

Opinion No. 45/2008 (India)

Communication addressed to the Government on 27 August 2007

Concerning Messrs. Manzoor Ahmad Waza; Nisar Ahmad Wani; Sh. Farooq Ahmad Kana; Mohammed Yousuf Mir; Mehraj-ud-Din Khanday; Nazir Ahmad Dar; Mohammed Younis Bhat; Umar Jan; Reyaz Ahmad Teeli and Abdul Qadeer

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. Despite their belated filing, the Working Group welcomes the cooperation of the Government, which has submitted information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows: Messrs. Manzoor Ahmad Waza, Nisar Ahmad Wani, Sh. Farooq Ahmad Kana, Mohammed Yousuf Mir, Mehraj-ud-Din Khanday (a minor), Nazir Ahmad Dar, Mohammed Younis Bhat, Umar Jan, Reyaz Ahmad Teeli, all Kashmiri, and Mr. Abdul Qadeer from Tajikistan, have all been taken into preventive detention at different,

partly unknown, places pursuant to the provisions of the Jammu & Kashmir Public Safety Act 1978 (J&K PSA).

5. Mr. Manzoor Ahmad Waza, aged 29, usually residing at District Barmulla, was arrested without a warrant on 16 November 2005 in Barmulla, by Indian Army officers in collaboration with agents from the Special Operations Group, on charges under Section 307 of the Ranbeer Penal Code (RPC) and Section 7/27 of the Indian Arms Act 1959 (IAA) (criminal case file FIR No. 283/05). Thereafter, he was handed over into the custody of the Police Station in Barmulla. Mr. Waza was detained on 6 March 2006 pursuant to a preventive detention order of the District Magistrate in Barmulla invoking the provisions of the J&K PSA on grounds that his activities were allegedly prejudicial to the security of the State. He is currently being detained at an unknown place of detention under the custody of the Jammu Kashmir Police in Barmulla. A writ petition against the detention order passed by the District Magistrate is currently pending for adjudication before the High Court of Jammu & Kashmir at Srinagar.

6. Mr. Nisar Ahmad Wani, usually residing at District Anantnag, was arrested without a warrant on 14 September 2004 in Kelam, Kulgam, by officials from the Special Operations Group, for charges laid against him in terms of sections 7/25 IAA and 4/5 of the Explosive Substance Act (criminal case file FIR No. 1205/04). He has been held in custody at an unknown place of detention by forces of the Jammu Kashmir Police Kulgam since 10 December 2005 under the authority of a preventive detention order of the District Magistrate of Anantnag. The order was passed invoking the provisions of the J&K PSA for reasons that the activities of Mr. Wani were allegedly prejudicial to the security of the State. The detention order is currently under challenge before the High Court of Jammu & Kashmir at Srinagar in a writ petition filed by the cousin of the detainee.

7. Sh. Farooq Ahmad Kana, aged 20 years, usually residing at District Barmulla, was arrested on 10 September 2005 in Shahbad Sopore by forces of the 112 BW Border Security Force (BSF) on charges under Section 7/25 IAA (criminal case file FIR No. 306/05). No arrest warrant was shown to him. Forces of the Jammu Kashmir Police held him for some days since 20 December 2005 at the Police Station in Sopore; thereafter he was transferred to a place of detention unknown to his relatives. The detention order was passed by the District Magistrate in Barmulla citing the J&K PSA for activities of the detainee, which were allegedly prejudicial to the security of the State. The detention order has been challenged before the Honorable High Court of Jammu & Kashmir at Srinagar on 25 February 2005.

8. Mr. Mohammed Yousuf Mir, usually residing at District Kupwara, was arrested without a warrant on 14 December 2004 in Srinagar by police forces of the Counter-Insurgency Kashmir Unit (CIK) in Srinagar on charges laid under sections 7/25 IAA, 2/3 E&IMCO, 120(b) RPC (criminal case file FIR No. 22/2004) and under sections 2/3 E&IMCO, 153(a) 153(b), 120(b) RPC, and 7/25 IAA (criminal case file FIR No. 16/2004), the latter of which carrying imprisonment for life. Mr. Mir is currently detained at the Central Prison in Kotbalwal Jammu by the Jammu Kashmir Police.

9. The first detention order No. DMK/PSA/05 was passed by the District Magistrate in Kupwara on 8 January 2005, which was quashed by the High Court in Habeas Corpus Petition No. 29/05. On 14 December 2005, Mr. Mir was granted bail by the 2nd Additional District and Sessions Judge in case FIR No. 22/2004 and directions were given to the Superintendent of the Central Prison in Kotbalwal to release the detainee. Immediately after his release, Mr. Mir was apprehended by the officials from the Counter-Intelligence Jammu Unit (C.I.J.) on the premises of the Central Prison in Kotbalwal and was then held at Tallab Tallo Interrogation Centre before being transferred to the holding cells of the CIK in Srinagar. From there the detainee was moved to the Interrogation Centre in Humhama and detained there until 10 January 2006. During this period Mr. Mir was not produced before a

court of law for a remand hearing as required by law. While in the custody at the Humhama Interrogation Centre, the detainee was incriminated in another criminal case bearing FIR No. 16/2004. Thereafter, he was again transferred to the Central Prison in Kotbalwal and detained in preventive custody.

10. The second detention order was passed on 27 February 2006 (order No. 05/DMK/PSA/2006) and was based in fact on the allegation that the activities of Mr. Mir were prejudicial to the security of the State and in law on the provisions of the J&K PSA. The detention order was never served to Mr. Mir. A writ petition against this detention order has been pending for adjudication before the High Court of Jammu & Kashmir at Srinagar since 25 April 2006.

11. Mr. Mehraj-ud-Din Khanday, 16 years of age, Indian citizen of the Kashmiri region, usually residing at District Pulwama, was arrested without a warrant on 5 August 2005 at his home in Panner Jagar, Tral, by officials from the Special Investigation Team South District Srinagar, on charges of two accounts under sections 307, 307 and 427 RPC, and 3/5 Explosive Substance Act (criminal case file FIR No. 56/2005), and in a third case under sections 302 and 307 RPC, Section 3/5 Explosive Substance Act in criminal case FIR No. 142/2005. The charges levelled against Mr. Khanday carry imprisonment for life. The minor was first detained by the Jammu Kashmir Police at the Police Station in Rajbagh Srinagar on 28 February 2006 pursuant to an order of the District Magistrate in Srinagar on grounds that his activities were allegedly prejudicial to the security of the State in terms of the J&K PSA, but was later transferred to a detention facility unknown to his family. The detention order passed by the District Magistrate has been challenged before the High Court of Jammu & Kashmir at Srinagar on 13 April 2006.

12. Mr. Nazir Ahmad Dar, usually residing at District Baramulla, was arrested on 10 December 2003 without a warrant in JVC Bemina Srinagar by forces of the Jammu Kashmir Police and Special Operation Group on charges under sections 7/25 IAA, and 3/6 of the Terrorist & Disruptive Activities (Prevention) Act 1987 (TADA), registered with the Police Station of the CIK in Srinagar (criminal case file FIR No. 18/2003). He has been taken into preventive detention on 3 March 2004 by the Jammu Kashmir Police at the District Prison in Udhampur Jammu. The detention order was passed by the District Magistrate in Srinagar invoking the provisions of the J&K PSA for reasons that the activities of the detainee are allegedly prejudicial to the security of the State.

13. The detention order was successfully challenged before the High Court of Jammu & Kashmir by Habeas Corpus Petition No. 210 of 2004 and set aside on 12 March 2005. The copy of the Court's order was served on the prison authorities; however, instead of releasing Mr. Dar, the prison authorities detained him as under trial. Thereafter, the Additional District & Sessions Judge in Srinagar, upon application of Mr. Dar, granted bail after hearing the State. The bail order was duly served on the prison authorities, which, however, did not release him but handed him over into the custody of the Joint Intelligence Committee (JIC) in Humhama. Officials from the JIC Humhama charged him in another criminal case FIR No. 3/2002 pursuant to sections 2/3 E & IMCO, 7/25 IAA, 302 and 120-B RPC. Mr. Dar was kept in custody at the premises of the JIC Srinagar for some days. Thereafter, he was transferred to the District Prison in Kotbalwal, where he was detained in preventive custody again under the provisions of the J&K PSA (order No. 257 of 2006 dated 6 March 2006). This detention order passed by the District Magistrate in Barmulla has been challenged before the High Court of Jammu & Kashmir in Srinagar on 26 April 2006.

14. Mr. Mohammed Younis Bhat, usually residing at District Srinagar, was arrested in 1999 by forces of the Jammu Kashmir Police on charges of two accounts under Section 7/25 IAA (criminal case file FIR No. 8/99) registered with the Police Station in Panth Chowk and the Police Station in Kheer Bawani, respectively. Later, further charges

were laid against him under Section 7/25 IAA (criminal case files FIR No. 78/2002 and FIR No. 81/2005). No warrant was shown to Mr. Bhat upon arrest. Case FIR No. 8/99 was presented to the court of competent jurisdiction and Mr. Bhat was awaiting his trial. While already in detention in connection with this case, Mr. Bhat was detained concurrently in preventive custody under the provisions of the J&K PSA. The detention order was passed by the District Magistrate in Srinagar for reasons that his activities were allegedly prejudicial to the security of the State. However, after the expiry of the said detention order, the detainee was not released. In 2002, Mr. Bhat was again charged in another criminal case bearing FIR No. 78/2002 pursuant to Section 7/25 IAA. On 29 September 2005 Mr. Bhat was incriminated in criminal case FIR No. 81/2005 and while in custody and awaiting his trial, a preventive detention order was issued by the District Magistrate in Srinagar on 18 October 2005. One order of detention has been challenged by his father in a writ petition before the High Court of Jammu Kashmir Srinagar which is pending adjudication since May 2006. Mr. Bhat has been in continuous detention since 1999.

15. Mr. Umar Jan, usually residing at District Anantnag Kashmir, was arrested without a warrant on 16 August 2005 at his home in Takya Behram Shah, Tehsil & District Anantnag, by forces of the 1st Rashtria Rifles (RR) in Khanabal Anantnag on charges under Section 7/25 IAA (criminal case file FIR No 651/2005). At the Interrogation Centre of the 1st RR Khanabal, Mr. Jan was ill-treated. Later, he was transferred to the Air Cargo Interrogation Centre in Srinagar and held there for around nine days. He was then detained at the Joint Interrogation Centre (JIC) for about one month before being returned to the 1st RR Khanabal and detained there for some days. Also because of public pressure exerted by locals during demonstrations, officials of the 1st RR Khanabal handed Mr. Jan over to the Police in Anantnag who incriminated the detainee under criminal case bearing FIR No. 651/2005 on charges pursuant to Section 7/25 IAA. The District Magistrate in Anantnag passed the preventive detention order on 26 November 2005 (order No. Det/PSA/05/176) under the provisions of the J&K PSA alleging that Mr. Jan's activities were prejudicial to the security of the State. He was then detained at the Central Prison in Kotbalwal Jammu under the authority of its Superintendent.

16. Mr. Jan filed a writ petition (No. 418/2005) before the High Court of Jammu & Kashmir challenging the legality of his detention. During the pendency of the said writ petition, the Government revoked the detention order of the detainee on 6 February 2006. Thereafter, Mr. Jan was handed over from the Central Prison in Kotbalwal to forces of the CIK Jammu and was detained there for about 40 days. In the meantime Mr. Jan was granted bail by the Judicial Magistrate in Anantnag on 22 April 2006 related to the criminal charges put against him under case FIR No. 651/2005. The bail order was served on the concerned Police. Instead of releasing Mr. Jan, however, he was again transferred to the Central Prison in Kotbalwal Jammu and detained under the provisions of J&K PSA. Mr. Jan has never been released from the custody of the State since his initial arrest on 16 August 2005. A writ petition against his detention is pending adjudication before the High Court of Jammu & Kashmir at Srinagar since May 2005.

17. Mr. Reyaz Ahmad Teeli, aged 27 years, usually residing at District Anantnag, was arrested without warrant on 23 March 2004 in Bijbehara by officials of the Jammu & Kashmir Police and of the Special Operations Group. He was charged under sections 307 RPC and 7/25 IAA (criminal case file FIR No. 117/04) and later again in a separate case pursuant to the same provisions (FIR No. 84/04), both registered with the Police Station in Bijbehara. The detainee did not apply for bail regarding the first charges put against him under FIR No. 117/04. While being held in custody, upon request of the Jammu & Kashmir Police, the District Magistrate in Anantnag passed the preventive detention order on 6 August 2004 for an indefinite period time invoking the provisions of the J&K PSA on grounds that the activities of Mr. Teeli were allegedly detrimental to the integrity and

sovereignty of the State (order No. 303/DMA/PSA/2004/549-54). He is currently being detained at the Joint Interrogation Centre in Humhama.

18. The preventive detention order dated 6 August 2004 was successfully challenged before the High Court of Jammu & Kashmir in a writ of Habeas Corpus petition and the Court directed the authorities to release Mr. Teeli in a judgement dated 27 September 2005. Meanwhile, the trial court of competent jurisdiction also granted bail to the detainee in criminal case FIR No. 117/04. Both orders were served to the Police for his release. However, instead of releasing Mr. Teeli, the Police transferred him to the Interrogation Centre, where he was ill-treated for some days. Mr. Teeli was then implicated in another criminal case (FIR No. 84/04). A corresponding bail application was accepted by the Sessions Judge in Anantnag. The bail order was duly served to the Police authorities concerned; however, Mr. Teeli was again not released. Under criminal case file FIR No. 84/04, anew detention of Mr. Teeli was requested by the Deputy Superintendent of the Police Joint Interrogation Centre in Hayhama according to letter No. JIC/06/H-O/13333 dated 4 January 2006. The request for preventive detention was approved by the District Magistrate in Anantnag on 29 April 2006 subject to the provisions of the J&K PSA (order No. Det/PSA/06/09). This order has been challenged before the High Court of Jammu & Kashmir at Srinagar on 29 May 2006.

19. Mr. Abdul Qadeer, 45 years of age, a Tajik national, usually residing at R/O Shaheed Mazar in Tajikistan, was arrested without a warrant by Indian forces in the year 1995 in the Kashmir region invoking the provisions of the J&K PSA in connection with criminal case FIR No. 101/1995 on charges pursuant to Section 7/25 IAA. Of these charges Mr. Qadeer was acquitted by the competent court on 20 June 2006. Still during the conduct of his trial, he was preventively detained for an indefinite period of time on 19 January 2006 pursuant to the J&K PSA under the authority of the Deputy Director of the Home Department, Civil Secretariat Jammu/Srinagar, in order to make the necessary arrangements for his deportation to his native country. The current place of detention of Mr. Qadeer is unknown. A writ petition is pending adjudication before the High Court of Jammu & Kashmir at Srinagar since 24 April 2006. The Court has been requested to order the detaining authorities to release Mr. Qadeer and remove him to Tajikistan.

20. The source alleges that the arrests and detention of the above-mentioned 10 persons is arbitrary. Concerning Mr. Manzoor Ahmad Waza his detention is arbitrary because he was ill-treated by the forces arresting him and unlawfully detained in preventive custody. The ordinary laws of the land would have been sufficient to deal with the detainee and prevent him from the activity from which he was sought to be restricted in terms of the detention order and there was no cogent material presented before the detaining authorities warranting the passing of a detention order. Furthermore, he was deprived of his right to effective representation to the Government and due process, since he was not given the opportunity to rebut the evidence recorded under Section 161 of the Criminal Procedure Code, which was allegedly provided by the Senior Superintendent of the Police in Barmulla to the detaining authorities, however, not to Mr. Waza himself as the concerned person. Moreover, the detention process has been conducted in breach of the procedural safeguards, thereby violating sections 13, 15 and 16 of J&K PSA. Mr. Waza's order of detention was neither approved within the period of time provided by the applicable law nor was reference made to the Advisory Board within the stipulated period. The detainee has never been produced before the Advisory Board and has never been given an opportunity of being heard in person or through his legal counsel. The Advisory Board has failed to submit its opinion to the Government for confirmation of the detention order within the stipulated period. Finally, Mr. Waza is being confined to his cell.

21. Mr. Nisar Ahmad Wani he had been arrested on 14 September 2004 and continuously detained until 10 December 2005 when the detention order was passed. The

authorities have not provided any compelling reasons for passing the detention order and its belated execution. The detention order was neither approved in time nor was Mr. Wani able to make presentation to the Advisory Board. Mr. Wani is being detained concurrently under the provisions of J&K PSA, despite the fact that he had already been subjected to punitive custody of the State before. The detention order and procedure followed by the detaining authorities violate article 22 (5) of the Indian Constitution and the relevant safeguards provided under the J&K PSA, so the source alleges.

22. The source argues that the arrest and detention of Sh. Farooq Ahmad Kana is arbitrary, because he was ill-treated by officials of the 112 Border Security Force (BSF) for days. There was no cogent material before the detaining authority to pass the detention order under the J&K PSA. Sh. Kana further moved an application for bail before Sessions Judge Barmullah, which was accepted by the court on 20 November 2005, but not mentioned by the detaining authorities in the detention order. Material forming the factual basis for the order was not furnished to the detainee and he was not informed of his right of representation to the Advisory Board, contrary to the provisions of the J&K PSA.

23. The detention orders passed by the District Magistrate in Kupwara concerning Mr. Mohammed Yousuf Mir is, according to the source, unlawful and amount to arbitrary detention, because the arresting police forces ill-treated him. Given the nature and seriousness of the charges related to criminal case FIR No. 16/2004 a second bail application could not have been successful. Therefore, it would have been sufficient to deal with Mr. Mir in terms of ordinary criminal law rather than detaining him in preventive custody pursuant to the provisions of the J&K PSA. In any event, there was no convincing material and compelling reasons on the basis of which the detaining authorities could satisfy them to pass the second detention order as required by the provisions of the J&K PSA. Since Mr. Mir has not been served with the second detention order he was deprived of his right to effective legal representation in violation of article 22 (5) of the Indian Constitution. Finally, the District Magistrate in Kupwara erroneously held that the first detention order was set aside by the High Court on mere technical grounds, whereas it was in fact revoked on the merits. Therefore, the District Magistrate could not have passed another detention order without levelling new charges against Mr. Mir.

24. The arrest and detention of Mr. Mehraj-ud-Din Khanday is arbitrary for the following reasons: The detainee was a minor of 16 years of age. He was ill-treated by officials of the Special Investigation Team carrying out his arrest and then detained in preventive custody under the provisions of the J&K PSA. The preventive detention order was passed by the District Magistrate in Srinagar upon request of the Police without awaiting the decision of the trial court designated under the applicable Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA). This court would be the competent court assigned to conduct the trial under ordinary law against Mr. Khanday as required for minors. However, these circumstances were not taken into consideration by the District Magistrate when ordering his preventive detention. Finally, Mr. Khanday has neither been served with the order of detention nor with the material referred to on the factual grounds of detention. This prevented him from making effective representation against the detention request.

25. The arrest and detention of Mr. Nazir Ahmad Dar is arbitrary, since the forces arresting him did so without justification and ill-treated him after the arrest. Furthermore, the District Magistrate in Barmulla did not take into consideration when passing the preventive detention order on 26 April 2006 that Mr. Dar had already been continuously in custody since 10 December 2003 and could therefore not have committed any crime for which he has been charged under the second criminal case FIR No. 3/2003 laid against him. At the time of his initial arrest the detaining authorities did not make mention of this criminal case. Furthermore, the detainee has never been produced before a Magistrate to

obtain remand as required by the applicable criminal laws. Therefore, the preventive detention order pursuant to the J&K PSA was passed by the authorities only to frustrate the ordinary course of criminal justice, so the source argues.

26. Concerning Mr. Mohammed Younis Bhat the source argues that his arrest and detention is arbitrary because he has repeatedly been taken into preventive detention on new charges as soon as the Police became aware of the fact that a court of law could order his release. Furthermore, he has not been informed of his right of representation to the Advisory Board in violation of article 22 (5) of the Constitution.

27. Furthermore, the arrest and detention of Mr. Umar Jan is unlawful, unconstitutional and arbitrary and in violation of internationally recognized principles for the following reasons: Mr. Jan was ill-treated after his arrest when in custody at the Interrogation Centre of the 1st RR Khanabal. He has been detained since his initial arrest on 16 August 2005 notwithstanding that a detention order was revoked by the Government and he was granted bail by the Judicial Magistrate in Anantnag. There was no new evidence produced or compelling reasons given on the basis of which the detaining authorities would have been able to continue the detention of Mr. Jan. The District Magistrate in Anantnag, at the advice of the Police, passed the second (preventive) detention order against Mr. Jan on exactly the same grounds known to the Government when revoking the first detention order. Moreover, the material on the basis of which the detaining authorities passed the detention order has neither been furnished to the detainee to enable him to make effective representation to the Advisory Board against the detention order nor was Mr. Jan informed of his right of representation. According to the source, this conduct violates article 22 (5) of the Constitution.

28. The source further argues that the arrest and detention of Mr. Reyaz Ahmad Teeli is arbitrary, since the Police have been violating several court orders instructing Mr. Teeli's release from custody. Furthermore, the second detention order was passed on identical grounds as the first one. There was no well-argued material before the detaining authorities warranting the passing of the second detention order. Mr. Teeli did not have to be prevented from any activity as he has been in custody of Government authorities already since 23 June 2004. Consequently, the District Magistrate in Anantnag did neither take into consideration all relevant facts when passing the second detention order nor reached the threshold of "subjective satisfaction" as required by the provisions of the J&K PSC. Mr. Teeli was not provided with an opportunity to make effective representation before the Advisory Board since he was not provided with the relevant evidence, including a copy of the FIR, a seizure memorandum, or other pertinent dossiers. Finally, the detaining authorities did not transmit his case to the Board as required by law.

29. Finally, the arrest and detention of Mr. Abdul Qadeer is arbitrary and violates international human rights law as he is a foreign national who has been acquitted of all criminal charges put against him by the court of competent jurisdiction. However, he is still being deprived of his right to liberty without justification. Instead of removing him to Tajikistan the detaining authorities took him into preventive custody without reason. According to the source, Government authorities are duty bound under applicable international law to return Mr. Qadeer to his native country.

30. These allegations from the source were transmitted to the Government on 27 August 2007. The response of the Government was received by the Working Group on 4 September 2008 and may be summarized as set out below.

31. Mr. Manzoor Ahmed Waza s/o Abdul Khaliq r/o Tawheed Guni, Baramulla. Mr. Waza is a member of Hizbul Mujahideen outfit who was arrested for attacking the security forces with a grenade at Cement Bridge Baramulla on November 16, 2005. He was detained under Public Safety Act (PSA) by District Magistrate Baramulla and lodged at

District Jail Udhampur from 10 March 2006. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Waza was released on bail by the trial court in May 2007.

32. Mr. Nishar Ahmed Wani s/o Abdul Gani r/o Kelam Kulgam. Mr. Nishar Ahmed Wani is a member of Hizbul Mujahideen outfit. He was arrested on 4 September 2004, for providing food/shelter to HM militants and concealing arms & ammunition in the house. At the time of arrest, one pistol, one magazine with four rounds, one packet of RDX (20 kgs.) and a cleaning rod was recovered from his house. He was detained under Public Safety Act (PSA) by District Magistrate Anantnag and lodged at Kotbalwal Jail Jammu with effect from 17 February 2006. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Wani was released on bail by the trial court on 14 November 2006.

33. Mr. Farooq Ahmed Kana (s/o Abdul Khaliq r/o Shahabad Sopore Baramulla) is a member of Lashkar-e-Taiba outfit. He provided food and shelter to terrorists while also informing them about the movement of security forces. He was arrested on 7 September 2005 at Police Station Sopore for violation of the Arms Act and one hand grenade and one detonator were recovered from him. He was detained under Public Safety Act (PSA) by District Magistrate Baramulla and lodged at District Jail Udhampur from 12 January 2006. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Kana was released on bail in December 2006.

34. Mr. Mohammad Yousuf Mir (S/o Abdul Gani s/o Gagal Lolab Kupwara) is a member of the Islamic Front outfit, for which he acted as a guide and motivator. He was detained under the Public Safety Act (PSA) by District Magistrate Kupwara on 13 January 2005 and lodged at Kotbalwal Jail Jammu. This detention order was quashed by the High Court of Jammu and Kashmir on 17 November 2005. The subject continued with his anti-national activities. He was again arrested in another case for violation of *inter alia*, the Arms Act. He was again detained under PSA by District Magistrate Kupwara and lodged in Central Jail Srinagar w.e.f. 1 March 2006. This detention order was revoked by the Government on 6 June 2006, and Mr. Mir was subsequently released on bail by the trial court on 3 August 2006.

35. Mr. Mehraj-ud-Din Khanday (s/o Ghulam Nabi r/o Panner, Tral, Pulwama) was arrested on 5 August 2005 on charges of being a militant of the Hizbul Mujahideen outfit and his involvement in three attacks on security forces. He was charged for violation of the Explosive Substance Act and the Arms Act. At the time of arrest, a Remote Control Device was recovered from him. He was detained under the Public Safety Act (PSA) by District Magistrate Srinagar and lodged in Kotbalwal Jail Jammu w.e.f. 9 March 2006. The detention order was quashed by the High Court of Jammu and Kashmir on 16 October 2006. Mr. Khanday is presently under judicial custody and is facing trial in respect of the case registered at Police Station Nishat.

36. Mr. Nazir Ahmed Dar (s/o Sonaullah Dar r/o Doora Sopore, Baramulla) is a trained militant and Group Commander of the Tehreek-ul-Mujahideen (TuM) outfit. He was arrested for violation of the Arms Act on 28 October 2003. One AK rifle, one radio set, one pistol and 120 rounds were recovered from him during arrest. He was detained under Public Safety Act (PSA) by District Magistrate Baramulla and was lodged at District Jail Udhampur w.e.f. from 5 April 2004. The detention order was quashed by the High Court on 30 August 2005. He was arrested in another case of violation of the Arms Act. He was detained under PSA by District Magistrate Baramulla and lodged at District Jail Udhampur from 10 March 2006. This order stands quashed and Mr. Dar was released on 29 June 2007.

37. Mr. Mohammad Younis Bhat (s/o Ghulam Mohammad r/o Khonmuh Srinagar) is affiliated with Hizbul Mujahideen (HM) outfit as a Local Trained Militant. He remained

associated with Peer Abdul Rashid, a self-styled Chief Commander of HM outfit. Mr. Bhat was arrested in 1999 for violation of the Arms Act and one Chinese pistol, one pistol magazine, seven rounds and one hand grenade were recovered from him. He was detained under PSA and then released in 2002. He was again arrested on 30 November 2002 for violation of the Arms Act at Police Station Kheerbhawani. He was detained under PSA for his terrorist activities at Kotbalwal Jail Jammu from 6 March 2003. The detention order, however, was quashed and also revoked by the Government and Mr. Bhat was released on 11 September 2005. As he continued to carry out subversive activities, he was arrested from Zakoor Srinagar and one IED time device, one detonator, one battery and 15 AK rounds were recovered from him. A case was registered at Police Station Pantha Chowk. He was detained under PSA at Kotbalwal Jail Jammu from 10 November 2005. Following the quashing of the detention order by the High Court of Jammu and Kashmir, Mr. Bhat was released by the trial court on 18 August 2007.

38. Mr. Umar Jan (s/o Ghulam Najar r/o Takiya Bahram Shah, Anantnag) was arrested on 18 October 2005 for being a local trained militant of Hizbul Mujahideen outfit and for providing food, shelter and information about movement of security forces to militants. A case was registered at Police Station Anantnag against him. He was detained under PSA by the order of District Magistrate Anantnag and lodged at Kotbalwal Jail from 29 November 2005. The detention order was revoked by the Government and he was released on 11 February 2006. After his release, he remained a close associate of Javed Sepan, HM militant and provided food and shelter to him. Accordingly, he was again detained under PSA by District Magistrate Anantnag and lodged at Kotbalwal Jail, Jammu from 26 April 2006. Following the quashing of the detention order, Mr. Umar Jan was released on 6 October 2006. After his release, Mr. Umar Jan was found to be in possession of five kilograms of RDX and one UBGL shell and was arrested by Police Anantnag. A case stands registered in this behalf against the subject in Police Station Anantnag. He was detained under PSA vide District Magistrate Anantnag and lodged at Kotbalwal Jail from 6 November 2006. This detention order has been quashed by the Court and the case is under process.

39. Mr. Reyaz Ahmed Teeli (s/o Abdul Majeed Teeli r/o Teeli Mohalla Biibehara, Anantnag), a Government employee, was affiliated with Hizbul Mujahideen outfit. He was arrested on 4 October 2004 for cases registered at Police Station Bijebhera involving violation of the Arms Act. During interrogation, the subject admitted that he had undertaken a grenade attack against security forces near district hospital Bijebhera in which 24 civilians were injured. He was detained under PSA by District Magistrate Anantnag on 6 August 2004 and was lodged in District Jail Kathua w.e.f. 16 October 2004. The said order was quashed by the High Court of Jammu and Kashmir and Mr. Teeli was released. He was again detained under PSA by District Magistrate Anantnag on 29 April 2006 on the basis of his continued involvement in subversive activities and was lodged in Kotbalwal Jail with effect from 29 April 2006. This order was revoked by the Government and Mr. Teeli was handed over to local police for further process.

40. The response from the Government was transmitted to the source which has not transmitted its comments or observations. The Working Group is able to render an Opinion on the basis of the information provided.

41. At the outset, the Working Group notes with appreciation the positive role of the Indian judiciary, in particular the superior courts (the High Courts and Supreme Court), in protecting and upholding individual liberty and fundamental rights of the people. This is evident from the significant number of cases of detention which have been successfully challenged before the High Court of Jammu and Kashmir.

42. Recourse to an impartial and independent judicial forum is important in view of the fact that some of the laws under which persons are being detained, provide a wide power of

discretion and margin of appreciation to the law enforcing authorities including the police, the para-military and military forces. Of particular note is the Public Safety Act (PSA) under which all persons in the instant case have been detained. The Government has not refuted the allegation that these persons were detained by security forces under the said Act without serving them with an arrest warrant, which constitutes a violation of due process in detention.

43. All detained persons are alleged by the Government to be members of militant outfits and engaged in acts of omission and commission that constitutes a threat to security forces as well as the public at large. Charges by the Government include attacks on security forces, providing shelter to militants as well as being in possession of arms and ammunition. These are very serious charges indeed. But, if these persons are accused of such dangerous offences, why have they successfully challenged their detention despite the alleged recovery of contraband material (including grenades, explosives, pistols, rifles etc.)?

44. The Working Group is not convinced that the detentions of these persons are indeed triggered by anti-State and terrorist activities posing a threat to the State as the detentions (except in two cases) were not followed to their logical conclusion of sentencing and end up being let off by the Judiciary every few months.

45. The Working Group also finds a deficit of due process in the manner in which the law enforcement authorities apply the mechanism of “serial detention” in order to deprive these persons of their liberty. The Working Group notes with concern that, as soon as a detainee is ordered by the court to be released on bail, he is promptly re-arrested and detained on another charge without affording him a chance to leave the jail, prison or place of detention.

46. The Working Group further notes that detainees have not been explained or provided the grounds on which they have been detained. In particular, charges have been leveled during their periods of detention resulting in successive/continuing deprivation of liberty.

47. The Working Group notes with concern that one of the detainees, Mr. Mehraj-ud Din Khanday is a minor, 16 years of age, and hence more vulnerable than his adult peers. In this case, the Government has not commented on or provided a reason for not extending the rights accorded under international law to a minor. In fact, in its response the Government states that this person is in judicial custody and facing trial for a case registered at Police station Nishat despite the fact that the High Court has quashed the detention order passed by the magistrate.

48. The Working Group is aware that in India, as in some other States, the concept of “preventive detention” is prevalent. This mechanism is one whereby law enforcing authorities such as the police detain persons as a preventive measure and without having to present a clear, cogent case to court for deprivation of liberty. Laws such as the PSA and TADA create legal space for apprehending persons suspected of subversive activity against the State. This concept of “preventive detention” informing laws of a country are in danger of falling below the minimum standards to a fair and free trial with safeguards of recourse to legal counsel, being given the opportunity to generate an effective defence.

49. As indicated earlier, the Working Group appreciates the role of the superior judiciary to protect individual liberty but also notes that, despite handing down release orders, detainees are either not released and re-arrested within the premises of detention or soon thereafter on some other set of charges. A more robust control over implementation and respect for detention decisions taken by courts is imperative to prevent arbitrariness in detention as per Principle 4 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

50. Finally, as part of due process, it is important that upon detention, legal counsel and family members be informed as soon as possible, and that whereabouts of the detained persons be made known to them. In the present cases, the detainees have been moved to different locations unbeknown to their family. This places them at a clear disadvantage in accessing justice.

51. The Working Group is aware of the political sensitivities regarding the state of Jammu and Kashmir and the complex law and order situation ensuing in that part of the country. As a part of its crisis management strategy, the Government is using laws of preventive detention, including the PSA and TADA. Be that as it may, any legal, administrative or other mechanism employed, must conform to international human rights standards and obligations undertaken by the Government of India.

52. According to paragraph 17 (a) and (e) of its methods of work, the Working Group issues the following Opinion:

(a) The detention of Messrs. Manzoor Ahmad Waza; Nisar Ahmad Wani; Sh. Farooq Ahmad Kana; Mohammed Yousuf Mir; Nazir Ahmad Dar and Mohammed Younis Bhat was arbitrary and falls under categories II and III of the categories used by the Working Group to consider cases of privation of liberty and was in contradiction with articles 7, 9, 10 and 11, paragraph 1, of the Universal Declaration on Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.

(b) The Working Group is of the opinion that the detention of Messrs. Mehraj-ud-Din Khanday; Umar Jan; Reyaz Ahmad Teeli and Abdul Qadeer is arbitrary and falls under categories II and III of the categories used by the Working Group to consider cases of privation of liberty and are in contradiction with articles 7, 9, 10 and 11, paragraph 1, of the Universal Declaration on Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights. The Working Group calls for the immediate release of the above-mentioned detained persons.

(c) In the case of minor Mehraj-ud-Din Khanday, article 14, paragraph 4, of the International Covenant on Civil and Political Rights, and Principle 16 (3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also stand violated.

53. The Working Group also calls upon the Government to consider the possibility of a re-consideration of the relevant domestic laws to bring these in conformity with international human rights obligations undertaken by the State.

Adopted on 26 November 2008