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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its sixty-second session, 16–25 November 2011

#### No. 66/2011 (Bangladesh)

#### Communication addressed to the Government on 12 September 2011

**Concerning Motiur Rahman Nizami, Abdul Quader Molla, Mohammad  
Kamaruzzaman, Ali Hasan Mohammed Mujahid, Allama Delewar Hossain Sayedee  
and Salhuddin Quader Chowdhury**

#### **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 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 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 the 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. Motiur Rahman Nizami, a national of Bangladesh, usually residing in Dhaka, is the leader of Jamaat-e-Islami, the third largest political party in Bangladesh. He was the Minister of Agriculture from 2001 to 2003 and the Minister of Industrial Affairs from 2003 to 2007.

4. It is reported that Mr. Nizami was arrested on 29 June 2010, at the Jatiya Press Club in Dhaka by officers of the Detective Branch of Dhaka Metropolitan Police on alleged charges of hurting religious sentiments of Muslims (registered case No. CR 1012/12), in contravention of sections 295(A) and 298/109 of the Penal Code. On 30 June 2010, Mr. Nizami was granted bail. However, he was immediately re-arrested in connection with five other cases (Paltan PS Case No. 20(2)10, Paltan PS Case No. 37(2)10, Paltan PS Case No. 25(6)10, Uttara PS Case No. 31(2)10 and Ramma PS Case No. 55(6)10). Mr. Nizami was later charged in three more cases (Kadamtali PS Case No. 57(4)10, Keranigang PS Case No. 34(12)07 and Pallabi PS Case No. 60(1)08).

5. On 30 June 2010, the Chief Metropolitan Magistrate Court ordered that Mr. Nizami should be held on remand in custody for 16 days. On 26 July 2010, he was taken into remand for three more days. Throughout this period he was allegedly held in remand at the Detective Branch Office with no access to his lawyers or family.

6. On 22 July 2010, the Chief Prosecutor of the International Crimes Tribunal established under the law of Bangladesh made an application to the Tribunal for the arrest of Mr. Nizami under rule 9, paragraph 1, of the Rules and Procedure of the International Crimes Tribunal for crimes committed under section 3, paragraph 2, of the International Crimes (Tribunals) Act 1973 as amended in 2009, on suspicion of committing war crimes during the 1971 Bangladesh war of liberation. On 2 August 2010, the Tribunal ordered that Mr. Nizami remain in police custody under section 11, paragraph 5, of the Act, which provides that “any member of a Tribunal shall have the power to direct, or issue a warrant for, the arrest of, and to commit to custody, and to authorize the continued detention in custody of, any person charged with any crime specified in section 3”. Although Mr. Nizami has not yet been charged with any crime under section 3 of the Act, he remains in detention at the Dhaka Central Jail.

7. On 29 November 2010, Mr. Nizami was granted bail in two criminal cases against him. On 30 November 2010, he was granted bail in four other cases. His application for bail in another case is pending before the High Court. In the remaining two cases (Keranigang PS No. 34(12)07 and Pallabi PS No. 60(1)08) that were subject to the intervention of the Chief Prosecutor of the International Crimes Tribunal, no bail was applied for as the defence counsel for Mr. Nizami was allegedly prevented from obtaining access to evidence.

8. Abdul Quader Molla, a national of Bangladesh usually residing in Dhaka, is the Assistant Secretary-General of Jamaat-e-Islami.

9. On 13 July 2010, Mr. Molla was arrested at the High Court premises in Dhaka by officers of the Detective Branch of the Dhaka Metropolitan Police for alleged violations of sections 148, 448, 302, 34, 101, 326, 307 and 436 of the Penal Code in a case concerning the mass killing of freedom fighters and arson attacks in the Pallabi which occurred 38 years ago. On 14 July 2010, the Chief Metropolitan Magistrate Court ordered Mr. Molla to be remanded in custody for five days at the Central Investigation Department. On 22 July 2010, the police added four further cases as grounds for the arrest of Mr. Molla. He was remanded in custody for 11 days.

10. On 22 July 2010, the Chief Prosecutor of the International Crimes Tribunal requested the Tribunal to order the arrest of Mr. Molla under rule 9, paragraph 1, of the Rules and Procedure of the International Crimes Tribunal for crimes committed under section 3, paragraph 2, of the International Crimes (Tribunals) Act. On 2 August 2010, the International Crimes Tribunal ordered Mr. Molla's arrest. The source argues that the Tribunal acted in violation of section 11, paragraph 5, of the Act. Mr. Molla has not been charged with any specific crime under section 3 of the Act. On 30 November 2010, he was granted bail in four cases against him. Bail was not applied for in two cases that were subject to the intervention of the Chief Prosecutor of the International Crimes Tribunal, as Mr. Molla's defence counsel was allegedly prevented from obtaining access to the evidence (Keranigang PS 34(12)07 and Pallabi 60(1)08).

11. Mohammad Kamaruzzaman, a national of Bangladesh usually residing in Dhaka, is the Assistant Secretary-General of Jamaat-e-Islami.

12. He was initially arrested on 13 July 2010, for alleged offences under sections 148, 448, 302, 34, 101, 326, 307 and 436 of the Penal Code of Bangladesh. On 14 July 2010, he was placed on remand for five days at the Crimes Investigations Department pursuant to an order issued by the Chief Metropolitan Magistrate Court.

13. On 22 July 2010, the police added charges in four more cases and he was placed on remand in custody for 11 days. The same day, the Chief Prosecutor of the International Crimes Tribunal made an application to the Tribunal for the arrest of Mr. Kamaruzzaman under rule 9, paragraph 1, of the Rules and Procedure of the International Crimes Tribunal for crimes committed under section 3, paragraph 2, of the International Crimes (Tribunals) Act. On 2 August 2010, the Tribunal ordered that Mr. Kamaruzzaman remain in police custody under section 11, paragraph 5, of the Act. On 30 November 2010, bail was granted in four cases. Mr. Kamaruzzaman remained in detention on charges under two other cases that were subject to the intervention of the Chief Prosecutor of the International Crimes Tribunal and in which the defence counsel for Mr. Kamaruzzaman was allegedly prevented from obtaining access to the evidence (Keranigang PS 34(12)07 and Pallabi PS 60(1)08).

14. Ali Hasan Mohammed Mujahid, a national of Bangladesh living in Dhaka, is the Secretary-General of Jamaat-e-Islami and former Minister of Social Welfare (2001–2006).

15. Mr. Mujahid was arrested on 29 June 2010, at Savar district by the Detective Branch of Dhaka Metropolitan Police on charges of hurting religious sentiment contrary to sections 295(A), 298 and 109 of the Bangladesh Penal Code. On 30 June 2010, he was granted bail. He was immediately re-arrested in five other cases. Mr. Mujahid was later charged in four further cases. He was placed at Dhaka Central Jail on 29 June 2010. On 20 January 2011, he was transferred to Narayanganj District Jail where he remains. On 30 June 2010, the Chief Metropolitan Magistrate Court ordered that Mr. Mujahid be held on remand in custody for 16 days in five criminal cases pending against him.

16. On 15 July 2010, he was placed on remand in custody for three days in relation to one of the cases against him. He was then taken into remand for three more days on 26 July 2010 in another case. Throughout this period he was held in remand at the Detective Branch Office and allegedly denied access to lawyers and family.

17. On 22 July 2010, the Chief Prosecutor of the International Crimes Tribunal made an application to the Tribunal for the arrest of Mr. Mujahid under rule 9, paragraph 1, of the Rules and Procedure of the International Crimes Tribunal for crimes committed under section 3, paragraph 2, of the International Crimes (Tribunals) Act. On 2 August 2010, the International Crimes Tribunal passed an order for the arrest of Mr. Mujahid in alleged contravention of section 11, paragraph 5, of the Act. According to the source, Mr. Mujahid has not yet been charged with any crimes under section 3 of the Act.

18. As in the case of other detainees, on 29 November 2010, Mr. Mujahid was granted bail in two cases. On 30 November 2010, he was granted bail in five more cases. His application for bail in another case is pending before the High Court. Mr. Mujahid remained in detention in connection with two cases (Keranigang PS Case No. 34(12)07 and Pallabi PS Case No. 60(1)08) that were subject to the intervention of the Chief Prosecutor of the International Crimes Tribunal allegedly preventing defence counsel for Mr. Mujahid from obtaining access to the evidence.

19. Allama Delewar Hossain Sayedee, a national of Bangladesh living in Dhaka, is a Vice-President of Jamaat-e-Islami.

20. Mr. Sayedee was arrested on 29 June 2010 at his home by the Detective Branch of the Dhaka Metropolitan Police on charges of hurting religious sentiments of Muslims contrary to sections 295(A), 298 and 109 of the Bangladesh Penal Code. From 29 June 2010 to 25 March 2011, Mr. Sayedee was transferred on multiple occasions to different detention centres. He currently remains in detention at the Dhaka Central Jail. On 30 June 2010, Mr. Sayedee was granted bail in one of the criminal cases pending against him. He was re-arrested in connection with charges brought in five other cases. He was later also charged in two further cases.

21. On 30 June 2010, the Chief Metropolitan Magistrate Court ordered for Mr. Sayedee to be held on remand in custody for 16 days in connection with the five cases. He was held in remand at Ramna Police Station for a total of 12 days and at Detective Branch Office for a total of four days. Throughout the period of his remand, Mr. Sayedee was allegedly denied access to his lawyers and family.

22. On 19 July 2010, Mr. Sayedee was taken into remand for a further 12 days. He was held at the Crimes Investigation Department and Detective Branch Office.

23. On 22 July 2010, the Chief Prosecutor of the International Crimes Tribunal made an application to the Tribunal for the arrest of Mr. Sayedee under rule 9, paragraph 1, of the Rules and Procedure of the International Crimes Tribunal for crimes committed under section 3, paragraph 2, of the International Crimes (Tribunals) Act. On 2 August 2010, the International Crimes Tribunal ordered the arrest of Mr. Sayedee. According to the source, this order is contrary to section 11, paragraph 5, of the Act considering that, to date, Mr. Sayedee has not been charged with any crime under section 3 of the Act.

24. On 29 November 2010, Mr. Sayedee was granted bail in three cases. On 30 November 2010, he was granted bail in four cases. His application for bail in one case is still pending before the High Court.

25. Salhuddin Quader Chowdhury, a national of Bangladesh living in Dhaka, is a member of the Standing Committee of the Bangladesh National Party.

26. He was arrested on 16 December 2010, at his residence in Joypurhat Sadar, in the Banani area of Dhaka, by a team of officers of the Rapid Action Branch, the Directorate General of Forces Intelligence and Detective Branch of the police. Mr. Chowdhury was arrested in a case relating to an arson attack committed on 26 June 2010.

27. On 15 December 2010, the Chief Prosecutor of the International Crimes Tribunal made an application to the Tribunal for the arrest of Mr. Chowdhury under rule 9, paragraph 1, of the Rules and Procedure of the International Crimes Tribunal for crimes committed under section 3, paragraph 2, of the International Crimes (Tribunals) Act, in particular on suspicion of having committed war crimes during the 1971 Bangladesh war of liberation.

28. On 19 December 2010, the International Crimes Tribunal issued a production warrant and an arrest warrant for Mr. Chowdhury under section 11, paragraph 5, of the Act. Mr. Chowdhury was denied bail on 19 April 2011, despite volunteering to conditional bail to minimize the risk of absconding, interference with investigation or committing further crimes. According to the information received from the source, Mr. Chowdhury has not been formally informed of the charges or grounds for his arrest.

29. The six individuals applied for bail on 21 April 2011, on the grounds that they were being arbitrarily detained without charge during pretrial proceedings. They submitted to voluntary conditions in order to negate the risk of absconding or interfering with the investigation or prosecution witnesses or the reoccurrence of any crimes. These conditions included surrendering their passports to competent authorities, residing at a given address and reporting to local authorities, and abstaining from travel without prior permission. They also offered a surety for an agreed amount as a condition for bail. Their bail was denied on the grounds that bail was a privilege that they were not entitled to in such a case. It is alleged that on 10 February 2011, the Minister of Law, Justice and Parliamentary Affairs stated in public that there was no scope for bail in such cases. The source submits that the refusal to grant them bail is unjustified.

30. The source contends that the deprivation of the liberty of Messrs. Nizami, Molla, Kamaruzzaman, Mujahid, Sayedee and Chowdhury contravenes article 9, paragraph 2, of the International Covenant on Civil and Political Rights. Following the order of the International Crimes Tribunal dated 2 August 2010, the defendants have not yet been informed of any specific charges justifying their detention, ongoing for more than a year. The source further contends that the allegations made by the Prosecution against the six individuals are vague and were not promptly communicated to the defendants after their arrest, in alleged breach of articles 9, paragraph 2, and 14, paragraph 3 (a), of the International Covenant on Civil and Political Rights. The source emphasizes that it is contrary to general principles of law and article 14, paragraph 3 (b), of the Covenant for the Investigation Agency to interrogate the defendants without knowledge of the charges they face.

31. According to the information received, the International Crimes Tribunal has stated that considering that the investigation against the six individuals was incomplete, their defence counsel were not entitled to receive any information concerning the investigation (*Chief Prosecutor, International Crimes Tribunal v. Motiur Rahman Nizami and others [ICT-BD Misc. Case No. 01/2010]*). In addition, the Tribunal, on 5 and 19 April 2011, ordered that the defence counsel should not attend the interrogations, in alleged violation of article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights. It is reported that following the interrogations of Messrs. Nizami, Mujahid, Sayedee and Chowdhury, the Chief Investigator allegedly addressed the media and released statements given by the defendants during the interrogation, according to which they had confessed to genocide in 1971.

32. The source draws attention to the allegation that on 20 April 2011 in the matter of *Chief Prosecutor, International Crimes Tribunal v. Allama Delwar Hossain Sayedee [ICT-BD Misc. Case No. 03 of 2010]* two case diaries had been submitted to the Tribunal by the Prosecution detailing the investigation against Mr. Sayedee but no disclosure has been made to the defence counsel.

33. In the light of the foregoing, the source submits that the continued pretrial detention of Messrs. Nizami, Molla, Kamaruzzaman, Mujahid, Sayedee and Chowdhury is arbitrary being in violation of the minimal guarantees enshrined in the right to a fair trial and access to justice.

*Response from the Government*

34. The Working Group forwarded a communication to the Government on 12 September 2011 and regrets that the Government has not provided the requested information. The Working Group would have welcomed the cooperation of the Government.

35. According to its revised methods of work, the Working Group is in a position to render an opinion on the case on the basis of the submissions that have been made. In the Working Group's communication forwarded to the Government on 12 September 2011 it is stated that "if no reply has been received upon expiry of the time limit set, the Working Group may render an Opinion on the basis of all the information it has obtained". The Working Group has since its inception consistently applied a presumption in favour of allegations that have not been responded to by the Government.

**Discussion**

36. The Working Group refers to the following statements by the Government of Bangladesh during the 2009 universal periodic review:

One of the Government's foremost goals in the field of human rights was to bring to justice all those who committed the most atrocious crimes against humanity during the war of national liberation. The Prime Minister, Sheikh Hasina, had already indicated that Bangladesh would seek United Nations help to ensure that the mechanisms adopted for the proposed trials of the perpetrators met international standards and safeguarded the basic principles of justice. Parliament had passed a unanimous resolution that there would be a trial of the perpetrators and the victims may expect redress. Bangladesh was committed to reversing the culture of impunity that had afflicted other areas of its national life. The Government intended to resurrect due process, expunge extra-judicial modalities and objectives, and promote political harmony and reconciliation (A/HRC/11/18, para. 15).

37. In the same document, the Government of Bangladesh stated that:

The Minister ... informed that Bangladesh was working to initiate trials of war criminals who had committed crimes against humanity during the 1971 war of liberation (A/HRC/11/18, para. 87).

38. The pretrial detention of the six individuals brings up the issue of compliance of the International Crimes Tribunal established under the domestic law of Bangladesh. Without addressing the relationship between the provisions contained in the International Crimes (Tribunals) Act and the guarantees and remedies available under the Constitution of Bangladesh, the Working Group notes that the procedure of this Tribunal must comply with the relevant obligations of Bangladesh under international law. Bangladesh has ratified the Rome Statute of the International Criminal Court that provides a model for resolving many such issues in national law, and further assistance may be found in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and other ad hoc tribunals.

39. The Working Group reiterates that, in international law, detention prior to conviction should be an exception rather than a rule. This rationale stems from the principle of presumption of innocence. The Human Rights Committee has stated that the deprivation of

liberty, even if initially legitimate and justified, will fall short of the guarantees contained in article 9 of the International Covenant on Civil and Political Rights if it is of indefinite duration. The Human Rights Committee has, in the context of lawful pretrial detention or remand in custody, held that the drafting history of article 9, paragraph 1, of the Covenant confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more widely to include elements of inappropriateness, injustice and lack of predictability (communication No. 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8; communication No. 631/1995, *Spakmo v. Norway*, Views adopted on 5 November 1999, para. 6.3; communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.8; and communication No. 560/1993, *A v. Australia*, Views adopted on 3 April 1997, para. 9.2).

40. The Government has not responded to the Working Group’s communication or refuted the contentions made by the source in relation to the alleged violations of the defendants’ rights while in pretrial detention.

41. Against this background and on the basis of the information available, the Working Group holds that there have been significant restrictions on the defendants’ access to legal assistance. In particular, the defence counsels have not been able to attend sessions during which the defendants were interrogated. Nor have they had unimpeded access to the evidence. The Working Group finds that access to information by the defendants and their lawyers has been restricted in a way that hinders any challenge of their pretrial detention, contrary to article 9, paragraphs 2 and 4, of the International Covenant on Civil and Political Rights and general principles of law.

42. After more than one year in pretrial detention pursuant to the order of the International Crimes Tribunal, the defendants have not yet been formally informed of the charges, in breach of article 9, paragraphs 2 and 3, of the International Covenant on Civil and Political Rights. The Government has not rebutted its continued failure to do so. Likewise, the Government has not submitted any information justifying the refusal to release these persons on bail, particularly considering that all the underlying conditions were fulfilled. The Working Group considers that holding individuals in pretrial detention in the absence of any reasoned and adequate explanation is unnecessary and disproportional to the aim sought.

### **Disposition**

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

The deprivation of liberty of Motiur Rahman Nizami, Abdul Quader Molla, Mohammad Kamaruzzaman, Ali Hasan Mohammed Mujahid, Allama Delewar Hossain Sayedee and Salhuddin Quader Chowdhury is arbitrary and constitutes a breach of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, falling into category III of the categories applicable to the cases submitted to the Working Group.

44. As a result of the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Motiur Rahman Nizami, Abdul Quader Molla, Mohammad Kamaruzzaman, Ali Hasan Mohammed Mujahid, Allama Delewar Hossain Sayedee and Salhuddin Quader Chowdhury in order to bring it into conformity with the norms and standards set forth in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

*[Adopted on 23 November 2011]*