

## **Opinion No. 28/2009 (Ethiopia)**

### **Communication addressed to the Government on 27 May 2009**

#### **Concerning Ms. Birtukan Mideksa Deme**

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. Acting in accordance with its methods of work, the Working Group forwarded a communication addressed to the Government on 27 May 2009. An extension of two months of the 90-day time limit for a reply was granted by the Working Group on 4 September 2009 in response to a request by the Government in accordance with paragraphs 15 and 16 of the methods of work of the Working Group. The Working Group conveys its appreciation to the Government for having provided it with information in its reply concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. According to the source, Ms. Birtukan Mideksa Deme, a citizen of Ethiopia, born in 27 April 1974, is a former judge and the chairperson of the political opposition party “Unity for Democracy and Justice” (UDJ). Ms. Birtukan is currently incarcerated in Kaliti Central Prison, Addis Ababa.

5. Ms. Birtukan was arrested in 2005, together with other leaders and supporters of the predecessor party of the UDJ, the “Coalition for Unity and Democracy” (CUD), following demonstrations against the counting and aggregation of the results of the May 2005 parliamentary and regional elections in Ethiopia.
6. According to the source, after the situation had deteriorated, resulting in the death of almost 200 persons in 2006, a group of Ethiopian elders initiated a mediation process to negotiate a traditional reconciliation between the Government and the detained CUD leaders. In this context, the elders convinced Ms. Birtukan and other CUD leaders to sign a document dated 18 June 2006, asking the public and the Government for forgiveness. An agreement had been reached that all persons detained because of their affiliation with the CUD would be released on the condition that they would not seek to change the constitutional order by unlawful means and would accept the institutions established by the Constitution, that the political dialogue between the Government and the CUD would resume and that the CUD would be able to continue its work without restrictions.
7. On 11 June 2007, the Federal High Court in Lideta, Addis Ababa, convicted Ms. Birtukan and 37 co-defendants, most of whom were also CUD leaders, of treason and other offences, and, according to information presented by the source, contrary to the promise made by the Government to the elders during the negotiation process. During the trial, the defendants, including Ms. Birtukan, had refused to defend themselves and to recognize the competence of the Court. On 16 July, Ms. Birtukan was sentenced to life imprisonment. On 20 July, the Ethiopian President pardoned her, as well as the 37 other persons, upon recommendation of the Pardon Board, to which the Prime Minister had submitted the document dated 18 June 2007, in which Ms. Birtukan, through the elders, had asked the public and the Government for forgiveness. The same day, she was released from prison.
8. According to information presented by the source, in November 2008, during a visit to Sweden Ms. Birtukan publicly stated that she had never applied for a pardon to the Pardon Board, while not denying that she had signed the document dated 18 June 2006 at the elders’ request, for the sake of reconciliation. On 10 November 2008, the Federal Police Commissioner summoned Ms. Birtukan to his office, where he questioned her about the statement that she had made in Sweden. On 24 December, he summoned her to his office again. Instead of asking her any of the questions indicated in the warrant, he informed her that her pardon would be revoked and that she would be imprisoned again unless she retracted her statement made in Sweden within three days. She refused to comply with the three-day ultimatum. On 27 December, the Pardon Board reportedly met and decided to revoke her pardon, re-imposing her original life sentence passed in 2007.
9. On 29 December 2008, Ms. Birtukan was arrested by the police without a court order in a manner, which, according to information presented by the source, was degrading and accompanied by violence, and brought to Kaliti Central Prison in Addis Ababa. Prof. Mesfin Woldemariam, a 78-year old human rights advocate, who was with Ms. Birtukan during her arrest, and her driver were beaten by the police when they protested against her treatment. Mr. Woldemariam sustained injuries to his leg which required treatment at hospital.
10. Subsequently, the Ministry of Justice issued a statement explaining that Ms. Birtukan’s pardon had been revoked because she had not complied with the condition for its granting.
11. Ms. Birtukan has since her arrest been detained in solitary confinement in a small cell in isolation from other prisoners. Only her mother and her four-year old daughter have been allowed to visit her. She was reportedly denied access to her lawyer prior to 29 January 2009, as well as to medical treatment, despite the fact that she had been on hunger strike and her state of health was deteriorating. On two occasions, her lawyer asked for

permission to visit her at Kaliti prison but was denied access, allegedly on the ground that Ms. Birtukan had refused the assistance of a lawyer when she had first been charged with treason and other offences in 2006.

12. In March 2009, her lawyer filed a complaint against the prison administration challenging that Ms. Birtukan was not allowed to receive any visitors except for her mother and daughter and that she was kept in isolation from the general prison population. On 13 April 2009, the Federal High Court ruled in favour of Ms. Birtukan's visitation right. However, it held that her solitary confinement was a matter to be decided by the prison administration.

13. According to the Ethiopian Ministry of Justice, the ground for revoking her pardon was her failure to comply with the conditions for the pardon. Article 16(3) of Proclamation No. 395/2004 on the Procedure of Pardon provides that "the decision of pardon shall be of no effect if it is known that the condition for its granting has not been met". The source argues that Ms. Birtukan and the other CUD leaders had been released on the basis of the agreement negotiated by the elders, rather than on the basis of the procedure laid down in Proclamation No. 395/2004. The official pardon procedure was inapplicable in her case, as she had never applied for a pardon to the Pardon Board. Pursuant to article 12(1) of Proclamation No. 395/2004, individuals who are convicted may apply for a pardon in person or through their spouse, close relatives, representatives or lawyer. The document dated 18 June 2006 signed by Ms. Birtukan had been submitted to the Pardon Board by Prime Minister Meles Zenawi, whom Ms. Birtukan had not authorized to act on her behalf. The source concludes that there was no legal basis for revoking Ms. Birtukan's pardon.

14. Procedural rules for revoking a pardon had not been complied with. Article 17 of Proclamation 395/2004 requires that the grantee of a pardon shall be furnished with a written notice of the cause for revocation of pardon, against which he or she may submit his or her reply within 20 days. Ms. Birtukan had not been furnished with a written notice. Instead, the Federal Police Commissioner had told her that her pardon would be revoked and that she would be imprisoned again unless she retracted her statement made in Sweden within three days. Apart from non-compliance with the requirements of article 17, including the 20-day period to reply, the Federal Police Commissioner was not the competent organ to notify her of the cause for revocation of pardon. The source reiterates that the revocation of her pardon was thus unlawful.

15. The ground for revoking Ms. Birtukan's pardon was the statement that she had made in Sweden. By stating that she had never asked for a pardon within the sense of the official pardon procedure, she had exercised her right to freedom of expression. The source contends that the true reason for Ms. Birtukan's re-arrest is that the Prime Minister saw his authority challenged by her statement, and that the Government wishes to silence dissent and opposition in the wake of the parliamentary elections in 2010. As the charismatic leader of the opposition party UDJ, Ms. Birtukan was one of the most prominent figures of the democratic opposition in Ethiopia. The revocation of her pardon and the resulting deprivation of liberty were therefore also based on her exercise of the rights to freedom of association and assembly and of the right to take part in the conduct of public affairs.

16. Ms. Birtukan was already the subject of three joint urgent appeals by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on 14 January 2009; by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the question of torture and the then Special Representative of the Secretary-General on the situation of human rights defenders

on 3 November 2005; and by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the then Special Representative of the Secretary-General on the situation of human rights defenders on 18 November 2005. The Government of Ethiopia responded on 23 November 2005 and on 12 February 2009

17. In its response to the allegations of the source, the Government refers to previous information provided, *inter alia*, to the mandate holders in response to the above-mentioned urgent appeals. The Government states that the 2005 violence resulted in the unfortunate death of several civilians and law enforcement officers, and the destruction of public property worth millions of dollars. The Government continued that it took constitutional measures to maintain law and order, but also stirred a number of inquiries into the crisis. The findings of the Parliamentary Commission clearly showed the extent to which some members of the opposition instigated, and in some instances were directly involved in, the violence.

18. According to the Government, the particular circumstance of the arrest and detention of Ms. Birtukan has also been a subject of a great deal of interest mainly due to the fact that she is the only opposition member who remained in custody after all of those who were arrested were released following an amnesty granted by the Government. She and others in the leadership of the former Coalition for Unity and Democracy (CUD) party were granted conditional pardon on 19 July 2007 by the President on the basis of the Procedure of Pardon Proclamation No. 395/2004. Ms. Birtukan and others in their plea for pardon apologized for the crimes committed against the constitutional order for which they were convicted and sentenced to life imprisonment. They requested pardon from the people and Government of Ethiopia. Upon recommendation by the Board of Pardon, the President granted these leaders of the CUD, including Ms. Birtukan, conditional pardon.

19. Most of these beneficiaries of the pardon are carrying out their political and social activities in accordance with the laws of the country. Some of them are already participating in public activities in preparation for the next parliamentary elections to be held in May 2010. However, Ms. Birtukan on different occasions misrepresented the circumstances of the pardon by making an open statement to her supporters saying “she did not make any plea for pardon” and that the pardon was rather granted through the intervention of elders and because of the pressure exerted on the Government by her supporters. In effect, Ms. Birtukan denied her request for pardon to the people and Government of Ethiopia. She violated the very premise and basis of the pardon by making it manifest she was not remorseful and did not have regrets about her former illegal acts.

20. Specifically, she acted in contravention of the first and second conditions of the pardon, namely, acceptance of individual and collective responsibility for the destructive acts committed and to refrain from such acts in the future. By denying that she ever petitioned the Government for pardon, Ms. Birtukan has in effect disavowed the first condition of the pardon, by which she in effect also disavowed the second one. As such, violation of any of the conditions of pardon in the case of constitutional pardon inevitably triggers the provisions of Proclamation No. 395/2004 relating to the revocation of pardon with all its legal consequences.

21. After Ms. Birtukan’s denial, the Government argues that it took immediate and appropriate measures. The Federal Police, discharging its responsibility of ensuring compliance with the conditions of pardon and protecting the constitutional order from criminal acts, talked to Ms. Birtukan on more than one occasion hoping her statement might have been an innocent mistake and could be rectified without difficulty. The Federal Police advised her to renounce the statements she made and set the record straight. However, Ms. Birtukan made it clear that she made no request for pardon. Once this had become clear, the Federal Police asked her to officially rectify her statement within three days, failing which

appropriate legal action would be taken to revoke the pardon granted to her by the Government. Again this cooperative gesture on the part of the Federal Police did not meet with any positive response from Ms. Birtukan. Contrary to expectations and the spirit of the pardon, Ms. Birtukan stuck to her position and issued press statements rejecting her previous request for pardon, which was the very basis for her release.

22. The Government continues to state that, on the basis of Proclamation No. 395/2004, the Federal Police, having observed Ms. Birtukan's final statements of refusal to renounce her misrepresentation of the condition for her release, requested the Board of Pardon to revoke the pardon. The Board of Pardon, according to Proclamation No. 395/2004, has the power to examine such cases and submit recommendations of revocation to the President when persons granted conditional pardon by the President have allegedly failed to meet such conditions or have violated the same. The Board, having considered the lapse of time given to her to renounce her denial of pardon and having been convinced of the existence of sufficient ground for revocation, submitted its recommendation to the President of Ethiopia for revocation of pardon. This is the lawful process through which the conditional pardon for Ms. Birtukan is revoked. It is fully in line with the procedure provided for in Proclamation No. 395/2004. Due to the conditional nature of the pardon, the penalty of life imprisonment imposed by the Federal High Court was reactivated starting from the day of revocation of the pardon.

23. According to the Government, Ms. Birtukan is being detained in humane manner, a treatment accorded to any detainee under custody in full compliance with the laws of the country and the international obligations of Ethiopia with respect to individuals under custody. Ms. Birtukan and other detainees in Ethiopia are visited by their family members every Saturday and Sunday. In her case the visitors included her mother, sister and her daughter. She receives food items every day from her family. No restriction is placed in this regard with respect to her family meeting her special requests. She has never been denied meeting with her attorney and in fact confers with her attorney as and when requested.

24. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government.

25. Having examined all information available to it, the Working Group notes at the outset that the Government and the source are in agreement about the fact that Ms. Birtukan was granted Presidential pardon on 19 or 20 July 2007. On 20 July 2007, she was released from prison to which she had been sentenced to life by the Federal High Court on 16 July 2007 on charges of treason and other offences against the constitutional order. The act of pardon was revoked and, on 29 December 2008, she was rearrested without a warrant or court order, as alleged by the source and not contested by the Government. Ms. Birtukan has since then been detained serving her term of life imprisonment based on her initial conviction.

26. The source and the Government disagree about the basis and the procedure followed leading to Ms. Birtukan's granting and revocation of pardon. The Government maintains that the rules of the Procedure of Pardon Proclamation No. 395/2004 were followed, whereas the source argued that Ms. Birtukan has never asked for pardon. According to the source, she indeed signed the document dated 18 June 2007 in which she had asked the public and the Government for forgiveness. She was, however, released on the basis of a reconciliation agreement negotiated by the elders outside the framework of Proclamation No. 395/2004. This document had been submitted by the Prime Minister to the Board of Pardon, who was not authorized to act on her behalf, and which is contrary to article 12, paragraph 1, of Proclamation No. 395/2004. Finally, the source asserts that the procedure laid down in this proclamation for revocation of a pardon was not followed.

27. The Working Group considers that Ms. Birtukan's imprisonment since 29 December 2008 is arbitrary in terms of Category I of the categories applicable to the consideration of cases submitted to it. The revocation of the pardon granted to her and hence her anew imprisonment is devoid of a legal basis.

28. The right to seek an act of pardon, historically being the sole prerogative of the ruler, granted as an act of grace largely outside of the sphere of law, has now been recognized by international human rights law as a human right in certain cases. Article 6, paragraph 4, of the International Covenant on Civil and Political Rights provides that "anyone sentenced to death shall have the right to seek pardon ... of the sentence. ... [P]ardon ... of the sentence of death may be granted in all cases". Within the framework of the right to a fair trial, article 14, paragraph 6, of the International Covenant on Civil and Political Rights also recognizes the existence of an act of pardon when it provides for a right to compensation under certain circumstances, *inter alia*, following such act.

29. In the view of the Working Group, international human rights law, in principle, does not prevent States from enacting laws which provide for a procedure governing the granting and revocation of pardon following a criminal conviction and imposing legal conditions or restrictions. This can be both upon the Government itself and on the beneficiary of a pardoning act within the framework of separation of powers between the executive, legislative and judicial branches of Government.

30. The validity of the Presidential pardon issued for Ms. Birtukan in July 2007, following which she was released from prison, as an exceptional correlate taken by the executive to a final decision taken by the judiciary in a criminal case, cannot be contested in the present case. In this context, it is irrelevant whether the President acted on the basis of powers granted to him under article 10, paragraph 1, of Proclamation No. 395/2004 to "grant or deny pardons based on the recommendations of the Board [of Pardon] or on his own appreciation of the facts", or on the basis of a prerogative power he may have retained as the Head of State, and in relation to the agreement struck by the elders. Legal certainty and the beneficial character of the pardoning act, specifically in view of the severity of the sentence to life imprisonment against Ms. Birtukan, requires that the granting of pardon remains valid. This is so even if the application procedure regulated in Proclamation No. 395/2004 may not have been followed with a view of Ms. Birtukan's assertion that she had never pleaded for pardon or authorized a representative to petition on her behalf. The Government has not disputed that the initial pardon act was valid.

31. Assuming that an act of pardon can be granted conditionally and revoked if the grantee fails to meet its terms or has violated them, the Working Group considers that such conditions and the legal basis for attaching such terms to an act of pardon must comply with applicable international human rights standards. This is not the case in respect of Ms. Birtukan.

32. According to the source, the revocation of her pardon followed a public statement made by Ms. Birtukan in Sweden where she stated that she had not petitioned for pardon, which was not contested by the Government. The Government added that she had made similar statements to her supporters and in press releases and confirmed that these statements were the reason for the Board of Pardon to recommend the revocation which was accepted and carried out by the President. However, such statements fall squarely within her right to freedom of opinion and expression as guaranteed by articles 19 of the International Covenant on Civil and Political Rights and of the Universal Declaration of Human Rights.

33. It has not been argued by the Government, and there are no grounds for the Working Group to believe, that a condition of pardon of such kind is "provided for by law" in Ethiopia and "necessary ... for the respect of the rights or reputations of others; o [f]or the

protection of national security or of public order (*ordre public*), or for public health or moral” as required by article 19, paragraph 3 (b), of the International Covenant on Civil and Political Rights for a justification of a limitation of the right to freedom of opinion and expression. Proclamation No. 395/2004, in its article 4, paragraphs 1 and 3, and article 16, paragraph 3, foresees conditional pardons, however, it fails to define any such condition. Even if such criteria for conditions were prescribed by Ethiopian laws they would not stand the test of the limitation clause of article 19, paragraph 3, of the International Covenant in the case at hand, and cannot form the legal basis for the revocation of Ms. Birtukan’s pardon.

34. Consequently, the Working Group considers that the new imprisonment of Ms. Birtukan results from her legitimate exercise of her right to freedom of opinion and expression. As the leader of a political party in a democratic society, she clearly enjoys the right to address her supporters at home or while visiting a foreign country. The deprivation of liberty of Ms. Birtukan also constitutes a violation of her right to freedom of association and assembly and the right to take part in the conduct of public affairs, guaranteed by articles 21, 22 and 25 of the International Covenant on Civil and Political Rights and by articles 20 and 21 of the Universal Declaration of Human Rights. Thus, it is arbitrary, in addition to Category I, in terms of Category II.

35. Finally, the renewed detention of Ms. Birtukan gravely violates the right to fair trial, more particularly the principle of *ne bis in idem*, or that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”, as protected by article 14, paragraph 7, of the International Covenant on Civil and Political Rights. In the view of the Working Group, acquittal “within the meaning of this provision includes acts of pardon”, which are final. If conditional pardons are recognizable under international human rights law, they must not contain conditions that are themselves in violation of international human rights laws and standards as in the case of Ms. Birtukan and thus cannot form the basis of a revocation and repeated punishment. Consequently, the current imprisonment of Ms. Birtukan is arbitrary in terms of Category III.

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

The deprivation of liberty of Ms. Birtukan Mideksa Deme is arbitrary, being in contravention of articles 9, 10, 19, 20 and 21 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights. It falls under categories II and III of the categories applicable to the consideration of cases submitted to the Working Group. Her detention since 29 December 2008 falls also under category I.

37. The Working Group requests the Government to take the necessary steps to remedy the situation, which, under the specific circumstances of this case, are the immediate release of, and adequate reparation to, Ms. Birtukan.

38. The Working Group would emphasize that the duty to immediately release Ms. Birtukan will not allow further detention, even if further actions taken against her should satisfy the international human rights obligations of Ethiopia. Furthermore, the duty to provide adequate compensation under articles 9, paragraph 5, and 14, paragraph 6, of the International Covenant on Civil and Political Rights is based on the arbitrary detention that has taken place and subsequent proceedings or findings in these cannot limit the State’s responsibility.

Adopted on 25 November 2009