that those with sentences of 10 years' imprisonment or more will be transferred to the Nusa Kambangan, an isolated island prison in Java, far from their homes and families.

11. The source concludes that these persons have been arrested, tried and sentenced for a non-violent protest. They only waved a flag and did not try to harm the President. The Court failed to consider that the actions of these persons were essentially non-violent. It was said that a life sentence was uncalled for in an episode that did not endanger the lives of others. The sentences against these persons were severely disproportionate to their act of civil disobedience.

12. While the Criminal Procedure Code limits the period of pre-trial detention and authorizes a maximum length of 61 days in very specific circumstances, these persons were held more than nine months in pre-trial detention.

13. The Government, in its response, acknowledges the facts of the event as presented by the source. It states, however, that this non-violent protest constitutes a serious violation of the national laws, in particular Government Regulation 77/2007 (03/PIM-MRP/2008) on the basis that:

- (a) Prior permission was not sought by the dancers;⁵
- (b) The act of dancing and unfurling the RMS flag constituted a display of separatist symbols criminalized under the aforementioned regulations;⁶
- (c) The individuals, by participating in the dance and unfurling the flag, posed a threat to national security falling within the definition of "makar" or rebellion; and
- (d) The act was a national embarrassment since it was in the presence of the President of the Republic marking an important Indonesian national event i.e., the 14th National Family Day (Harganas).

14. The Government also makes reference to constitutional and statutory provisions protecting freedom of opinion and expression. This right however can not be used in a manner which is detrimental to the State Constitution and territorial integrity of Indonesia.⁷

⁵ Permission has to be sought under chapter 510 of the Criminal Code.

⁶ Article 6 of Regulation 77/2007 prohibits display of the RMS flag in Maluku. The persons faced rebellion charges under articles 106-110 of the Criminal Code.

15. The Working Group has accorded due consideration to allegations by the source as well as the response of the Government and believes this to be a case of arbitrary detention falling within categories II and III outlined above on the following grounds:

16. By all accounts, the act of dancing and unfurling the RMS flag in a public meeting was conducted in a non-violent manner and lasted no more than five minutes. It was an expression of views and opinions covered under national and international laws. However, these acts of expression came into conflict with a domestic law i.e., Regulation 77/2007. An implicit hierarchy of rights/laws was thus created wherein the right to freedom of expression became subservient to the right to be protected from national disintegration. The acts of dancing and unfurling of the RMS flag was interpreted by the Government as amounting to a threat to national security and an act of treason going beyond the right to freedom of speech and expression. Judges failed to consider that these actions were non-violent.

17. The Working Group has in its work reiterated the principle that nationalist assertions through peaceful and non-violent means, such as a dance as in the instant case, which falls within the freedom of expression, is protected under the international human rights instruments, in particular the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights and for which the individual or individuals concerned, ought not to be held criminally liable by the State (see, for instance, Working Group's Opinions 28/2000 at E/CN.4/2001/14/Add.1 at 134; Opinion 7/2001 at E/CN.4/2002/77/Add.1 at 50 and Opinion 13/2003 at E/CN.4/2004/3/Add.1 at 71).

18. Whilst there does exist a law addressing offences amounting to treason which was invoked in the instant cases, the Working Group is of the view that a critical freedom of expression that is peaceful, constitutes an internationally recognised right under legal obligations accepted by Indonesia. To classify these as treason attracting prolonged detention and even life imprisonment, and responding by the counter terrorist detachment of the State, violates the above cited rights. Recalling an annual report of the Working Group, this constitutes a case of "over-incarceration":

"61. The Working Group is fully cognizant of the fact that States enjoy a wide margin of discretion in the choice of their penal policies, e.g. in deciding whether the public interest is best served by a "tough on crime" approach or rather by legislation favouring measures that are alternatives to detention, conditional sentences and early release on parole. The Working Group also recognizes that the imposition of a long term of imprisonment for an offence which in another country would have received only a light or conditional sentence cannot be taken as arbitrary, in the sense of a case falling into the categories used by the Working Group when considering individual communications.

62. The Working Group is, however, not entirely indifferent to the sentencing policies of States. Article 9 of the International Covenant on Civil and Political Rights starts with the fundamental principle that "Everyone has the right to liberty and security of person". Regional human rights agreements enshrine the same principle⁷.

63. The Working Group takes the view that this principle not only means that nobody shall be deprived of his or her liberty in violation of the law or as a result of the exercise of a fundamental right, but that it first of all requires that States should have recourse to deprivation of liberty only insofar as it is necessary to meet a

⁷ Law No. 9 of 1998 on Freedom of Opinion in the Public Sphere; Law No. 40 of 1999 stipulating freedom of the press.

pressing societal need, and in a manner proportionate to that need. (E/CN.4/2006/7).”

19. Many of the persons in the present case were held in pretrial detention for periods well over the maximum of 61 days permitted only in very specific circumstances under the Criminal Procedure Code. The Government in its response admits as much by stating that: “Since then, many of them have been remanded into custody at the Polros Ambon, Maluku and the Tantui Ambon, Maluku. Long after their arrest, the normal proceedings were followed”.⁸

20. The detained persons have not received a fair and open trial; neither have they had access to legal counsel. Right to a fair trial both under national and international law is a basic human right and impacts on the question of whether a detained person has been held in arbitrary detention. The Government has not responded with any explanation in this regard and not refuted the allegation by the source. The presumption made by the Working Group is therefore that the trials fall below the minimum standards of a fair trial.

21. It is pertinent to note here that, in the past, the Working Group has been seized of similar cases regarding Maluku nationalists asserting their right to expression of their beliefs and opinions (see Opinion No. 11/1999, E/CN.4/2000/4/Add.1) and where it has rendered its Opinion regarding the arbitrariness of detention under Category II. The cases in hand are recent examples that arrest and detention continue to persist and prevail without recourse to a fair and free trial, equality before law and equal protection of the law, as other protestors involved in similar acts of demonstration would not have arguably been meted out similar treatment.

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

The detention of Messrs. Johan Teterisa; Ruben Saiya; Romanus Basteran; Daniel Malwauw; Fredi Akihary; Abraham Saiya; Jefta Saiya; Alexander Tanate; Yusup Sapakoli; Josias Sinay; Agustinus Abraham Apono; Piter Patiasina; Stevanus Tahapary; Jhordan Saiya; Daniel Akchary; Baree Manuputty; Izaak Saimima; Erw Samuel Lesnusa; Renol Ngarbinan; Soni Bonseran; Ferdinan Waas; Samuel Hendrik; Apner Litamahaputty; Philip Malwauw; Alex Malwauw; Marlon Pattiwael; Jhon Saranamual; Yacob Supusepa; Jhonatan Riri; Petrus Rahayaan; Elias Sinay; Piter Latumahina; Johannes Apono; Domingus Salamena and Deni de Fretes is arbitrary, being in contravention of articles 7, 9, 10, 18, 19 and 20 of the Universal Declaration on Human Rights, as well as articles 9, 14, 18, 19, 21, 26 and 27 of the International Covenant on Civil and Political Rights, falling within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

23. Accordingly, the Working Group calls upon the Government to release the detained persons forthwith; to give serious consideration to the domestic laws on treason and bring these into conformity with the country’s international human rights law obligations.

Adopted on 25 November 2008

⁸ At p. 2, response of the Government of Indonesia communicated on 21 October 2008 via the Permanent Mission to the United Nations Office at Geneva.