No. 57/2013 (Djibouti, Sweden and the United States of America)

Communication addressed to the Governments on 13 August 2013

Concerning Mr. Mohamed Yusuf and Mr. Ali Yasin Ahmed

The Government of Sweden replied to the communication on 10 October 2013. The States are parties to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Governments.
2. The Working Group regards deprivation of liberty as arbitrary in the following cases:
(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);
(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, or disability or other status and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. Mr. Mohamed Yusuf is a dual citizen of Somalia and Sweden. He was 29 years old at the time of his detention. Mr. Ali Yasin Ahmed is a dual citizen of Somalia and Sweden. He was 27 years old at the time of his detention.

4. In December 2008, Mr. Yusuf and his friend, Mr. Ahmed, left Sweden and travelled to Kenya and then continued on to Somalia, according to the Swedish police intelligence agency. In 2012, they were both arrested in Djibouti, allegedly on their way to Yemen, and transported to the United States of America, where they were detained under special administrative measures and subsequently indicted on three counts: conspiracy to provide material support to a foreign terrorist organization; providing material support to a foreign terrorist organization; and use of firearms.

Allegations against the Government of Djibouti

5. The source alleges that the Government of Djibouti did not have legitimate legal reasons for arresting Mr. Yusuf and Mr. Ahmed. The source submits that the Government of Djibouti breached the right of Mr. Yusuf and Mr. Ahmed to protection from arbitrary arrest and detention under article 9, paragraph 1, of the International Covenant on Civil and Political Rights, as they were not given any legal grounds for their arrest, nor was any legitimate legal procedure followed for their arrest. Contrary to article 9, paragraph 2, of the Covenant, Mr. Yusuf and Mr. Ahmed were not informed of the charges against them at the time of their arrest.

6. Mr. Ahmed and Mr. Yusuf have stated that they were interrogated for months in Djibouti without being charged. It is unclear who ordered their detention and what the reasons for the detention were. Mr. Yusuf and Mr. Ahmed were not informed of the duration of their detention, as this allegedly rested solely at the discretion of the authorities who ordered it. The source estimates this detention period at over two months.

7. On 18 October 2012, a court in New York issued a secret indictment against Mr. Yusuf and Mr. Ahmed. The source argues that the failure to charge Mr. Yusuf and Mr. Ahmed officially until that date is a circumvention of the additional rights extended to suspects of a crime as spelled out in articles 9 and 14 of the International Covenant on Civil and Political Rights. The source alleges that Mr. Yusuf and Mr. Ahmed were not brought promptly before a judge, contrary to article 9, paragraph 3, of the Covenant, as there was a period of at least 65 days between their original arrest and their indictment.

8. According to the source, from the time of the arrest of Mr. Yusuf and Mr. Ahmed to the date of their indictment, they were held in an undisclosed place of custody and were not given the possibility to institute habeas corpus or otherwise challenge the lawfulness of the detention before a court of law, contrary to article 9, paragraph 4, of the Covenant.

9. The source reports that during this period of detention, Mr. Yusuf and Mr. Ahmed were not allowed any contact with their families. The source considers their detention as incommunicado and refers to the finding of the Human Rights Committee that an incommunicado detention of 15 days constitutes a violation of article 10 of the Covenant. The source additionally cites a statement made by the Inter-American Court of Human Rights that prolonged isolation and deprivation of communications are in themselves cruel and inhuman treatment contrary to article 10 of the Covenant, even if it is not known what has actually happened during the prolonged isolation of the particular individual.

10. The source considers this period of detention of Mr. Yusuf and Mr. Ahmed to be a violation of their right to a fair trial under article 14 of the Covenant. It submits that its contention is in line with the finding of the Working Group on Arbitrary Detention that certain practices inherent in secret detention, such as the use of secrecy and insecurity caused by denial of contact with the outside world and the family's lack of knowledge of the whereabouts and fate of the detainee, all exert pressure on the detainee to confess to a crime, and infringe the right not to be compelled to testify against oneself under article 14, paragraph 3 (g), of the Covenant. The source submits that these are all practices to which Mr. Yusuf and Mr. Ahmed were subjected.

11. According to the source, this period of detention was also a violation of the rights of Mr. Yusuf and Mr. Ahmed under the International Convention for the Protection of All Persons from Enforced Disappearance. Secret detention is explicitly prohibited in article 17, paragraph 1, of the Convention and every instance of secret detention also amounts to a case of enforced disappearance, contrary to article 2 of the Convention. The source cites the general comment of the Working Group on Enforced or Involuntary Disappearances on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance.

12. On 14 November 2012, Mr. Yusuf and Mr. Ahmed were handed over to the Federal Bureau of Investigation (FBI) and flown to New York the following day. On 21 December 2012, they appeared before a federal court in Brooklyn, New York, charged with terrorism offences. The FBI accused them of providing material support to Al-Shabaab, officially categorized as a terrorist organization by the United States State Department in 2008.
13. The source argues that the Government of Djibouti did not have any legitimate legal reason for the continued detention of Mr. Yusuf and Mr. Ahmed from the time of their arrest to their indictment. Further, it submits that the Government failed to follow any legitimate legal process or provide Mr. Yusuf and Mr. Ahmed with any legal representation during this period. In addition, the Government of Djibouti did not clarify why United States agents were permitted to carry out their arrest and extradition to the United States to be charged. In the opinion of the source, this was not a time of emergency, as defined under article 4 of the International Covenant on Civil and Political Rights and therefore the Government of Djibouti had no reason to derogate from this provision.

Allegations against the Government of the United States of America

14. The FBI reported that the two men were arrested "in Africa" in early August 2012 "while on their way to Yemen". No information was given by the FBI as to the nationality of the local authorities that carried out the arrest, although the source cites a report from the Washington Post newspaper that Mr. Yusuf and Mr. Ahmed were detained by United States agents while passing through Djibouti. It is unclear under what warrant or public authority decision this was carried out and which legislation was applied at that time.
15. The source submits that the United States agents neither gave any legal grounds for the arrest of Mr. Yusuf and Mr. Ahmed, nor followed any legitimate legal procedure to carry it out, contrary to article 9, paragraph 1, of the International Covenant on Civil and Political Rights. The source contends that, at the time of their arrest, Mr. Yusuf and Mr. Ahmed were not informed of the charges against them, contrary to article 9, paragraph 2, of the Covenant.
16. The source reports that Mr. Ahmed and Mr. Yusuf stated that they were interrogated for months in Djibouti without being charged. It is unclear who ordered their detention or what the reasons for their detention were. Mr. Yusuf and Mr. Ahmed were not informed of the duration of their detention, as this allegedly rested solely at the discretion of the authorities who ordered it. The source estimates this detention period at over two months.
17. On 18 October 2012, a New York court issued a secret indictment against Mr. Yusuf and Mr. Ahmed. The source argues that the failure to charge Mr. Yusuf and Mr. Ahmed officially until that date is a circumvention of the additional rights extended to suspects of a crime spelled out in articles 9 and 14 of the International Covenant on Civil and Political Rights. The source alleges that Mr. Yusuf and Mr. Ahmed were not brought promptly before a judge, contrary to article 9, paragraph 3, of the Covenant, as there was a period of at least 65 days between their arrest and their indictment.
18. According to the source, from the time of the arrest of Mr. Yusuf and Mr. Ahmed to their indictment, they were held in an undisclosed place of custody and were not given the opportunity to institute habeas corpus or otherwise challenge the lawfulness of their detention before a court of law, contrary to article 9, paragraph 4, of the Covenant.
19. The source reports that during this period of detention, Mr. Yusuf and Mr. Ahmed were not allowed any contact with their families. The source considers their detention as incommunicado and refers to the finding of the Human Rights Committee that an incommunicado detention of 15 days constitutes a violation of article 10 of the International Covenant on Civil and Political Rights.
20. The source considers this period of detention to be a violation of the right of Mr. Yusuf and Mr. Ahmed to a fair trial. It submits that its contention is in line with the finding of the Working Group on Arbitrary Detention that certain practices inherent in secret detention, such as the use of secrecy and insecurity caused by denial of contact with the outside world and the family's lack of knowledge of the whereabouts and fate of the detainee, all exert pressure to confess to a crime, and infringe the right not to be compelled to testify against oneself under article 14, paragraph 3 (g), of the Covenant. The source submits that these are all practices to which Mr. Yusuf and Mr. Ahmed were subjected.
21. According to the source, this period of detention was also a violation of the rights of Mr. Yusuf and Mr. Ahmed under the International Convention for the Protection of All Persons from Enforced

Disappearance. Secret detention is explicitly prohibited in article 17, paragraph 1, of the Convention and every instance of secret detention also amounts to a case of enforced disappearance, contrary to article 2. It cites the general comment of the Working Group on Enforced or Involuntary Disappearances on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance.

22. On 14 November 2012, Mr. Yusuf and Mr. Ahmed were handed over to the FBI and flown to New York the following day. The two men were secretly held under the false names of "John Doe A" and "John Doe B" in New York jails for five weeks before the charges were made public on 21 December 2012. In the view of the source, the delay in making the charges public constitutes an undue delay of trial contrary to both articles 9, paragraph 3, and 14, paragraph 3 (c), of the International Covenant on Civil and Political Rights.

23. On 21 December 2012, Mr. Yusuf and Mr. Ahmed appeared before a federal court in Brooklyn, New York, charged with terrorism offences. The FBI accused them of providing material support to al-Shabaab, officially categorized as a terrorist organization by the United States State Department in 2008.

24. According to the source, Mr. Yusuf and Mr. Ahmed are charged on three counts under title 18, Crimes and Criminal Procedure, of the United States Code: (a) conspiracy to provide material support to terrorists (§2339A (b)); (b) providing material support to terrorists (§2339A (b)); and (c) use of firearms (§924 (c) (1) (A) (ii), 924 (c) (1) (A) (iii), 924 (c) (1) (B) (ii)).

25. The source argues that the arrest of these persons is unlawful and their detention is arbitrary.

26. The source submits that the Government of the United States neither had any legitimate legal reasons for arresting Mr. Yusuf and Mr. Ahmed in Djibouti in August 2012, nor for detaining them between their arrest and their indictment on 18 October 2012, particularly as they were located in another jurisdiction. The Government of the United States failed to follow any legitimate legal process or to provide Mr. Yusuf and Mr. Ahmed with any legal representation during this period of detention.

27. The source adds that the United States had no legitimate reason for the extradition of Mr. Yusuf and Mr. Ahmed, given their status as Swedish nationals. The source cites a statement made by the Minister for Foreign Affairs of Sweden that Sweden was not informed that the men would be extradited to the United States.

28. The source contends that it is likely that the right of Mr. Yusuf and Mr. Ahmed to a fair trial under article 14 of the International Covenant on Civil and Political Rights will be compromised, given the circumstances of their arrest, detention and extradition, the methods used to obtain evidence against them and the time that the Government of the United States has had to prepare its case against them compared with the time they have had to prepare their defence.

29. In the view of the source, the failure to allow Mr. Yusuf and Mr. Ahmed to be returned to and tried in Sweden is an arbitrary deprivation of their right to enter their own country under article 12, paragraph 4, of the International Covenant on Civil and Political Rights, as the reasons for which they are being held in the United States are illegitimate.

30. The source submits that the Government of the United States has no legitimate reason to derogate from its treaty obligations in those circumstances.

Allegations against the Government of Sweden

31. The source argues that, although the Government of Sweden was not responsible for the arrest or detention of Mr. Yusuf and Mr. Ahmed, it is responsible for breaches of their human rights by virtue of its alleged acquiescence in their arrest and detention by the Governments of Djibouti and of the United States. In this regard, the source submits that the Government of Sweden failed to ensure respect for the rights of its citizens under article 2, paragraph 1, of the International Covenant on Civil and Political Rights.

32. The source further cites general comment No. 31 (2004) of the Human Rights Committee on the nature of the general legal obligation imposed on States parties to the Covenant, in which the Committee clarified that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the

territory of the State party. The source submits that, as Mr. Yusuf and Mr. Ahmed are Swedish nationals, the Government of Sweden should have intervened on their behalf.
33. The source considers it to be likely that the Government of Sweden acquiesced in the arrest and detention of Mr. Yusuf and Mr. Ahmed by agents of the United States and Djibouti, since one day after Mr. Yusuf's mother reported him missing, the Swedish police intelligence agency visited her, requesting that she identify black and white photos of both Mr. Yusuf and Mr. Ahmed.
34. The source submits that the Government of Sweden has no legitimate reason for derogating from its treaty obligations in these circumstances.

Response from the Government of Sweden

35. On 13 August 2013, communications were addressed to each of the Governments of Djibouti, Sweden and the United States, requesting their response to the allegations made.
36. The Government of Sweden submitted its response on 10 October 2013 in which it emphasized that it is important to the Government that all countries act in accordance with international human rights standards, including their treaty obligations. According to international law, States have a right to provide diplomatic protection with regard to the interests of their nationals in countries where they are staying. The Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations lay down the right for diplomatic and consular officers of the sending State to communicate with and contact nationals deprived of their liberty abroad. Swedish missions abroad have a general obligation to look after the rights and best interests of Swedish nationals in accordance with laws and other statutes. They are also required, to a reasonable extent, to provide help and assistance to Swedish nationals, when needed, and to watch over and protect their interests.
37. According to the Government of Sweden, the Ministry for Foreign Affairs received confirmation on 14 August 2012 that two Swedish nationals were being detained in Djibouti. No information was given to the Government other than that they had been deprived of their liberty by the authorities in Djibouti. The Swedish Embassy in Addis Ababa, which is also accredited in Djibouti, was instructed by the Ministry for Foreign Affairs to investigate the matter and report back. The Embassy then applied to the authorities in Djibouti for access to the two Swedish nationals. Consular access was subsequently granted and a representative of the Embassy was able to visit Mr. Ahmed and Mr. Yusuf in Djibouti.
38. The Government of Sweden indicates that its two nationals were extradited to the United States in November 2012. The Swedish Embassy in Washington, D.C. was asked to take the customary consular measures, i.e. to monitor the legal proceedings, inquire whether the detainees desired consular contact with the Embassy and ascertain that they were being treated well and were represented by legal counsel.
39. According to the reply, extradition is a matter of cooperation between States to enable persons who are suspected of crimes to be prosecuted or persons who have been convicted of crimes to serve their sentence. The cooperation is between the State that requests a person's extradition and the State that takes the decision on extradition. In extradition cases, the right of communication and contacts with nationals applies; thus, an extradition per se does not mean that consular duties cease.
40. The Government of Sweden emphasizes that the fact that a person whose extradition is requested is a national of a third country has no direct bearing on the matter of extradition. Contrary to what is alleged by the source, the country of nationality cannot intervene in the extradition process and is neither able nor required to consent to the extradition.
41. The Government of Sweden submits that, although it has the right to provide diplomatic protection for the interests of its nationals in countries where they are staying, its consent is not a precondition for the detention of one of its nationals in another State or for the extradition of one of its nationals from another State. The claim put forward by the source that the Government acquiesced in the detention and extradition of Mr. Yusuf and Mr. Ahmed is unfounded. Consequently, the Government refutes the allegation by the source that it is responsible for breaches of the human rights of Mr. Yusuf and Mr. Ahmed in acquiescing in their arrest and detention by the Governments of Djibouti and of the United States.

42. The Government of Sweden also responds to the allegations put forward by the source that it failed to ensure respect for the rights of its citizens under article 2, paragraph 1, of the International Covenant on Civil and Political Rights.
43. The Government of Sweden indicates that it is initially pertinent to note that the human rights violations alleged by the source all took place while Mr. Yusuf and Mr. Ahmed were outside Swedish territory. While the International Covenant on Civil and Political Rights, to which Sweden is a party, also entails obligations on a State party with regard to individuals who are not within its territory, such obligations require that the individuals are within the jurisdictional power or effective control of the State party (see, for instance, paras. 3 and 10 of general comment No. 31 of the Human Rights Committee). The mere fact that Mr. Yusuf and Mr. Ahmed are Swedish nationals does not, in itself, put them within Swedish jurisdiction. Moreover, the right of the Government of Sweden to provide diplomatic protection for the interests of its nationals in countries where they are staying does not mean that those nationals are within the power or effective control of the Government of Sweden in the meaning of article 2, paragraph 1, of the Covenant. Consequently, the Government firmly contests the allegation that Mr. Yusuf and Mr. Ahmed were within its power or effective control in the meaning of article 2, paragraph 1, at the time of the alleged breaches of their rights. It thus follows that the issue of derogation from its treaty obligations under the Covenant is not relevant in the present case.
44. Moreover, the conduct of the Government of Sweden in relation to the detention of Mr. Yusuf and Mr. Ahmed and their extradition from Djibouti to the United States has been scrutinized by the Committee on the Constitution, a Swedish parliamentary committee which, inter alia, scrutinizes the activities of the Government and its ministers and informs the Riksdag (the parliament) of the results of its scrutiny. The examination of the present case by the Committee on the Constitution resulted in the conclusion that the Ministry for Foreign Affairs, the Embassy in Addis Ababa and the Consulate General in New York had made several efforts to obtain access to Mr. Yusuf and Mr. Ahmed in order to carry out consular duties and that the Government and the Ministry for Foreign Affairs had acted in accordance with the requirements that might arise in the case at hand.
45. As regards the current situation of Mr. Yusuf and Mr. Ahmed, the Government of Sweden submits that Mr. Yusuf and Mr. Ahmed remain in detention in the United States. They are receiving consular assistance from the Swedish Embassy in Washington, D.C. and the Swedish Consulate General in New York and are both represented by legal counsel. Court proceedings have commenced and the Government has been informed that the charges concern suspicion of crimes related to terrorism.
46. The Government of Sweden also refers to a press release published by the FBI on 22 December 2012, in which it formulated the suspected crimes as "providing material support to the designated foreign terrorist organization Al-Shabaab and the unlawful use of high-powered firearms". In September 2013, a letter from one of the detainees to his family, transmitted by the Swedish authorities, was published in the Swedish media. The letter contained allegations of torture suffered in Djibouti. The Government reports that the detainee has not asked the Swedish authorities to act on these allegations.

Discussion

Burden of proof

47. The Working Group regrets that the Governments of Djibouti and of the United States have not responded to the allegations transmitted to them. Despite the absence of any information from the two Governments, the Working Group considers that it is in a position to render its opinion on the detention of Mr. Yusuf and Mr. Ahmed in conformity with paragraph 16 of its methods of work.
48. The Working Group emphasizes that the Governments of Djibouti and of the United States have not rebutted the prima facie reliable allegations submitted by the source. The Working Group refers to its constant jurisprudence, most recently its Opinion No. 41/2013 (Libya), and recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to refute the allegation made by the applicant lies with the public authority, because the latter is "generally able to demonstrate that it has followed the

appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out."[1]

49. A similar approach has been adopted by the Human Rights Committee, according to which the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.[2]

Arrests and detention abroad, extradition and trial of terrorist suspects

50. In its jurisprudence, deliberations, legal opinions and concluding reports from country visits and in its annual reports to the Human Rights Council, the Working Group has reviewed issues relating to arrests and detention abroad and the extradition and trial of terrorist suspects. Those issues were also addressed in the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42) undertaken by two special rapporteurs and two working groups, including the Working Group on Arbitrary Detention.

51. Furthermore, in its annual report for 2008, the Working Group elaborated a list of principles in conformity with articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, which may be used in relation to the deprivation of liberty of persons accused of acts of terrorism (A/HRC/10/21, para. 54).

Allegations against Djibouti

52. The Working Group has found several violations of international law. Mr. Ahmed and Mr. Yusuf were detained and interrogated for more than two months in Djibouti without being charged or otherwise informed of the grounds for, or the duration of, their detention and were not offered legal representation, in breach of articles 9 and 14 of the International Covenant on Civil and Political Rights. There was a period of 65 days or more between their arrest and their indictment, during which time Mr. Yusuf and Mr. Ahmed were not given access to a court, which constitutes a grave violation of article 9 of both the Universal Declaration of Human Rights and the Covenant.

53. The Working Group also notes that secret detention or incommunicado detention may put individuals under pressure to confess to a crime and infringe the right not to be compelled to testify against oneself under article 11 of the Declaration and article 14 of the Covenant. In the conclusions of the 2010 joint study on global practices in relation to secret detention referred to in paragraph 50 above, the experts reiterated that international law clearly prohibits secret detention, which violates a number of human rights and humanitarian law norms that may not be derogated from under any circumstances (A/HRC/13/42, para. 282).. The lack of legal representation under interrogation by government agents of Djibouti and the United States constitutes another grave violation under article 11 of the Declaration and article 14 of the Covenant.

54. The Working Group notes that international law on extradition provides procedures that would need to be observed by countries in cases such as the one currently before it.

55. The Working Group emphasizes that the Government of Djibouti remains responsible also for the acts of foreign agents on its territory, at the same time as the United States is responsible for the acts of its agents on the territory of Djibouti. This is clearly established in international law, in the jurisprudence of the International Court of Justice and by various United Nations human rights bodies. Examples include Opinion No. 44/2013 (Saudi Arabia) and deliberation No 9[3] of the Working Group, the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42) and the analysis in the judgment of the European Court of Human Rights in the case of El-Masri[4].

56. The arrest, secret and incommunicado detention and subsequent transport of Mr. Ahmed and Mr. Yusuf constitute violations of articles 9 and 11 of the Universal Declaration of Human Rights and articles 9 and 12 of the International Covenant on Civil and Political Rights. The detention falls under categories I and III of the categories applicable to the cases before the Working Group.

Allegations against the United States of America

57. The source alleges that the arrest of the two individuals in Djibouti was undertaken by United States agents and that the United States authorities were involved with the detention of Mr. Yusuf and Mr. Ahmed and the interrogations taking place while they were in custody there.

58. The Working Group emphasizes that the United States of America remains responsible for the acts of its agents on foreign territory (see the international jurisprudence cited in para. 55 above). That responsibility covers the arrest and subsequent detention of Mr. Yusuf and Mr. Ahmed on the territory of Djibouti and their transport to the United States. During this period, the United States had responsibility for respecting the rights of the two individuals under articles 9 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights.
59. The source alleges that on 14 November 2012, Mr. Yusuf and Mr. Ahmed were formally handed over to the FBI and flown to the United States on the following day. They reportedly only appeared before a court on 21 December 2012. The Government of the United States has not responded to or rebutted this allegation. The Working Group thus bases its opinion on the submission by the source and holds that the continued secret detention of Mr. Yusuf and Mr. Ahmed, before the charges were made public and they were brought before a court on 21 December 2012, constitutes a violation of article 9 of both the Declaration and the Covenant.
60. Each of the two periods of detention before the court hearings on 21 December 2012 constitutes a grave violation of the right of Mr. Yusuf and Mr. Ahmed not to be arbitrarily detained.
61. The Working Group now turns to whether either or each of the two periods of detention has compromised their right to a fair trial.
62. The Working Group concurs with the view of the European Court of Human Rights that "an accused often finds himself in a particularly vulnerable position at that stage of the proceedings ... In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer …".[5] Similarly, the Trial Chamber of the International Criminal Tribunal for Rwanda in the case of *Bagosora et al.* emphasized that the right to counsel is rooted in the concern that an individual, when detained by officials for interrogation, is often fearful, ignorant and vulnerable; and that vulnerability can lead to abuse of the innocent and guilty alike, particularly when a suspect is held incommunicado and in isolation.[6]
63. Evidence obtained during periods of detention without access to legal advice or in secret, in violation of international law, is under international law inadmissible in the legal proceedings against Mr. Yusuf and Mr. Ahmed. In its constant jurisprudence (see Opinions 40/2012 (Morocco), 19/2013 (Morocco) and 25/2013 (Morocco)), the Working Group has heard inadmissible evidence deriving from confessions made during police interviews which have taken place without the individual concerned having the opportunity to seek legal advice and assistance. The Working Group emphasizes that the admission of such evidence will in itself render the continued detention of Mr. Yusuf and Mr. Ahmed arbitrary.
64. Even without the use of information from the interrogations carried out while Mr. Yusuf and Mr. Ahmed were in detention in Djibouti or in the United States without access to legal advice, the subsequent legal process in the United States will be compromised. In its Opinion 41/2013 (Libya), the Working Group concurred with the International Criminal Court in the Lubanga judgment that "where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place ... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial."[7]
65. The Working Group is of the view that a fair trial cannot take place after the secret and incommunicado detention in Djibouti, interrogation without access to legal advice and the subsequent transport to and secret and incommunicado detention in the United States before the first public court hearing.
66. The arrest, secret and incommunicado detention and subsequent transport to the United States of Mr. Ahmed and Mr. Yusuf therefore constitute violations of articles 9 and 11 of the Universal Declaration of Human Rights and articles 9 and 12 of the International Covenant on Civil and Political Rights. The detention falls within categories I and III of the categories applicable to the cases before the Working Group.

Allegations against Sweden

67. The Government of Sweden has replied that it has offered and continues to offer consular assistance to Mr. Yusuf and Mr. Ahmed. It rejects the allegations made by the source against the Swedish authorities and makes reference to parliamentary scrutiny in the Riksdag, citing a report by the Constitutional Affairs Committee in its support.[8] That report also provides an extensive and helpful overview of other cases the Committee has reviewed, with findings in one specific instance of non-compliance by the Government with international law, including recommendations from the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. The Constitutional Affairs Committee inquired into the extradition process between Djibouti and the United States and whether the Swedish authorities had assisted Mr. Yusuf and Mr. Ahmed in that process. The Government stated that it had not assisted them but did not throw any further light on the extradition process.
68. The Working Group agrees with the Constitutional Affairs Committee when in its report it emphasized that "when liberty is deprived in violation of general principles of law, in the view of the Constitutional Affairs Committee, foreign authorities may have a duty to intervene with diplomatic means to attempt to remedy the situation" and that an "extradition process does not bring consular tasks to an end". The Working Group further notes that the Government of Sweden has not directly addressed the issues relating to cooperation between intelligence services and the provision of information, in particular where there is a danger of secret detention, torture, rendition or violations of the conditions necessary for a fair trial. The source has not addressed those elements in such detail that the Working Group can make any findings, but the Working Group will point out that such cooperation may provide grounds for responsibility in a case involving arrests abroad, such as the present case.
69. In the light of the above, the Working Group files the matter concerning the Government of Sweden.

Disposition

70. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:
The matter concerning Sweden is filed.
71. In the matter concerning Djibouti, the Working Group on Arbitrary Detention renders the following opinion:
The detention of Mr. Yusuf and Mr. Ahmed constitutes a violation of articles 9 and 11 of the Universal Declaration of Human Rights and articles 9 and 12 of the International Covenant on Civil and Political Rights. The detention falls into categories I and III of the categories applicable to the cases before the Working Group.
72. In the matter concerning the United States of America, the Working Group on Arbitrary Detention renders the following opinion:
The detention of Mr. Ahmed and Mr. Yusuf constitutes a violation of articles 9 and 11 of the Universal Declaration of Human Rights and articles 9 and 12 of the International Covenant on Civil and Political Rights. The detention falls into categories I and III of the categories applicable to the cases before the Working Group.
73. Consequent upon the opinion rendered, the Working Group requests the Governments of Djibouti and of the United States of America to take the necessary steps to remedy the situation of Mr. Ahmed and Mr. Yusuf and bring it into conformity with the standards and principles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
74. The Working Group requests the Government of Djibouti to accord Mr. Ahmed and Mr. Yusuf an enforceable right to compensation, pursuant to article 9, paragraph 5, of the International Covenant on Civil and Political Rights.
75. The Working Group requests the Government of the United States of America to release Mr. Ahmed and Mr. Yusuf immediately and to accord them an enforceable right to compensation, pursuant to article 9, paragraph 5, of the International Covenant on Civil and Political Rights.
[Adopted on 21 November 2013]

[1]Case of Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), International Court of Justice, judgment of 30 November 2010, para. 55.
[2]See, for instance, CCPR/C/102/D/1412/2005, para. 7.3; CCPR/C/87/D/1297/2004, para. 8.3; *Official Records of the General Assembly, Fortieth Session, Supplement No. 40* (A/40/40), annex XI and *Thirty-seventh Session, Supplement No. 40* (A/37/40), annex X;
[3]See A/HRC/22/44, paras. 37-75.
[4]Case of *El-Masri v. the former Yugoslav Republic of Macedonia*, European Court of Human Rights, application no. 39630/09, Grand Chamber judgment of 13 December 2012.
[5]Case of *Pavlenko v. Russia*, European Court of Human Rights, application no. 42371/02, judgment, 1 April 2010, para. 101.
[6]Case of *Bagosora et al.*, International Criminal Tribunal for Rwanda, decision on the Prosecutor's motion for the admission of certain materials under rule 89(C), case No. ICTR-98-41-T, 14 October 2004, para 16.
[7]Judgment on the appeal of Thomas Lubanga Dyilo against the decision on the defence challenge to the jurisdiction of the Court pursuant to article 19 (2) (a) of the statute of 3 October 2006, case No. ICC-01/04-01/06 (OA 4), 14 December 2006, para. 39.
[8]2012/13:KU20.