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Human Rights Council Working Group on Arbitrary Detention

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No. 48/2011 (Indonesia)

Communication addressed to the Government on 25 May 2011

Concerning: Filep Jacob Samuel Karma

The State is a party 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. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102. The mandate was extended for a further three-year period in Council resolution 15/18 of 30 September 2010.

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 sentence or despite an amnesty law applicable to him) (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; 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. Filep Jacob Samuel Karma is an Indonesian citizen usually residing in Jayapura City. He is a human rights activist and former Indonesian civil servant in the Indonesian Education and Training Department.

4. In July 1998, Mr. Karma participated in a flag-raising ceremony in his hometown of Biak. Mr. Karma was wounded in the legs by rubber bullets fired by the Indonesian military, and was arrested, charged and convicted of sedition. He was sentenced to six and a half years' imprisonment. On 20 November 1999, he was released on appeal after having served one and a half years.

5. On 1 December 2004, Mr. Karma was arrested at Trikora Field, Abepura in the province of Papua by the National Police, while organizing and participating in a ceremony celebrating the independence from Dutch rule. Several hundred Papuans gathered at the ceremony, shouted the word "freedom", chanted a rejection of Papua's Special Autonomy status and raised the Morning Star flag, a symbol of Papuan independence. After the police attempted to forcibly remove the flag and disband the rally, participants protested by throwing blocks of wood, rocks and bottles. The police responded by firing into the crowd. Mr. Karma was one of the individuals arrested. He was presented with no warrant for his arrest.

6. On 2 December 2004, the Jayapura District Prosecutor charged Mr. Karma with purported violations of articles 106, 110, 154 and 155 of the Criminal Code of Indonesia (KUHP). The prosecutor sought five years of imprisonment for Mr. Karma.

7. According to the source, Mr. Karma was initially placed in detention at the Jayapura Police Station for the duration of his trial in 2005. He was then moved to Abepura Prison in mid-2005. In December 2010, he was transferred to the Jayapura Police Station. On 7 March 2011, Mr. Karma was returned to Abepura Prison.

8. On 26 May 2005, the Jayapura District Court convicted Mr. Karma of sedition and conspiracy to commit sedition and crimes against public order (case number 21/PID/2005/PT.JPR, 11 July 2005). He was sentenced to 15 years of imprisonment, a sentence three times higher than that sought by the prosecutor. The Jayapura High Court and the Indonesian Supreme Court affirmed the conviction on 11 July 2005 and 27 October 2005, respectively.

9. The source argues that Mr. Karma's detention violates his rights under the Indonesian constitution. Article 28(e) of the Constitution provides that "each person has the right to be free in his convictions, to assert his thoughts and tenets, in accordance with his conscience". It further states that "each person has the right to freely associate, assemble, and express his opinions". Article 28(i), paragraph 1, stipulates that "the rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance".

10. The source refers to Decision No. 6/PUU-V/2007 of 17 July 2007, in which the Constitutional Court of Indonesia ruled that articles 154 and 155 of the Criminal Code – under which Mr. Karma was charged – are unconstitutional and have no binding legal effect.

11. The act of raising the Morning Star flag is, according to the source, an act of free expression, since the flag is a symbol used by Papuans to celebrate their independence from Dutch rule. Article 2, paragraph 2, of the Special Autonomy Legislation explicitly provides that “the Papua Province may have Regional Symbols as its greatness and grandeur banner and cultural symbol for the greatness of the Papuan’s identity in the form of the regional flag and regional hymn which are not positioned as sovereignty symbols”.

12. The source submits that Mr. Karma’s arrest and detention are the result of his exercise of the rights to freedom of expression, assembly and association as embodied in articles 19 and 20 of the Universal Declaration of Human Rights. Although Indonesia acceded to the International Covenant on Civil and Political Rights only in February 2006, and after the judgment of Mr. Karma was rendered, the source contends that his post-Covenant-accession detention on the basis of acts protected by the Covenant constitutes a breach of the Covenant, namely, article 19, paragraphs 1 and 2, article 21 and article 22.

13. The source also reports that Mr. Karma’s minimal guarantees as enshrined in the right to a fair trial have not been observed and they are of such gravity as to amount to an arbitrary deprivation of liberty. Reference is made to several statements attributed to the trial judge, which allegedly violated the judicial impartiality as prescribed in article 158 of the Criminal Code of Indonesia. The trial judge allegedly made derogatory remarks to Mr. Karma and his counsel, such as “smash in the head of Filep if he’s naughty” and “don’t bring the name of your God in here, your God has been dead a long time” (see Criminal Matter No. 04/Pid.B/2005/PN-JPR, Testimony of Filep Karma, Defendant’s Legal Advisors’ Defence Brief, on Behalf of Filep Karma, p. 7; Defendant’s Legal Advisors’ Appeals Brief on Behalf of Filep Karma, pp. 4-6). Mr. Karma’s counsel raised a procedural defence on the partiality of the judge, which was subsequently denied. The defence did not prevail either in arguing that Mr. Karma was unfairly denied access to his counsel in violation of articles 54 and 198, paragraph 2, of the Criminal Procedure Code, due to the fact that the trial court began proceedings on 10 May 2005 with insufficient notice to Mr. Karma’s counsel.

14. According to the information received, Mr. Karma was improperly denied access to an appeal of the trial court’s conviction and sentence. The source contends that Mr. Karma’s appeal was dismissed because the documents relating to his case were not transferred by the trial court to the High Court. According to the source, the Indonesian Supreme Court did not provide redress to this violation of articles 67 and 244 of the Criminal Procedure Code of Indonesia, which guarantee a defendant’s right to appeal. In this context, the source argues that minimum international standards as enshrined in the right to a fair trial have not been respected.

15. Mr. Karma suffers from prostate issues that recently required surgery, as well as leg and back injuries and chronic respiratory problems. The source notes that while in detention his health has deteriorated. These problems worsened in 2009. In October 2009, doctors at Dok Dua hospital who were allowed to see Mr. Karma recommended that the prison officials at Abepura send him immediately to Jakarta for urological surgery. It was not until July 2010 that Mr. Karma was transferred to a hospital in Jakarta for medical consultations and surgery. His medical condition further worsened following an incident on 3 December 2010 at Abepura Prison, after a number of inmates attempted to escape. Mr. Karma was asked by fellow inmates to represent them, in an effort to avoid further violence, in the negotiations with prison officials. Shortly thereafter Mr. Karma was transferred to the Jayapura Police Station, the poor conditions of which, including inadequate food and

exposure to rats, have contributed to a further deterioration of his health condition. On 7 March 2011, Mr. Karma was brought back to Abepura prison. Given the alleged denial and delay of a medical transfer of Mr. Karma, despite the recommendation of physicians, the source contends that the Indonesian authorities breached article 22, paragraph 2, of the Standard Minimum Rules for the Treatment of Prisoners. The latter provides that “sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals”.

Response from the Government

16. The Working Group forwarded its communication to the Government on 6 June 2011 and regrets that the Government has not provided the requested information. The Working Group would have welcomed the cooperation of the Government.

Discussion

17. According to its revised methods of work, the Working Group is in a position to render an opinion on the basis of the submissions that have been made.

18. The matter before the Working Group is the detention of Mr. Karma. This is the second period of detention that has come before the Working Group, and it started in 2004. The first question is whether this second period of detention is the result of a judgment or sentence for Mr. Karma’s exercise of the right to freedom of expression, assembly and association. The second is whether Mr. Karma’s right to a fair trial has been observed.

19. The Working Group, in the report on its 1999 visit to Indonesia, considered Mr. Karma’s first detention and the surrounding circumstances (see E/CN.4/2000/4/Add.2). The Working Group stated:

[64.] Another group of individuals faces trial on Biak, following a flag-raising ceremony in July 1998 which was dispersed by the security forces. From 2 to 6 July 1998, public demonstrations took place at the Community Health Centre near Biak Port. Led by Filip Jakob Samuel Karma, an employee of the regional government, people gathered to demand independence for the province. In the early morning of 6 July 1998, troops opened fire on hundreds of unarmed demonstrators and took over 100 individuals into custody, most of whom were released shortly thereafter. The individuals currently facing trial were arrested without warrants. All of them were charged under article 106 of the Criminal Code and many face subsidiary charges under article 154 of the Criminal Code. Military forces were involved in the arrest of these individuals, many of whom were interrogated without legal representation.

[65.] On the basis of the information conveyed to it, the Working Group considers that the majority of individuals facing charges in connection with the above-mentioned symbolic flag-raising ceremonies were arrested for having mostly peacefully exercised their beliefs, and that their detention is arbitrary within the meaning of category II of the Group’s methods of work.

20. The Working Group also raised concerns over the provisions of the Criminal Code relating to national security:

[50.] These provisions are contained in four chapters of Book II of the Criminal Code and concern: Crimes against the security of the State (chap. I, arts. 104-129); Crimes against the dignity of the President and Vice-President (chap. II, arts. 130-139); Crimes against public order (chap. V, arts. 154-181); Crimes against public authority (chap. VIII, arts. 207-241). Most of these provisions are, especially inasmuch as the intentional element of the crime is concerned, drafted in such

general and vague terms that they can be used arbitrarily to restrict the freedoms of opinion, expression, assembly and association. They can be used notably to target the press, peaceful political opposition activities and trade unions, as they were frequently under the former regimes.

[51.] In this context, articles 154 to 157 (some provisions of which date back to the colonial period), which criminalize acts that give “expression to feelings of hostility, hatred or contempt against the Government of Indonesia” (art. 154) deserve particular mention. Another such provision is article 137 (relating to the crime of “lèse-majesté”), which targets insults against the President and the Vice-President. These provisions were frequently used to neutralize or intimidate any political opposition or members of trade unions. The majority of persons arrested and tried under these chapters of the Criminal Code under the regime of President Soeharto have now been released. However, these provisions remain in force and carry grave risks of arbitrary detentions, as long as they have not been abrogated or their content amended to make them compatible with international standards guaranteeing the freedoms of opinion and expression.

21. The Working Group also refers to the Human Rights Committee’s general comment No. 29 (2001) on states of emergency, in which the Committee provides that any derogation based on national security concerns must conform to the requirements of proportionality and necessity: “the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation” (CCPR/C/21/Rev.1/Add. 11, para. 4). The Working Group has also been assisted by the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which contain principles applicable to invocation of the national security exception.

22. The Working Group will briefly dispose of an issue relating to the application *ratione temporis* and the Indonesian accession to the International Covenant on Civil and Political Rights in 2006, after the sentence was passed on Mr. Karma. Under the Covenant, an arbitrary detention does not become less arbitrary and must be brought to an end even if the sentence precedes the entry into force, following accession or ratification. The Working Group further adds that none of the issues in the present opinion would have a different outcome if assessed on the basis of customary international law.

23. The next question is legality. The detention must be in accordance with the law. The source argues that the sentence was in contravention of Indonesian law. The source has referred the Working Group to a judgment by the Constitutional Court of Indonesia where it ruled that articles 154 and 155 of the Criminal Code – under which Mr. Karma was charged – are unconstitutional and have no binding legal effect (see Decision No. 6/PUU-V/2007 of 17 July 2007). The source has also referred to the relevant provisions of the Indonesian Constitution. The source has provided strong support for the detention not being in accordance with Indonesian law. The Working Group does not need to rule on the compliance with Indonesian law, as it is clear that the detention is in direct violation of the substantive human rights obligations of Indonesia.

24. In the present case, the first of the two main questions is whether the deprivation of liberty is arbitrary as a result of the exercise of the rights and freedoms in articles 19 (freedom of opinion and expression) and 20 (freedom of peaceful assembly and association) of the Universal Declaration of Human Rights and in articles 19 (freedom of opinion and expression), 21 (freedom of peaceful assembly) and 22 (freedom of association) of the International Covenant on Civil and Political Rights. The source has established a *prima facie* case that the detention of Mr. Karma is due to his participation in a peaceful flag-raising ceremony and is in violation of his rights as listed above. The

Working Group has requested the Government to provide it with detailed information about the current situation of Mr. Karma and to clarify the legal provisions justifying his continued detention. In the absence of such information, the Working Group must base its opinion on the prima facie case as made out by the source. The arbitrary detention falls within category II of the categories applicable to the cases submitted to the Working Group.

25. The second main question is whether there are violations of the right to a fair trial (articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights) of such gravity as to confer on the detention an arbitrary character. The source has established a prima facie case that Mr. Karma's right to an appeal was restricted. The Working Group also refers to the assessment in its 1999 report as cited above on the sedition and public order offences that Mr. Karma was convicted for. Therein, the Working Group noted that "most of these provisions are, especially inasmuch as the intentional element of the crime is concerned, drafted in such general and vague terms that they can be used arbitrarily to restrict the freedoms of opinion, expression, assembly and association. They can be used notably to target the press, peaceful political opposition activities and trade unions, as they were frequently under the former regimes". It also emphasizes the concluding point that "these provisions remain in force and carry grave risks of arbitrary detentions, as long as they have not been abrogated or their content amended to make them compatible with international standards guaranteeing the freedoms of opinion and expression". On the basis of the information available to the Working Group, Mr. Karma's trial and conviction based on the above-mentioned provisions is further in violation of articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights. The arbitrary detention falls within category III of the categories applicable to the cases submitted to the Working Group.

26. The Working Group reminds Indonesia of its duties to comply with international human rights obligations not to detain arbitrarily, to release persons who are arbitrarily detained, and to provide compensation to them. The duty to comply with international human rights rests not only on the Government but on all officials, including judges, police and security officers, and prison officers with relevant responsibilities.

Disposition

27. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Karma is arbitrary, and constitutes a breach of articles 9, 10, 11, 19 and 20 of the Universal Declaration of Human Rights and of articles 9, 14, 19, 21 and 22 of the International Covenant on Civil and Political Rights, falling within categories II and III of the categories applicable to the cases submitted to the Working Group.

28. The Working Group requests the Government of Indonesia to take the necessary steps to remedy the situation, including the immediate release of Mr. Karma and providing him with adequate reparation.

[Adopted on 2 September 2011]