



HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND
www.ohchr.org • TEL: +41 22 917 9289 • FAX: +41 22 917 9006 • E-MAIL: wgad@ohchr.org

REFERENCE:

[G/SO 218/2]

2 October 2015

Dear Mr. Genser and Ms. Turner,

I would like to refer to the seventy-third session of the Working Group on Arbitrary Detention, during which time the Working Group adopted several Opinions on cases of deprivation of liberty submitted to it.

In accordance with paragraph 18 of the Working Group's revised methods of work, I am sending to you, attached herewith, the text of Opinion No. 33/2015(Maldives) adopted on 4 September 2015, regarding a case submitted by you.

In conformity with its revised methods of work, the Working Group transmits its Opinions to the source of the petitions, two weeks after having transmitted it to the relevant Government.

This Opinion will be published on the website of the Working Group and reflected in its annual report to the Human Rights Council. In the meanwhile, we would encourage you to treat the information given to you by the Working Group on this matter with discretion.

Yours sincerely,

Christophe Peschoux
Secretary a.i.

Working Group on Arbitrary Detention

Mr. Jared Genser & Ms. Maran Turner
Freedom Now
1776 K Street, NW, 8th Floor
Washington, DC 20006
United States



General Assembly

Distr.: General
17 September 2015

Original: English

Human Rights Council
Working Group on Arbitrary Detention

ADVANCE UNEDITED VERSION

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-third session, 31 August– 4 September 2015

No.33/2015 (Maldives)

Communication addressed to the Government on 12 May 2015

Concerning Mohamed Nasheed

The Government has replied to the communication.

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, 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/30/69), the Working Group transmitted the above-mentioned communication to the Government.

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 Nasheed is a 48 year old national of the Maldives. He is the founder and leader of the Maldivian Democratic Party (MDP).

4. Mr. Nasheed is a prominent environmental activist, journalist and politician in the Maldives. As a journalist, he regularly reported on and criticised the Maldivian Government. According to the source, Mr. Nasheed has been subjected to multiple instances of politically motivated persecution, having been arrested and detained at least 20 times over the last two decades for his pro-democracy activism. Mr. Nasheed was the subject of an Opinion adopted by the Working Group in 1995,¹ and was designated a 'prisoner of conscience' by Amnesty International at that time.

5. From 2008 to 2012, Mr. Nasheed served as the fourth President of the Maldives, after winning the first multiparty election held in the Maldives in 2008. According to the source, Mr. Nasheed is the first and only democratically-elected President in the Maldives. After his election, Mr. Nasheed embarked on significant reforms, including implementing the provisions of the 2008 Constitution that sought to establish an independent judiciary and the separation of powers.

6. According to the source, Mr. Nasheed was forced to resign as President on 7 February 2012 under threat of personal violence and unrest created by his opponents. The source claims that Mr. Nasheed continues to be targeted by the Government and its current President. The current President of the Maldives is the half-brother of a former President who held power for 30 years from 1978 to 2008. Mr. Nasheed was first imprisoned during that 30-year rule.

7. On 22 February 2015, Mr. Nasheed was arrested by police at his home address. The police presented Mr. Nasheed with an arrest warrant issued by the Criminal Court of the Maldives at the request of the Prosecutor General. The source informs that Mr. Nasheed was accused of masterminding the abduction of Judge Abdulla Mohamed on 16 January 2012. At that time, Judge Abdulla was the Chief Judge of the Criminal Court, and currently holds that position. Judge Abdulla was not among the three judges that presided over Mr. Nasheed's current trial.

8. On 23 February 2015, during the first hearing at the Criminal Court of the Maldives, Mr. Nasheed was charged with terrorism under section 2(b) of the Prevention of Terrorism Act (No. 10/1990) for his alleged role in the abduction of Judge Abdulla. Section 2(b) of

¹ In that Opinion (36/1995), the Working Group found that the detention of Mr. Nasheed and another journalist was "solely motivated by the will to suppress their critical voices ... on the eve of parliamentary elections which were to decide the future of the country." The detention of Mr. Nasheed was found by the Working Group to be arbitrary, falling within category II of the categories applied by the Working Group.

the Prevention of Terrorism Act provides that “the act or the intention of kidnapping or abduction of person(s) or of taking hostage(s)” shall be construed as acts of terrorism.

9. On 13 March 2015, less than three weeks after he was arrested and charged, Mr. Nasheed was found guilty of terrorism and was sentenced to 13 years of imprisonment. According to an Information Note (discussed below) distributed by the Government of the Maldives on 25 March 2015 to Permanent Missions to the United Nations in Geneva, the Criminal Court recorded a sentence of ten years for the offence of terrorism. However, the Court increased the sentence by three years due to aggravating factors, including Mr. Nasheed’s previous convictions for theft, perjury, disorderly conduct, and misappropriation.

Background to the terrorism charges against Mr. Nasheed

10. The source submits that the detention of Mr. Nasheed is the most recent act of the Government in a long-running campaign to silence Mr. Nasheed and impede his political involvement in the Maldives.

11. In particular, the source alleges that Mr. Nasheed had received numerous complaints during his presidency regarding the serious misconduct of Judge Abdulla during his tenure on the Criminal Court. Mr. Nasheed asked both the police and the Minister of Home Affairs to investigate Judge Abdulla, but Mr. Nasheed’s involvement ended with that request. According to the source, Mr. Nasheed did not give any instructions to arrest Judge Abdulla, nor was he involved in the decision to do so, and was not informed in advance that Judge Abdulla would be arrested.

12. The source notes that it was the Ministry of Home Affairs, with assistance from the Defence Minister, which ordered the Maldives National Defence Force (MNDF) to arrest Judge Abdulla in January 2012. Judge Abdulla was detained by the MNDF for 22 days. According to the source, the Supreme Court issued an order for Judge Abdulla’s release which was directed to the MNDF, not Mr. Nasheed.

13. In November 2012, legal proceedings were initiated against Mr. Nasheed under section 81 of the Maldivian Penal Code for the “illegal detention” of Judge Abdulla. This offence carries a maximum penalty of three years’ imprisonment. The source alleges that the proceedings were an attempt by the Government to prevent Mr. Nasheed from campaigning for the 2013 presidential election. The criminal case was suspended in July 2013, and no further hearings took place.

14. Despite these proceedings, Mr. Nasheed retained a strong political base, winning 45% of the vote in the first round of elections in September 2013. The source informs that the Supreme Court nullified those results, despite international consensus that the election had been free and fair, and suspended the re-vote three times in order to block Mr. Nasheed’s candidacy. Mr. Nasheed subsequently lost the election to the current President. Meanwhile, the illegal detention charges against Mr. Nasheed remained dormant.

15. In January 2015, the Government lost a key coalition partner in the parliament who switched his allegiance from the current President to Mr. Nasheed. A few weeks later, on 16 February 2015, the Prosecutor General (who had been a judge on the Criminal Court at the time of Judge Abdulla’s arrest and was physically present when the arrest occurred), withdrew the illegal detention charges against Mr. Nasheed.

16. On 22 February 2015, the Prosecutor General released a statement that the illegal detention case against Mr. Nasheed had been withdrawn to review the charges and to change the court at which it was filed, but did not mention that any new charges would be filed. However, that same day, Mr. Nasheed was arrested on charges of terrorism, based on the same underlying facts as the 2012 illegal detention case. The offence of terrorism carries a minimum sentence of 10 years of imprisonment and a maximum sentence of 15

years of imprisonment or banishment. Mr. Nasheed was not informed of the terrorism charges until the time of his arrest.

17. Mr. Nasheed's Minister of Defence and three MNDF officers were also arrested on charges of terrorism. The former Minister of Defence has been found guilty and sentenced to ten years of imprisonment, while two MNDF officers were found not guilty, and the remaining case has not yet been concluded.

Detention and trial of Mr. Nasheed on terrorism charges

18. On 23 February 2015, Mr. Nasheed attempted to speak to the press prior to the first hearing of his trial, but the source alleges that he was assaulted by the police and suffered injuries to his arm, finger and shoulder. Mr. Nasheed also suffers chronic back pain, and pain in his ribcage and chest. According to the source, Mr. Nasheed was denied medical treatment during the hearing despite repeated requests, forcing him to create a makeshift sling for his arm by using his tie. The Maldives Human Rights Commission provided a doctor to conduct a medical examination at Maafushi Prison, but he was turned away by the prison authorities. Mr. Nasheed was taken to an independent clinic the next day, but not to the hospital requested by his lawyers.

19. The source alleges that Mr. Nasheed was denied legal representation during the first hearing, and that he was tried before a three-judge panel. The three judges summarily denied bail to Mr. Nasheed on the basis that he "might abscond". This decision was never reconsidered, even though a hearing was scheduled to review the legality of the arrest warrant and the denial of bail.

20. The second hearing was held three days later on 26 February 2015, despite Mr. Nasheed's request to be granted at least ten days to prepare his defence. The hearings continued for 19 days until sentencing took place on 13 March 2015.

21. On 13 March 2015, the Court handed down a guilty verdict based solely on the prosecution evidence. The source informs that Mr. Nasheed was not given time to prepare for the sentencing, and has not been able to appeal his sentence. In January 2015, the Supreme Court, of its own volition, repealed the provisions relating to appeal in the Judicature Act, creating a new procedure in the form of a Supreme Court Circular. The new procedure reduced the time for lodging an appeal from 90 to 10 days, and requires the trial court to forward the appeal petition to the High Court. Mr. Nasheed's lawyers indicated in writing that they intended to appeal, but the Criminal Court failed to provide the trial record until 24 March 2015 (the 11th day after the verdict and outside the 10-day period for appeal), making it substantively impossible for Mr. Nasheed to lodge an appeal.

22. Mr. Nasheed was detained from 22 February to 21 April 2015 at the Dhoonidhoo Island Detention Centre and from 21 to 27 April 2015 in Asseyri Jail on Himmafushi Island. The source alleges that during these periods of detention, Mr. Nasheed spent approximately six weeks in solitary confinement, particularly at Dhoonidhoo Island Detention Centre.

23. According to the source, Mr. Nasheed was transferred on 27 April 2015 to serve his sentence in the maximum security "Special Protection Unit" at Maafushi Prison. The source alleges that Mr. Nasheed's cell was specifically constructed for him. The cell was highly unsanitary as it is located immediately adjacent to the prison garbage dump, and was full of flies and mosquitoes. His food was barely edible. His family and counsel were denied entry on multiple occasions, even after being previously told that visits would be permitted. His family has been able to visit him only once at Maafushi Prison.

24. In August 2015, the Government informed the Working Group that Mr. Nasheed had been transferred temporarily to house arrest on 21 June 2015 in order to undertake

medical examinations. However, the Office of the UN High Commissioner for Human Rights (OHCHR) issued a Briefing Note indicating that Mr. Nasheed was suddenly transferred back to Maafushi Prison on 23 August 2015.² The briefing indicates that force, including pepper spray, was used against Mr. Nasheed's supporters who gathered around his residence to protest the renewed imprisonment. The briefing also notes that: "The return of Mr. Nasheed to prison in our view constitutes a serious set-back to the human rights situation as well as to moves towards finding a political solution in the Maldives".

Submissions regarding arbitrary detention

25. The source submits that the detention of Mr. Nasheed violates his rights under articles 9, 10, 11, 19, 20 and 21 of the UDHR, and articles 9, 14, 15, 19, 22 and 25 of the ICCPR, and constitutes an arbitrary detention according to categories I, II, III, and V of the categories applied by the Working Group.

26. In relation to category I, the source claims that the warrant pursuant to which Mr. Nasheed was arrested refers generically to "terrorism", and failed to set out the alleged criminal conduct for which he was detained. Further, the source submits that the law under which Mr. Nasheed was charged is so vague as to raise concerns about any individual prosecuted under its provisions. The source argues that it is nonsensical for the Government to insist that the arrest of Judge Abdulla, which was facially valid and conducted in accordance with the law, can later be determined an act of terrorism, subjecting anyone involved, up to the President, to criminal prosecution. In addition, the source claims that there was no evidence of any kind presented to prove that Mr. Nasheed had ordered Judge Abdulla's arrest and, even if this was proved, it could not satisfy the elements of the charged crime.

27. In relation to category II, the source submits that Mr. Nasheed's detention resulted from the exercise of his rights to freedom of opinion and expression, association, and political participation.³

28. The source argues that the terrorism charge against Mr. Nasheed was a pretext for the curtailment of his right to freedom of opinion and expression as a political leader. The source points to several public statements made by Mr. Nasheed against the Government, including criticism of the Government for using torture to intimidate the public and to maintain power, questioning the legitimacy and independence of the judiciary, and challenging his rivals to compete in elections rather than using the courts to manipulate presidential polls. The source argues that a pattern of attempting to discredit and silence Mr. Nasheed can be seen in his previous trials, and in his current detention and trial.

29. The source submits that the Government has singled out Mr. Nasheed because he is associated with the major opposition party in the Maldives, the MDP, in violation of his freedom of association and right to political participation. The source claims that the Government views the MDP as a threat to its power, as the MDP is the most popular opposition political party in the Maldives, having won the presidency in 2008. The MDP currently holds the second highest number of seats in the parliament. Mr. Nasheed was a founder of the MDP and regularly convenes with the party's other leaders, as well as with other political leaders, such as the coalition partner who switched his allegiance to Mr. Nasheed in January 2015.

² OHCHR Press Briefing Note, 25 August 2015.

³ While these freedoms are not absolute, the source submitted that Mr. Nasheed's situation does not fall within the limitations which are permissible under article 19(3) of the ICCPR to protect national security, public order, public health or morals.

30. In addition, the source emphasizes that, two weeks after Mr. Nasheed was sentenced, the Government adopted a law banning all prisoners from being members of political parties. As a result, Mr. Nasheed is no longer able to lead the MDP and, due to his conviction for terrorism, he is disqualified under article 109(f) of the Maldives Constitution from running for the presidency for the length of his detention, plus three additional years. Mr. Nasheed will be unable to participate in the 2018 presidential election in the Maldives.

31. In relation to category III, the source submits that the violations of Mr. Nasheed's right to a fair trial was of such gravity as to give his detention an arbitrary character. The source refers to statements made by the UN High Commissioner for Human Rights, the former UN Special Rapporteur on the Independence of Judges and Lawyers,⁴ Amnesty International and other human rights organisations on the haste with which Mr. Nasheed's trial was conducted, and the lack of respect for the most basic principles of a fair trial and due process during the trial.

32. The source alleges that the Government violated numerous procedural requirements, including the arrest of Mr. Nasheed without a proper warrant on 22 February 2015. The source states that the warrant was sought by the Prosecutor General, who personally went to the Court to seek the order, even though the Prosecutor General has no power to seek a warrant. Further, the source submits that the warrant was missing critical information, including the place where Mr. Nasheed was to be detained, the period of his detention, and when he was to be brought to court. The source alleges that the Court covered up its error by issuing a second warrant the following day which ordered the police to present Mr. Nasheed at a specific time. Mr. Nasheed requested the Court to consider the legality of his arrest and the denial of bail, but the Court refused to do so.

33. In addition, the source alleges several violations of his right to fair trial, including the principle of equality of arms. According to the source, Mr. Nasheed was refused the right to prepare an adequate defence, to present any defence witnesses or cross-examine prosecution witnesses fully, and to examine key evidence.

34. Further, the source alleges that the Government failed to provide an independent and impartial tribunal. The source points to the fact that the Prosecutor General had no authority to withdraw the previous illegal detention charges in the already initiated prosecution against Mr. Nasheed, and to replace them with a new charge of terrorism on the same set of facts. Mr. Nasheed challenged the legality of the Prosecutor General's decision, but the Court rejected the argument. The source suggests that the Court's failure to rectify this procedural defect is evidence that the Maldivian judiciary was not acting independently.

⁴ The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, is quoted in a UN News Release dated 18 March 2015: "Clearly no one should be above the law, and the trial of a former Head of State would be a major challenge for any government. But in a polarized context, and given the long-standing serious concerns about the independence and politicization of the judiciary in the Maldives, this case should have been handled with much greater care and transparency." Former Special Rapporteur on the Independence of Judges and Lawyers, Ms. Gabriela Knaut, is quoted in a UN News Release dated 19 March 2015: "Mr. Nasheed's trial was not only a clear violation of the Maldives' international human rights obligations under the International Covenant on Civil and Political Rights, but it also made a mockery of the State's own Constitution. The speed of the proceedings combined with the lack of fairness in the procedures lead me to believe the outcome of the trial may have been pre-determined."

35. The source claims that both the timing of the new terrorism charges against Mr. Nasheed, as well as the rapid pace of the trial, raise serious concerns that the judiciary was not acting impartially or independently. The source points to the fact that, in total, less than three weeks elapsed between Mr. Nasheed's arrest and conviction, with hearings held almost every day, often into the evening. This haste was highly prejudicial to Mr. Nasheed, who was not afforded adequate time or facilities to prepare a defence, particularly given that the new charge of terrorism involved more than 1,125 pages of documentation and involved a very different set of legal challenges and arguments to the original charges of illegal detention.

36. The source also points to the Supreme Court circular which changes the rules for appealing a lower court decision, noting that the timing of this change suggests that the case against Mr. Nasheed was politically motivated.

37. The source alleges that the Prosecutor General and two of the three judges who presided over Mr. Nasheed's trial had a significant conflict of interest. According to the source, both judges are close friends and colleagues of Judge Abdulla, and both were present at, and tried to prevent, the arrest of Judge Abdulla. Both judges submitted witness statements during the police investigation of Judge Abdulla's arrest which were used in support of the prosecution case. In addition, both judges lodged complaints with the Maldives Human Rights Commission about Judge Abdulla's detention.

38. The source notes that Judge Abdulla, who was called to give evidence against Mr. Nasheed, is still the Chief Judge of the Criminal Court where Mr. Nasheed was tried, and all of the three presiding judges report directly to him. The source points to a recent statement by Judge Abdulla which praised the presiding judges for swiftly concluding the trial against Mr. Nasheed. The source claims that the bias of the judges was evident in their leading of key government witnesses through their testimony, while Mr. Nasheed was not permitted to call any witnesses or evidence. The two judges refused to recuse themselves from Mr. Nasheed's trial when his lawyers submitted an application requesting them to withdraw from the case. The source submits that, in failing to recuse themselves after only 20 minutes of deliberation, the judges deprived Mr. Nasheed of the opportunity to be tried by an independent and impartial tribunal.

39. Further, the source states that there was no credible evidence that Mr. Nasheed ordered the arrest and detention of Judge Abdulla, and the only evidence used to convict him was impermissible double hearsay evidence. The source notes that Judge Abdulla testified that he "assumed" that he was taken into custody on the order of the then President Nasheed. In addition, the source points to the Government's claims that it had video evidence of speeches given by Mr. Nasheed stating that he ordered the arrest of Judge Abdulla. However, copies of the CDs provided to the defence were corrupted and the defence had no opportunity to examine the evidence in advance. No video evidence presented to the Court included a statement or confession by Mr. Nasheed that he had ordered the arrest, as claimed by the Government. According to the source, the Court therefore rendered a verdict that was wholly contrary to the evidence, denying a fair trial to Mr. Nasheed.

40. Further, the source argues that the Government did not provide Mr. Nasheed with the right to the presumption of innocence. Instead, the Court chose to rely solely on evidence presented by the Government, reasoning that there was no evidence that Mr. Nasheed could have introduced that would have proven his innocence. The source alleges that the Court's reasoning makes clear that the judges had every intention of convicting him. The source points to the speed of Mr. Nasheed's trial, suggesting that Mr. Nasheed's guilt had already been determined, especially given that a terrorism case is typically more complex and should have taken longer to complete. The source also refers to a reported

statement over social media by one of the presiding judges to the need for Mr. Nasheed to “prove his innocence”, thus reversing the burden of proof.

41. The source alleges that the Government interfered with Mr. Nasheed’s right to counsel.⁵ In particular, Mr. Nasheed’s lawyers were told on 23 February 2015 that they were required to register with the court two days prior to the hearing. This was impossible to comply with, as Mr. Nasheed had only been arrested the day before and was not aware of the charges against him prior to his arrest. During one of the hearings, Mr. Nasheed was forced to sit in the witness stand, physically separated from his lawyers. Further, on 8 March 2015, Mr. Nasheed’s lawyers felt compelled to withdraw from the case because the Government was preventing them from carrying out their ethical duty to provide Mr. Nasheed with adequate legal representation. The Court continued the trial despite Mr. Nasheed’s requests for new counsel, and refused to assign court-appointed counsel to the case.

42. Moreover, the source claims that Mr. Nasheed was repeatedly denied the right to a public trial. Although the courtroom could seat 40 persons, chairs were removed from the room so that only a limited number of people could attend. As a result, only 10 members of the press and 6 members of the public could attend,⁶ while other groups, including members of civil society, were denied access. On some occasions, all outside observers were banned, limiting the transparency of the proceedings. According to the source, hearings were always held at night beginning at 8pm or 10pm, and little notice of the date and time of the trial was provided to Mr. Nasheed, his counsel and the public. Several hearings were conducted completely in camera, with no explanation from the Court as to why this was necessary.

43. Further, the source claims that the Government also failed to meet its obligation to provide a publicly accessible judgment, as the Criminal Court only released a synopsis of the proceedings which does not explain how and why the Court reached its conclusions in Mr. Nasheed’s case. The synopsis did not include statements of witness testimonies or the closing statement submitted by the prosecution.

44. The source claims that, due to the sudden change by the Supreme Court of the appeal rules, Mr. Nasheed was effectively denied the right to appeal his conviction and sentence. Without the trial record, it was impossible for Mr. Nasheed to file an appeal as his lawyers could not complete a thorough examination of the case.

45. In addition, the source contends that the sentence was disproportionate in light of the nature and circumstances of the crime which Mr. Nasheed allegedly committed, which amounts to cruel, inhuman or degrading treatment or punishment contrary to article 7 of the ICCPR. The source argues that the solitary confinement of Mr. Nasheed, the poor prison conditions, and the denial of medical treatment after he was injured on the first day of the hearings, could ultimately constitute torture in violation of this provision.

⁵ The source notes that Mr. Nasheed was without defence counsel on 23 February 2015 (presentation of charges and bail hearing), 26 February 2015, and 8, 9, 10, and 13 March (presentation of verdict and sentencing). The source states that the result was that four out of the ten trial hearings took place without counsel being present.

⁶ The Government annexed a list of journalists and observers who attended various sessions of the trial to its response (Annex 12). This document supports the source’s claim that only 10 members of the press could attend each session, and does not alter the Working Group’s Opinion in terms of the allegation of the lack of a public trial.

46. In relation to category V, the source submits that Mr. Nasheed was arrested, detained and convicted because of his political opinion, which was critical of and contrary to the Government, and his detention is therefore arbitrary.

Response from the Government

47. On 12 May 2015, the Working Group transmitted the allegations from the source to the Government of the Maldives under its regular communication procedure, requesting the Government to provide detailed information by 11 July 2015 about the current situation of Mr. Nasheed, and to clarify the legal provisions justifying his continued detention.⁷

48. In its response of 10 July 2015, the Government provided the Working Group with the following information:

49. The position of the Government is that the petition in relation to Mr. Nasheed is an attempt to divert attention from the serious offence that he committed, namely using the military illegally to abduct a serving judge and hold him incommunicado for 21 days. The Government argues that the intent behind this act was to intimidate an independent judiciary and its officials. The Government further states that the allegations in the petition are either factually incorrect or a mischaracterisation of the real position. In its view, Mr. Nasheed has not been the victim of a politicised process, but is attempting to remove the current democratically-elected government so that he can be reinstated as President of the Maldives.

50. The Government states that Mr. Nasheed has publicly admitted that the arrest of Judge Abdulla was in response to his wishes. Mr. Nasheed's actions were therefore an example of the executive branch of government seeking to impose its will on the people rather than acting in accordance with the Constitution and existing avenues to remove judges, such as through the Judicial Service Commission or in accordance with the Judges Act. The Government alleges that Judge Abdulla was abducted after he refused to grant a warrant for the arrest of another political leader and as a result of his ordering the police to release that leader from custody.

51. The Government submits that none of the criticisms made by the source of the trial process were so serious either individually or cumulatively as to render the entire proceedings a denial of justice and the detention arbitrary. In any event, any actual or perceived irregularities can be addressed on appeal. The Government submits that references to previous criminal proceedings involving Mr. Nasheed are irrelevant to the consideration of the matter currently before the Working Group. Nevertheless, according to the Government, Mr. Nasheed was widely known prior to this matter for his disposition towards breaking the law, and gives several examples of this as a matter of setting the historical record straight.

52. The Government refers to the mandate of the Working Group and the rules in respect of its independence. Further, the Government notes that one of the four petitioners acting on behalf of Mr. Nasheed is a Special Rapporteur⁸, so that there is potential for the

⁷ On 25 March 2015, the Government had transmitted an Information Note to Permanent Missions of the Member States to the United Nations and International Organisations in Geneva. The Note outlined the thirteen-year sentence which had been imposed on Mr. Nasheed for terrorism on 13 March 2015, and noted that: "This brief is prepared to properly communicate accurately, to our stakeholders and partners, informing the same of the applicable law and the prescribed opportunity of appeal."

⁸ The petitioner in question is the current Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism.

independence of the Working Group to be compromised by inference. The Government submits that the petitioner in question must withdraw, and that the source's communication is compromised entirely and must be dismissed on this basis.

53. In relation to the submissions by the source, the Government notes that Mr. Nasheed was convicted by a Maldivian Court in accordance with Maldivian law, and this precludes his case from being argued under category I of the categories applied by the Working Group. The Government adds that the petition is further flawed in that it seeks to argue that Mr. Nasheed's detention is arbitrary under categories II and V. The case against Mr. Nasheed is specifically related to allegations of an individual criminal act, and not to the exercise of his human rights to freedom of opinion and expression, association, and political participation. There is no evidence of discrimination on the basis of political opinion in this case, and Mr. Nasheed actively participated in political activities throughout the period of the original charges and the period leading up to his conviction on terrorism charges. Rather, the crime for which Mr. Nasheed was convicted was a violation of Judge Abdulla's personal liberty and human rights.

54. In relation to category III, the Government reminds the Working Group that it has no power to assess the value of any evidence adduced in any trial or to substitute itself for a domestic appellate tribunal and should not, as the source suggests, enter into any evaluation of the strength of the evidence against Mr. Nasheed. Likewise, the Government argues that the Working Group has no mandate to assess the source's argument as to whether the allegations against Mr. Nasheed constitute an offence under anti-terrorism laws. Alternatively, even if the Working Group considers this matter, the Government argues that charges involving kidnapping can constitute an offence of terrorism.

55. The Government argues that it is also beyond the mandate of the Working Group to consider the conditions in which Mr. Nasheed is detained. However, in relation to the detention of Mr. Nasheed without access to his family or lawyers, the Government notes that incommunicado detention is permitted in exceptional circumstances for "a matter of days".⁹ The Government states that it has submitted a schedule of visits which shows that adequate visitation was subsequently permitted.

56. The Government seeks to refute the source's arguments relating to deficiencies in the arrest warrant executed in relation to Mr. Nasheed. The Government notes that the allegations against Mr. Nasheed pre-date the appointment of the current Prosecutor General and the seeking of the warrant cannot have been politically motivated, and that the warrant was lawfully sought and issued, and clearly set out the charges. Further, the initiation of the terrorism charges in February 2015 was the result of a detailed investigation which was subject to review by Mr. Nasheed and by the courts.

57. The Government argues that bail was denied because the charge related to a non-bailable offence, the defence had previously attempted to delay the proceedings, and there were reasonable grounds to believe that Mr. Nasheed would attempt to flee the jurisdiction of the Maldivian courts, as he had done on two previous occasions. The Government argues that, as the former President, Mr. Nasheed has the means and the wherewithal to abscond.

⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 15, 16 and 18(3). The Government also cites Opinion 26/1999 in which the Working Group considered that charges of terrorism represented an exceptional circumstance where incommunicado detention might be authorised for a brief period. However, the Working Group points out that, in that case, the relevant court took measures for the physical and psychological protection of the person under arrest so that he received a medical examination daily, unlike Mr. Nasheed's case.

58. In relation to the source's allegation of the interference with Mr. Nasheed's right to counsel and adequate time to prepare a defence, the Government states that Mr. Nasheed knew in advance of the case against him as it was based on the same materials previously available to his legal team for the illegal detention charge. The Government argues that the only material change was the legal qualification of the charge as an offence of terrorism. In addition, Mr. Nasheed had the ability to challenge rulings of the Court, and availed himself of that opportunity on more than one occasion. The Government submits that Mr. Nasheed also had the benefit of a team of lawyers (including the team that had allegedly withdrawn during the hearings due to their ethical obligations). In its view, the 'double threshold' applied by the Working Group should be utilised here in determining that even if there was a violation of Mr. Nasheed's due process rights, the violation was not of sufficient importance to nullify the proceedings.

59. The Government submits that Mr. Nasheed was not prevented from calling any evidence in his defence or cross-examining prosecution witnesses. The Court has an inherent discretion to hear relevant evidence, and to refuse to hear witnesses that are not capable of providing evidence that goes to a relevant matter in issue. The Court had requested Mr. Nasheed's lawyers to specify what issues its witnesses would give evidence on, but the defence failed to do so and the Court ruled upon the available prosecution evidence. According to the Government, Mr. Nasheed was not prevented from requesting additional witnesses, but simply failed to do so, and did not put forward any other evidence to refute the charges.

60. The Government points out that there was no evidence that one of the presiding judges made any statement that would reverse the burden of proof in violation of the presumption of innocence, and that it was appropriate for the Court to have taken into account Mr. Nasheed's previous convictions in convicting and sentencing him on the terrorism charges.

61. In relation to the independence of the judges who presided over Mr. Nasheed's trial, the Government states that the Prosecutor General wrote to the Criminal Court requesting that Judge Abdulla have nothing to do with the matter so as to avoid actual or perceived influence, and a replacement Chief Judge was appointed. Further, of the eight Criminal Court judges, seven witnessed the arrest of Judge Abdulla, but none were privy to the investigation after the arrest or the evidence that formed part of the prosecution case. The facts surrounding the arrest could have been gleaned from any media outlet or ordinary discussions in the community. The Prosecutor General also recused himself from prosecuting the case given that he had previously served as a judge on the Criminal Court.

62. The Government argues that Mr. Nasheed was afforded a public trial as members of the public were allowed to observe, including the Bar Human Rights Committee of England and Wales (BHRC). Hearings took place in the evenings due to the need to preserve security.

63. On the right to appeal, the Government submits that the application at this stage is simply for leave to appeal, which Mr. Nasheed could have undertaken within ten days. This period can be extended if delay is caused by the courts, and it only included business days. The Government argues that the defence team were provided with the trial record, but caused delay by initially refusing to sign it. Mr. Nasheed can also submit an out-of-time appeal.

64. The Government rejects that Mr. Nasheed was the subject of ill-treatment. As a former President, he was afforded the privilege of not being handcuffed, and was warned not to speak to the media outside court. Physical force was used to bring him into the building, but not to an excessive level. The Government notes that a Police Integrity Commission review of the production of Mr. Nasheed at court found that the action taken

was proportionate to the situation. Mr. Nasheed received medical care, though not from a medical practitioner of his choosing. Mr. Nasheed was not held in solitary confinement but, as a former President, was separated from other prisoners due to security concerns, and was held in conditions that far exceed minimum standards. The Government claims that Mr. Nasheed also received numerous visits from his family and lawyers during his detention.¹⁰

65. On 29 June 2015, the Government forwarded a letter to the President of the Human Rights Council which reiterated that the sentencing of Mr. Nasheed is not politically motivated and that, like any other citizen of the Maldives, he was afforded an independent and impartial trial in accordance with the relevant national laws in force and international law.

66. On 12 August 2015, the Government responded to a letter from the UN High Commissioner for Human Rights. The Government's response clarifies that Mr. Nasheed's house arrest was only arranged for a period of eight weeks in order to give him time to undergo necessary health checks. The response also states the Government's view that Mr. Nasheed must first exhaust his appeals before a request for the exercise of Presidential clemency could be considered.

67. Finally, on 19 August 2015, the Government sent a letter from the Maldives Minister of Foreign Affairs to the Chair-Rapporteur of the Working Group with an update on Mr. Nasheed's case. The letter notes that the Prosecutor General has filed an appeal in the High Court in relation to the case. While not discussing the details of the appeal, the letter notes that the appeal is in two parts: (i) the specific grounds raised by Mr. Nasheed, and (ii) further points not raised by Mr. Nasheed in his appeal, but nevertheless "deemed to be issues relevant to the Working Group's consideration of the issues raised in the original communication to the Working Group".

68. In the letter, the Government notes that many of the issues raised by the Prosecutor General were not cited by Mr. Nasheed as grounds of appeal, but have been raised "in line with the clear commitment to the right to a fair trial, and more generally, the rule of law". The Government points out that the decision by the Prosecutor General was taken following the lodging by Mr. Nasheed of an appeal on six grounds, which was accompanied by a request from Mr. Nasheed that the Prosecutor General submits the six grounds of appeal to the High Court.

69. The Government informs that Mr. Nasheed was moved to house arrest in order for medical examinations to be undertaken, which was a temporary measure only and not a change in his sentence. This step "evidences how the Government is demonstrating its commitment to the fundamental rights of its citizens and further, respects the dignity of those that have been imprisoned, contrary to the allegations contained within the Communication filed by President Nasheed with the Working Group". Submissions

Further comments from the source

70. The Government's response was sent to the source on 10 July 2015 for comment. The source replied on 19 August 2015. In its response, the source reiterates its claim that

¹⁰ The Government annexed a series of five "Security Sector Information Bulletins" from the Maldives Police Service during the trial (Annex 16) which support the Government's claims about Mr. Nasheed's treatment in detention and first appearance at court, though one of the bulletins notes that the Maldives Human Rights Commission condemned police action at Mr. Nasheed's first appearance. The Working Group is informed that the OHCHR continues to closely monitor Mr. Nasheed's situation, including through two recent visits to the Maldives.

Mr. Nasheed's arrest, trial, conviction, sentencing and ongoing detention are arbitrary and in violation of international law.

71. The source states that the Government is asking the Working Group to disbelieve not only what Mr. Nasheed says, but also what every international organization, third party government, and NGO that has looked at this case has concluded. The source notes that this includes comments made during the Maldives' Universal Periodic Review in May 2015. In addition, the source refers to the trial observation report prepared by the BHRC which emphasized that "Mohamed Nasheed's right to a fair trial, as guaranteed under international law, has been breached" and therefore his "conviction cannot properly be regarded as safe." Further, the source notes that on 24 July 2015, the Prosecutor General announced an intention to appeal the conviction that his office secured, suggesting that even the Maldivian authorities recognise that the trial was flawed.

72. The source submits that, despite a reply of over 100 pages, the Government does not attempt to refute the evidence of violations of international law, and requests the Working Group to find in those instances that the Government has admitted the facts as alleged.

73. In relation to category III of the categories applied by the Working Group, the source reiterates its submission that the criminal case against Mr. Nasheed was marred by serious due process deficiencies and failed to meet international fair trial standards, including through:

- (i) violations of the presumption of innocence;
- (ii) lack of independence and impartiality of the judges;
- (iii) bias by the lead prosecutor and selective prosecution of Mr. Nasheed;
- (iv) denial of adequate time and facilities to prepare a defence;
- (v) violation of Mr. Nasheed's right to present evidence and present witnesses;
- (vi) violation of the Mr. Nasheed's right to cross-examine witnesses;
- (vii) denial of the right to counsel;
- (viii) lack of a public hearing, and
- (ix) denial of the right to appeal.

74. The source argues that the Government's reply on whether it was appropriate for the Court to take Mr. Nasheed's previous convictions into account misses the point. The source claims that those convictions were themselves politically motivated, as determined by independent third parties. The fact that those convictions were taken into account in Mr. Nasheed's trial on terrorism charges violated his right to be presumed innocent until proven guilty.

75. Further, the source submits that the Government's response to allegations of bias against two of the presiding judges is misleading. According to the source, the Government omits to mention that two judges were not only present at the time of Judge Abdulla's arrest, but they filed witness complaints that were used as evidence in the proceedings against Mr. Nasheed, and at one stage they were listed as witnesses for the prosecution. In addition, the source notes that the prosecutor in Mr. Nasheed's case had previously explained that the case against Mr. Nasheed was initially brought before the Hulhumale Magistrates' Court because the Criminal Court had a conflict of interest in the matter. In relation to the Government's claim that seven of the Criminal Court judges witnessed Judge Abdulla's arrest, the source suggests that, if there was no unbiased judge available, international assistance should have been sought or other measures taken, such as constituting a bench from appellate court judges or retired judges.

76. The source points to evidence of the actual and perceived bias of the presiding judges in Mr. Nasheed's case. The source submits that the refusal to allow Mr. Nasheed to call witnesses, the limits placed on his cross-examination of prosecution witnesses, the judges leading government witness through their testimony, and the fact that they called Judge Abdulla to testify (over the objections of the prosecution) are examples of actual bias. In addition, the source notes that the BHRC report confirmed that the bias of the judges, including the failure to recuse themselves, rendered the trial unfair. The BHRC found that: "the judges' acknowledgement that they could choose whether to be witnesses or judges in the case itself amounts to an explicit acceptance of apparent bias on their behalf. In such circumstances, the judicial panel could not possibly have appeared impartial to a reasonable observer". Finally, the source argues that, contrary to the Government's assertions that Judge Abdulla kept his distance from the trial, the reality is that he was very much involved, which was confirmed by the BHRC trial observation.

77. The source disputes the Government's claim that the Prosecutor General recused himself from the trial, noting that this is simply untrue, despite requests from Mr. Nasheed's lawyers that he do so. Instead, the prosecution team claimed that the Prosecutor General would recuse himself if and when he felt it was necessary, though he never did, and Mr. Nasheed's lawyers were not permitted by the Court to pursue this matter. The source points to the fact that a former President is being tried on serious terrorism charges for one alleged offence, when his predecessor has not had to answer for any alleged serious human rights violations documented during his term, indicates that Mr. Nasheed has been selectively prosecuted in violation of his right to equality before the Courts enshrined in article 14(1) of the ICCPR.

78. The source reiterates its assertion that the Government failed to provide Mr. Nasheed with adequate time and facilities to prepare a defence. The source refers to the Working Group's jurisprudence, noting that it is not sufficient for counsel to be appointed, and they must be given a real chance to "do their job".

79. The source states that the Government fell short of this international standards in at least five respects: (i) only 20 days elapsed from arrest to sentence, (ii) proceedings on the merits started the day after Mr. Nasheed's arrest, when the new charges were notified to him, (iii) the Court unreasonably refused an adjournment sought by Mr. Nasheed after his counsel resigned, (iv) Mr. Nasheed and his counsel were denied access to evidence, and (v) Mr. Nasheed's counsel was entirely absent from key hearings in the case.

80. According to the source, the Government's argument that Mr. Nasheed had previously requested expedited proceedings omits to mention that this request was made in reference to the charges of illegal detention filed in 2012 which had stalled for 2.5 years at the time of the request. In addition, the source contends that the Government's argument that the matter was not new and would not require a greater level of preparation, is not sustainable. The source reiterates that the elements of the more serious crime of terrorism are completely different to those of illegal detention and would require a different assessment of the evidence, and at least 21 entirely new documents which had not been relied on in the 2012 trial were provided to Mr. Nasheed's lawyers. In addition, the source argues that the guarantee of adequate time runs from the moment a person has been made aware of the charges against him or her, not merely of the available evidence. The source refers to a statement from the UN High Commissioner for Human Rights that despite the Government's argument that the new case was based on the same materials previously

available to his legal team, Mr. Nasheed should still have been given time to instruct his counsel and prepare a new defence.¹¹

81. Further, the source states that the Government does not dispute the fact that the Court refused the request for an adjournment for Mr. Nasheed to review the evidence. The source notes that the BHRC report found that the failure to allow Mr. Nasheed adequate time to prepare violated article 14(3)(b) of the ICCPR.

82. The source submits that the Government's response does not dispute the failure by the prosecution and the Court to disclose video and audio evidence, and that Mr. Nasheed should not have been convicted on the basis of evidence to which he or his lawyers did not have full access. The source also recalls that Mr. Nasheed sought, but was not permitted, to call four witnesses that had direct knowledge of the facts of Judge Abdulla's detention, in violation of the principle of equality of arms. The Government's argument that their evidence was not relevant cannot be sustained. Finally, the source contends that Mr. Nasheed's lawyers were prohibited from questioning the credibility of prosecution witnesses to establish bias or discredit their testimony. According to the source, cross-examination was limited in this manner for five of the nine witnesses presented by the prosecution. The source notes that the Government does not suggest that there were exceptional circumstances requiring any limits on cross-examination.

83. The source recalls the withdrawal of Mr. Nasheed's defence counsel during the trial and notes that, while the Court stated that he could appoint new counsel, he was only given 24 hours to do so, which was practically impossible while he was being held in prison. Moreover, even if Mr. Nasheed failed to appoint new counsel, the source argues that the Court should not have proceeded with the trial and should have ensured that legal representation was available to Mr. Nasheed.

84. The source disputes the Government's contention that Mr. Nasheed's trial was open to the public. The source points to the findings of the BHRC in its report that Mr. Nasheed was not guaranteed a public trial, in violation of article 14(1) of the ICCPR. In particular, the BHRC report stated that: "On all three days on which BHRC's trial observer attended court, there were insufficient seats for those wishing to attend. She herself was prevented from observing on 4 March 2015 for this reason. No provision was made by the Court to facilitate or improve public access to the proceedings, notwithstanding the fact that the space available was demonstrably inadequate for those wishing to attend." The source argues that there was no legitimate basis for restricting access in the most important trial that has ever taken place in the Maldives, where there were questions about its fairness, and where the courtroom could have accommodated a larger presence but for actions taken by the Government to reduce the space available. Finally, as pointed out by the UN High Commissioner for Human Rights,¹² the Court refused requests by the Maldives Human Rights Commission and domestic and international observers to monitor the trial.

85. The source also disputes the Government's contention that Mr. Nasheed has not attempted to appeal his conviction and sentence. The source states that Mr. Nasheed submitted a written intent to appeal on 15 March 2015, two days after his conviction. The source notes that, contrary to the Government's submission that the appeal period runs from the date the trial record is received, the 10-day period runs from the date of conviction, as stated in the new Supreme Court Circular which introduced this change. Moreover, the Circular requires defendants to file the complete appeal within 10 days of the conviction, not just leave to appeal, as the Government incorrectly stated. There is also no discretion of

¹¹ UN News Release dated 18 March 2015 (cited at footnote 4, above).

¹² UN News Release dated 18 March 2015 (cited at footnote 4, above).

the Court to accept out-of-time appeals. The source submits that the Prosecutor General's appeal in this case does not remedy the violation of Mr. Nasheed's denial of a right to appeal.

86. In relation to categories II and V, the source argues that the Government has failed to understand and reply to the allegations made in relation to Mr. Nasheed. The source argues that a crime charged does not have to relate to the exercise of protected rights, but that the Working Group looks behind criminal charges to see if there were, as is the case for Mr. Nasheed, used as a pretext to limit the exercise of fundamental rights including freedom of opinion and expression, freedom of association, and freedom of political participation. The source asserts that the Government's denials do not contradict the evidence provided by the source or the broad range of independent and international voices that support Mr. Nasheed's claim that the terrorism charge was simply a pretext for his prosecution.

87. The source notes that the Government acknowledged that legislation to disqualify prisoners from being members of political parties was adopted within weeks of Mr. Nasheed's trial, but denies that it targeted him. The source argues that the Government did not provide any evidence to refute the allegation, and has not explained the suspicious timing of the legislation or given alternative reasons as to why it was adopted.

88. According to the source, the Government acknowledges that, because of his conviction, Mr. Nasheed will not be able to contest the 2018 presidential elections. However, the Government argues that there is nothing discriminatory about the ban since it is set out in a constitutional provision that was adopted in 2008, before Mr. Nasheed's case. However, the source argues that it is not the ban itself that is discriminatory, but the Government's reliance on a groundless conviction to trigger the ban and thereby prevent Mr. Nasheed's candidacy.

89. In addition, in relation to category I, the source submits that it is not enough for the Government to simply assert that Mr. Nasheed has been charged under appropriate domestic law, and therefore his detention after conviction on this basis cannot be arbitrary. The source contends that the Government must show that Mr. Nasheed has in fact been appropriately charged under domestic law, but has failed to do so.

90. Further, the source notes that Mr. Nasheed was originally charged in 2012 for the alleged crime of "illegal detention," not "terrorism." The source argues that it was at that time acknowledged that the alleged act of ordering an arrest did not meet the definition of terrorism under the plain language of the Prevention of Terrorism Act because there was no attempt to charge it as terrorism until it became politically expedient to do so. The source submits that the Government should have ensured that anti-terrorism legislation defines the nature of the prohibited acts with sufficient precision to enable individuals to regulate their conduct accordingly, but in this case has failed to do so. Mr. Nasheed was found guilty of a crime on account of an act which did not constitute a criminal offence at the time it was committed, in violation of article 15 of the ICCPR. The source notes that the judgment does not refer to any evidence that Mr. Nasheed ordered the arrest of Judge Abdulla or had prior knowledge of it, contrary to the Government's assertions that Mr. Nasheed had publicly admitted that the arrest of Judge Abdulla was in response to his wishes.

91. Finally, the source clarifies a number of matters raised by the Government. Firstly, the source states that, as the Working Group has previously made clear, there is no need for the exhaustion of domestic remedies before it can render an Opinion on a matter. Secondly, in relation to the Government's assertion that one of the four petitioners acting on behalf of Mr. Nasheed is a Special Rapporteur and must withdraw from this case, the source submits that applicable UN Codes of Conduct for Special Procedures do not prohibit a UN Special Rapporteur from maintaining a legal practice focusing on human rights or making an

independent submission, in his personal capacity, to another one of the UN Special Procedures. Moreover, the source submits that there is no issue affecting the members of the Working Group, whose independence and impartiality is not in question.

Discussion

92. The Working Group thanks the source and the Government for their extensive submissions in relation to Mr. Nasheed's most recent legal proceedings. It is evident that the detention of Mr. Nasheed and, in particular, whether it is arbitrary, is highly contested between the parties. The source claims that Mr. Nasheed's detention was arbitrary according to categories I, II, III and V of the categories applied by the Working Group. The Working Group considers each of these categories in turn below.

93. In relation to category I, the Working Group notes that detention will be considered arbitrary when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. The Working Group respectfully disagrees with the Government's assertion that, since Mr. Nasheed was convicted by a Maldivian court in accordance with Maldivian law, this precludes the case from falling within category I. The Working Group considers that it is entitled to assess the proceedings of the court and the law itself to determine whether they meet international standards. In this regard, the Working Group recalls the Human Rights Council's reaffirmation that States must ensure that any measures, including national laws, taken to combat terrorism comply with their obligations under international law, in particular international human rights law.¹³

94. In an offence as serious as terrorism, which in the Maldives carries a sentence of between 10 to 15 years of imprisonment or banishment for terrorist acts which do not result in the loss of life, the Government should have been able to demonstrate the legal basis of the charges against Mr. Nasheed. The Working Group considers that the Government has not explained how the arrest of Judge Abdulla, which was carried out by the MNDF under an order given by a third party, could constitute terrorism. In simply producing a list of witnesses and evidence in its response, the Government has also failed to rebut the assertion by the source that there was no evidence produced at the trial that Mr. Nasheed had ordered Judge Abdulla's arrest.

95. The Working Group considers that it is therefore clearly impossible to invoke any legal basis justifying the deprivation of liberty of Mr. Nasheed, and that his detention was arbitrary and falls within category I of the categories applied by the Working Group.

96. In relation to categories II and V, the source submitted that Mr. Nasheed's detention resulted from the exercise of his rights to freedom of opinion and expression, association, and political participation, and that he was detained because of his "political opinion" which was critical of and contrary to the Government.

97. In the view of the Working Group, there are several factors which, taken together, strongly suggest that Mr. Nasheed's conviction was politically motivated. These include: (i) the history and pattern of proceedings brought against Mr. Nasheed, including his arrest

¹³ Human Rights Council Resolution 7/7, Protection of human rights and fundamental freedoms while countering terrorism, 27 March 2008, paragraph 1. See also the Working Group's list of principles concerning the compatibility of anti-terrorism measures with articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR: Report of the Working Group on Arbitrary Detention, UN Doc. A/HRC/10/21, 16 February 2009, paragraphs 50-55. These principles include that: the detention of persons suspected of terrorist activities shall be accompanied by concrete charges, and in the development of judgments against them, the persons accused shall have a right to the guarantees of a fair trial and the right to appeal.

and detention in 1994 which was declared by the Working Group to be arbitrary and solely motivated by the will to suppress his critical voice, (ii) the sudden way in which charges were reinstated against Mr. Nasheed after the original case had been inactive for 2.5 years when the Government lost a key coalition partner in the parliament, (iii) the fact that, two weeks after Mr. Nasheed was sentenced, the Government adopted a law banning all prisoners from being members of political parties, and (iv) the fact that Mr. Nasheed will not be able to participate in the 2018 presidential election as a result of his conviction. In this case, the Working Group considers that Mr. Nasheed's detention has resulted from the exercise of his rights as a political opposition leader to express views contrary to the Government, to associate with his own and other political parties, and to participate in public life in the Maldives.

98. The Working Group concludes that there is a violation of Mr. Nasheed's rights to freedom of opinion and expression, freedom of association, and freedom of political participation under articles 19, 20 and 21 of the UDHR, and articles 19, 22 and 25 of the ICCPR, and that he was targeted on the basis of his political opinions. The case therefore falls within categories II and V of the categories applied by the Working Group.

99. In relation to category III, the Working Group notes that Mr. Nasheed's trial has been the subject of an exceptionally high level of attention and scrutiny both within and outside the Maldives. A range of human rights experts who are familiar with Mr. Nasheed's case have stated that his trial did not meet international human rights standards, including the UN High Commissioner for Human Rights and the former UN Special Rapporteur on the Independence of Judges and Lawyers.

100. As an example, the Working Group refers to the findings of one of two visits conducted by OHCHR representatives to the Maldives in April and July 2015 in relation to Mr. Nasheed's case. During its first visit on 20-23 April 2015, the delegation met with the Government and judicial officials, civil society, and Mr. Nasheed, and found that:

“... however serious the allegations against him, the trial of Mr. Nasheed was vastly unfair and his conviction was arbitrary and disproportionate. In the absence of an adequate criminal code, evidence law, and criminal procedures, the Prosecutor-General and the judges have excessive discretionary powers that worked in this case against Mr. Nasheed. He learnt about the new charge under the Terrorism Act only upon arrest. Following a rushed process that took place over less than three weeks, at night and often without the presence of Mr. Nasheed's lawyers, he was convicted and sentenced. Importantly, the court denied Mr. Nasheed the possibility to prepare and present adequate defence, including calling defence witnesses, and examining the evidence against him”.¹⁴

101. In addition, the problems associated with the judiciary in the Maldives, including its actual and perceived lack of independence, and the “reactivation of old cases to arrest opposition members of Parliament or bar them from Parliament”, have been documented by the United Nations in recent years.¹⁵ These reports suggest that there are systemic problems in the Maldives involving the arrest of political opposition leaders, the lack of independence of the judiciary and prosecutors, and procedural defects in providing a fair trial.

¹⁴ OHCHR Press Briefing Note, 1 May 2015.

¹⁵ Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, paragraphs 31-37, 2 March 2015. See also the Report of the Special Rapporteur on the independence of judges and lawyers, Mission to the Maldives, A/HRC/23/43/Add.3, 21 May 2013.

102. While this information from multiple sources does not bind the Working Group, it is difficult for the Government to credibly contend that Mr. Nasheed's trial met international standards despite overwhelming evidence to the contrary. The Working Group has considered each of the alleged due process violations. In doing so, the Working Group emphasizes that it did not substitute itself for a domestic appellate tribunal, but considered whether the facts in Mr. Nasheed's case demonstrate a failure by the Government to afford him a fair trial.

103. In the view of the Working Group, there were several serious due process violations which, taken together, demonstrate that Mr. Nasheed did not receive a fair trial. These violations have not been sufficiently rebutted by the Government, including by documentary evidence of the trial proceedings and judgment to support the Government's arguments.¹⁶ The violations include:

- (i) the fact that 20 days elapsed between Mr. Nasheed's arrest and conviction in a trial involving a serious new charge of terrorism, and proceedings commenced the day after Mr. Nasheed's arrest, suggesting that the result was pre-determined;
- (ii) an apparent conflict of interest on the part of the Prosecutor General and two of the three presiding judges who were friends and colleagues of Judge Abdulla and witnessed his arrest, as well as the refusal by the judges to recuse themselves after deliberating on the request for only 20 minutes;
- (iii) refusal to allow Mr. Nasheed to call any witnesses or evidence, and the limits placed on his cross-examination of prosecution witnesses;
- (iv) limited provision of evidence to the defence team, including CDs and video evidence;
- (v) the absence of legal representation for Mr. Nasheed at key points during the trial;
- (vi) refusal of an adjournment after the withdrawal of Mr. Nasheed's counsel;
- (vii) limitations on how many observers and members of the public could attend Mr. Nasheed's trial, and the provision by the Court of a synopsis of the proceedings rather than a judgment;
- (viii) a sudden change by the Supreme Court of the appeal rules, and the delay in providing the trial record to the defence.

104. The Working Group considers that there was a violation of Mr. Nasheed's right to a fair trial, particularly: (i) the right to the presumption of innocence (article 11(1) UDHR, article 14(2) ICCPR); (ii) the right to an independent and impartial tribunal (article 10 UDHR, article 14(1) ICCPR); (iii) the right to equality of arms (article 10 UDHR, article 14(1) ICCPR); (iv) the right to adequate time and facilities to prepare a defence (article 11(1) UDHR, article 14(3)(b) ICCPR); (v) the right to examine prosecution witnesses and call and examine witnesses for the defence (article 11(1) UDHR, article 14(3)(e) ICCPR); (vi) the right to counsel (article 11(1) UDHR, article 14(3)(b) and (d) ICCPR); (vii) the

¹⁶ See the Working Group Opinion No. 41/2013 (Libya) which 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 prove the negative fact asserted by the applicant is on 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": Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), ICJ, Judgment, 30 November 2010, para. 55.

right to a public hearing (article 10 UDHR, article 14(1) ICCPR), and (viii) the right to appeal (article 14(5) ICCPR).

105. The Working Group concludes that the breaches of articles 9, 10 and 11 of the UDHR and articles 9 and 14 of the ICCPR in the case of Mr. Nasheed are of such gravity as to give his deprivation of liberty an arbitrary character, falling within category III of the categories applied by the Working Group.

106. The Working Group wishes to record its concern about Mr. Nasheed's physical and psychological integrity while serving the 13 years of imprisonment imposed in March 2015. In particular, the Working Group refers to the allegations made by the source that Mr. Nasheed has been held in solitary confinement and in unsanitary conditions, subjected to ill-treatment before his first hearing, and not given access to medical care. The source alleged that these factors constitute cruel, inhuman and degrading treatment, and could amount to torture as the conditions persist. These allegations were denied by the Government.

107. The Working Group recalls that efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged.¹⁷ Given that Mr. Nasheed has recently received medical attention while under house arrest, and was recently visited by a delegation from the OHCHR while in prison and under house arrest, the Working Group considers that it does not need to refer the matter to the relevant Special Rapporteur for follow up action. The OHCHR continues to monitor the situation closely.

108. The Working Group notes that it is rendering this Opinion while an appeal that was initiated by the Prosecutor General is ongoing in the Maldives. As the Working Group has previously made clear in its jurisprudence, there is no requirement that domestic remedies be first exhausted before the Working Group can issue an Opinion.¹⁸ In addition, it is not clear when the outcome of that appeal will be known, or whether it will reach the same conclusion as the Working Group that Mr. Nasheed has not been afforded a fair trial. Accordingly, the Working Group considers it appropriate to render an Opinion requesting Mr. Nasheed's immediate release on the basis that his detention was arbitrary, particularly in light of recent information that Mr. Nasheed has been returned from house arrest to prison.

109. Finally, given that the Working Group has adopted this Opinion by consensus among its five independent members, the Working Group considers that no reasonable person could conclude that its independence is compromised by the fact that one of the four petitioners is a Special Rapporteur.

Disposition

110. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Nasheed, being in contravention of articles 9, 10, 11, 19, 20 and 21 of the UDHR and articles 9, 14, 19, 22 and 25 of the ICCPR, is arbitrary, falling within categories I, II, III and V of the categories applicable to the consideration of cases submitted to the Working Group.

111. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Nasheed without

¹⁷ Principle 7, Basic Principles for the Treatment of Prisoners.

¹⁸ Opinion Nos. 11/2000, 19/2013.

delay and bring it into conformity with the standards and principles in the UDHR and the ICCPR.

112. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to release Mr. Nasheed immediately and accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the ICCPR.

[Adopted on 4 September 2015]
