

## **Opinion No. 2/2009 (United States of America)**

**Communication addressed to the Government on 1 July 2008**

**Concerning Mr. Mohammed Abdul Rahman Al-Shimrani**

**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 of the United States of America for having provided it, on 21 November 2008, with information concerning the allegations of the source. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. According to the source, Mr. Mohammed Abdul Rahman Al-Shimrani (hereafter Mr. Al-Shimrani), a 31 year-old Saudi Arabian national, a master's degree student, and a public high-school teacher in Najran, Saudi Arabia, is currently detained at the United States Naval Base in Guantánamo Bay, Cuba. He received a Bachelor of Arts from Imam Mohammed Bin Saud University in 1999. While in Saudi Arabia, he founded an organization that gives food and books to the poor.
5. Mr. Al-Shimrani was seized by Pakistani forces in November 2001, and interrogated at a Pakistani military base in Kohat, Pakistan. The Pakistani military then turned him over to the United States military, which flew him to the United States military base in Kandahar, Afghanistan, where he was allegedly subjected to abusive interrogation. After 12 days, he was transferred to the United States Naval Base at Guantánamo Bay, Cuba (hereafter Guantánamo), where he has been imprisoned without charge for over six years and half.
6. There is information indicating that the continuation of Mr. Al-Shimrani's detention constitutes a serious danger to his physical and mental health and his life. He may have been hospitalized for mental health problems caused by his ongoing confinement in oppressive conditions. He also has stomach problems, which have caused him to cough up blood after eating, and a lung condition that causes bleeding and coughing up blood.
7. The source recalls that in 2004, following the judgment of the United States Supreme Court in the case of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the United States Department of Defense (US DoD) created the Combatant Status Review Tribunals (CSRTs) to review the "enemy combatant" status of detainees. It is pointed out that the CSRT procedures depart from the basic requirements of due process, fair trial procedures, and fundamental human rights. The CSRT panel is composed of military personnel who owe formal allegiance to the detaining authority. The CSRT rules require a presumption in favour of the Government's evidence.
8. The source reports that during CSRTs hearings, which are closed to the public, detainees, are prohibited from rebutting evidence; they are denied legal counsel; they are required to disprove their guilt; and are compelled to self-incriminate. In addition, although the CSRT procedures require CSRT personnel to collect exculpatory evidence from other Government agencies, these agencies allow CSRT personnel access only to "pre-screened and filtered" information. Access to many intelligence databases, required to further search for relevant information, is also denied. CSRT procedures also create an unreliable body of evidence by permitting the panel to consider "hearsay" evidence and evidence allegedly procured by torture. Thus, the CSRT was permitted to rely on conclusions and evidence obtained through coercion and torture and was not required to conduct even cursory

inquiries into the source of such information to assess its reliability and probative value. The vast majority of the CSRT panels' decisions are based on classified evidence, which detainees are prohibited from accessing.

9. According to the source, the CSRT tribunal was structurally, and actually, biased against Mr. Al-Shimrani. The CSRT procedures provided Mr. Al-Shimrani with no meaningful notice of the alleged factual basis for his continued detention. Virtually all the evidence the Government presented to the CSRT tribunal was classified, and therefore concealed from Mr. Al-Shimrani. The evidence that was presented to him was unreliable and one-sided. Mr. Al-Shimrani had neither opportunity to fairly and effectively defend himself nor real opportunity to introduce any evidence of his own. Coupled with the fact that the Government's evidence was presumed as being the truth, and his inability to have legal counsel, it was impossible for Mr. Al-Shimrani to refute the charges against him.

10. At his CSRT hearing, Mr. Al-Shimrani was denied a fair and public hearing; he had no access to legal counsel; he was convicted on the basis of unreliable and one-sided evidence which he could not contest; he was not brought before a judicial authority within a reasonable time; and he has never been informed of his fundamental rights. It is believed that CSRT procedures in no way guarantee Mr. Al-Shimrani the minimum international standards as required by the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

11. The source argues that although the Working Group does not consider itself in a position to determine whether detainees in Guantánamo are entitled to prisoner-of-war status under the relevant Geneva Conventions, it is however competent to undertake the task of appreciating whether the absence of minimum guarantees provided under articles 9 and 14 of the International Covenant on Civil and Political Rights may confer upon detention an arbitrary character within the scope of its mandate. Furthermore, the source believes that the United States' obligations under the International Covenant on Civil and Political Rights unequivocally apply, since the State has not at any time discussed, let alone implemented, the procedural requirements for the derogation from the International Covenant on Civil and Political Rights.

12. The source concludes that Mr. Al-Shimrani's detention is arbitrary because it fails to meet international standards relating to the right to a fair trial pursuant to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Mr. Al-Shimrani was not given a hearing by an independent and impartial tribunal. He was not brought before a judicial authority within a reasonable amount of time; he was not informed of any of his rights and he was denied communication with the outside world. Additionally, there is no evidence that the United States Government ever provided him the option of communicating with a Saudi consular official or the Saudi Government in order to seek assistance from an official in his own country.

13. The Government of the United States responded to the above allegations, presenting its position on the case under three broad areas: detention of enemy combatants; treatment in detention; and, applicable international law.

14. Regarding the first point, the Government reiterates its stated position on the status of Guantánamo detainees by qualifying them as "enemy combatants" and thus not enjoying the right to a fair trial and other related rights accorded to accused persons. It argues that Mr. Al-Shimrani is an enemy combatant and deserves the detention and treatment meted out to him and that his classification as such gives the United States Government the right to detain him for the duration of the conflict. In view of this position, it therefore disagrees with an Opinion of the Working Group (No. 43/2006) adopted earlier where it had stated

that “the struggle against international terrorism cannot be characterized as an armed conflict within the meaning that contemporary international law gives to that concept”.<sup>12</sup>

15. Further, the Government believes that the CSRT procedure, the Administrative Board Review (ARB) and the recently permitted right to challenge their detention in the Federal court “provides an unprecedented protection to the detainees in the history of war”.

16. Regarding the treatment in detention of Mr. Al-Shimrani and the concerns raised by the Working Group in this regard, the United States Government denies any act of torture and/or abuse. It presents a detailed account of the medical facilities available and accessible to detainees as well as avenues for redress of any ill-treatment by officers at the detention facility. The Government denied the information offered by the source about the medical problems of Mr. Al-Shimrani. In turn, it provided some confidential details about his health and medical history which, in its view, do not present any hazard to the detainee’s well-being, arguing that whatever ailments may have arisen in the past, have been dealt with quite adequately.

17. On the third and final point of applicable international law to Mr. Al-Shimrani, the United States Government believes that he falls within the category of enemy combatant and therefore the rights to a fair trial and other safeguards outlined in the International Covenant on Civil and Political Rights do not apply. Further, under its interpretation of article 2, paragraph 1, of the International Covenant on Civil and Political Rights, since the geographical location of Guantánamo falls outside its territory, the Government is not obligated to extend relevant rights enumerated in the International Covenant on Civil and Political Rights to detainees in that facility.

18. As per the methods of work of the Working Group, the response of the Government was transmitted to the source for its comments, which are summarized below.

19. The source considers that the response of the Government does not fully address its initial submission. For instance, it asserts that while Mr. Al-Shimrani’s detention was reviewed through the CSRT, in *Boumediene v. Bush* the United States Supreme Court concluded that the review provided by this tribunal was “inadequate”. The CSRT procedures departed in numerous ways from the basic requirements of due process, fair trial procedures, and fundamental human rights. The source refers to its submission explaining how he was (a) not brought before a judicial authority within a reasonable amount time; (b) never informed of his rights; (c) required to disprove his presumed guilt; and (d) denied legal counsel. The review was not conducted until almost three years after Mr. Al-Shimrani was secretly detained, tortured and then transferred to Guantánamo.

20. The source argues that while the Government asserts that Mr. Al-Shimrani is being “detained pursuant to the law of war”, there has yet to be any proceeding that examines whether the detention is in fact justified pursuant to international humanitarian law. The CSRT proceedings were designed to confirm that the prisoners at Guantánamo were “enemy combatants”, but the laws of war do not authorize indefinite military detention based on the United States Government’s expansive definition of this designation.

21. According to the source, while the United States Government asserts that “the purpose of this detention is to prevent them from returning to the battlefield”, there is no procedure in place that applies this factor in examining whether or not continued detention is necessary. The ARB that conducts annual post-CSRT reviews to determine the need for continued detention does not even consider this as a key factor in its decision making process; instead it looks at (a) whether the detainee poses any danger to the United

<sup>12</sup> Opinion No. 43/2006 (United States of America), A/HRC/7/4/Add.1, p. 29, para. 31.

States and its allies; (b) whether the detainee continues to have any intelligence value; and (c) whether there is any other reason to detain.<sup>13</sup>

22. The source further suspects that the United States Government continues to delay the meaningful review to Federal court to which the detainee is now entitled by filing motion after motion thwarting the judges' efforts to further the speedy resolution of all habeas corpus cases before them. It also continues to use secret evidence and resist disclosure of exculpatory evidence. Such conduct demonstrates the Government's repeated failure to observe Principle 11, paragraph 1, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>14</sup> which requires that "[a] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority".

23. The source submits that the assertion of the United States Government that the purpose of detention is to prevent return to the battlefield is belied by Mr. Al-Shimrani's individual circumstances. A national of Saudi Arabia, Mr. Al-Shimrani has been approved by his home Government for release into its highly sophisticated and very successful reintegration program. The program is widely acclaimed and more than 100 men released from Guantánamo have been successfully reintegrated into Saudi society. There is an initial period of intense "deprogramming" in a Saudi prison facility, following which the men are closely monitored with the compliance of their families. The source states that the allegations against Mr. Al-Shimrani do not differ from those raised against many of his countrymen who have already been released into this program which also prevents their travel outside the Kingdom, rendering impossible any return to the battlefield.

24. The source emphatically challenges the information included in the United States Government response regarding the health condition of Mr. Al-Shimrani which, they argue, is incomplete and as such does not address the specific concerns raised. Assertions that Mr. Al-Shimrani has not been treated for particular conditions or that said conditions do not appear in the medical history referenced do not assuage concerns about his health. The suggestion of the United States Government seems to be that he has not suffered from any health problems in the seven years he has been incarcerated at Guantánamo except for three days of heartburn for which he was treated in 2002. The source finds it difficult to accept this claim and states that it greatly heightens their concerns about Mr. Al-Shimrani's access to medical care.

25. Based on the range of documentation and information received, the Working Group believes itself to be in a position to render an Opinion on this case.

26. The United States Government appears to adopt the position that the definition of what constitutes a state of war, enemy combatant and other international laws governing armed conflict, has undergone a modification in a post-September 11th world. This seems to be the main justification for detention of persons from any jurisdiction in the world, detaining them without a warrant or without informing family of the detainee, as well as denying basic minimum rights under international humanitarian law and human rights law (such as the International Covenant on Civil and Political Rights to which it is a State party).

<sup>13</sup> Memorandum from the United States Department of Defense, Administrative Review Board Process, §3(f) "Standards and Factors to be Considered by the ARB" (Jul. 13, 2006) available at: <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>. Indefinite detention for the purpose of interrogation is not permissible under the Law of War. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2006).

<sup>14</sup> General Assembly resolution 43/173.

27. The Working Group perceives a number of deficiencies in this position and stance of the Government and would like to recall its position adopted in its “Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay”.<sup>15</sup> It would be pertinent to also refer to an Opinion rendered earlier by the Working Group stating that “[it] would like to stress as a matter of principle that the application of international humanitarian law to an international or non-international armed conflict does not exclude application of human rights law. The two bodies of law are complimentary and not mutually exclusive. In the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the *lex specialis* will have to be identified and applied”.<sup>16</sup>

28. The Working Group on Arbitrary Detention is unable to bring into the fold of legality the secretive methods of detention, interrogation and rendition adopted by the Government in its detention of Mr. Al-Shimrani as it does not find support in international law to this effect. It does not find legal support for the act of arrest and interrogation of Mr. Al-Shimrani by Pakistani forces before being turned over to the United States military which flew him to the United States military base in Kandahar, Afghanistan, where he was allegedly subjected to abusive interrogation. After 12 days, he was transferred to the Naval Base at Guantánamo Bay, where he has been imprisoned without charge or trial. The total period of detention is now almost eight years.

29. The Working Group would like to state that it has been seized of similar cases of detention in Guantánamo Bay for more than seven years leading to a consistent analysis of the nature of detention at this facility and consequent Opinions being rendered. A robust and on-going jurisprudence is thus being generated which may be referred to in annual reports of the Working Group as well as in Opinions rendered on the subject.<sup>17</sup>

30. The Working Group would further like to recall here the joint report<sup>18</sup> of five special procedures mandate holders of the former Commission on Human Rights, in which it has stated quite categorically that “The persons held at Guantánamo Bay are entitled to challenge the legality of their detention before a judicial body in accordance with article 9 of the International Covenant on Civil and Political Rights, and to obtain release if detention is found to lack a proper legal basis. This is currently being violated, and the continuing detention of all persons held at Guantánamo Bay amounts to arbitrary detention in violation of article 9 of the International Covenant on Civil and Political Rights”.<sup>19</sup>

31. The Working Group notes that the Government does not avail the opportunity of offering an explanation of the various facts related to the arrest, interrogation and detention either by acknowledging that these have indeed taken place as indicated by the source, or by denying the various detention periods.

32. The Working Group further notes that the Government does not adequately address the serious issues arising from the allegations of abuse, prolonged detention, denial of due process, fair trial, or any meaningful review in respect of both. Since 1991, the Working Group has adopted a clear position that it is not convinced that military tribunals and adjudicating processes offer the requisite protection of due process. To this end, therefore, the procedures of the CSRT and the ARB are not adequate procedures to satisfy the right to a fair and independent trial as these are military tribunals of a summary nature.

<sup>15</sup> E/CN.4/2003/8, p. 19, paras. 64 *et seq.*

<sup>16</sup> Opinion No. 44/2005 (*Iraq and the United States of America*), A/HRC/4/40/Add.1, p. 25, para. 13.

<sup>17</sup> For instance, see annual reports of the Working Group on Arbitrary Detention E/CN.4/2006/7, p. 20, paras. 68 *et seq.*; A/HRC/4/40, p. 16, paras. 30 *et seq.*; E/CN.4/2005/6, p. 20, paras. 59 *et seq.*; E/CN.4/2004/3, p. 17, paras. 50 *et seq.*; E/CN.4/2003/8, p. 19, paras. 61 *et seq.*

<sup>18</sup> E/CN.4/2006/120.

<sup>19</sup> *Ibid.* at para. 84.

33. It is relevant to note here that the United States has not derogated from substantive provisions of the International Covenant on Civil and Political Rights and thus remains bound by its provisions. Even if it had, the right to habeas corpus, although not explicitly enumerated in the catalogue contained in article 4 of the International Covenant on Civil and Political Rights, belongs to the non-derogable rights even in states of emergencies.<sup>20</sup>

34. In view of the above analysis, the Working Group renders the following Opinion:

The detention of Mr. Mohammed Abdul Rahman Al-Shimrani is arbitrary, being in contravention of articles 9, 10, and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and falling within Category III of the categories applicable to the consideration of cases submitted to the Working Group.

35. The Working Group requests the Government of the United States of America to remedy the situation of Mr. Mohammed Abdul Rahman Al-Shimrani and to bring it into conformity with applicable international human rights norms and standards as contained, *inter alia*, in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Under the circumstances, the Working Group requests the Government of the United States of America to forthwith release Mr. Al-Shimrani from detention.

36. Finally, the Working Group welcomes the statement of the new United States Administration regarding its intention to shut down the detention facility at the Naval Base at Guantánamo Bay Cuba, and encourages it to implement this decision as soon as possible.

Adopted on 6 May 2009

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<sup>20</sup> Working Group on Arbitrary Detention, Opinion No. 43/2006 (United States of America), A/HRC/7/4/Add.1, p. 29, para. 36, concurring with the Human Rights Committee's general comment No. 29, on article 4: Derogations during a state of emergency, para. 15.