

OPINION No. 12/1999 (INDONESIA)

Communication addressed to the Government on 6 December 1993

Concerning José Alexander (“Xanana”) Gusmao

The State is not a party to the International Covenant on Civil and Political Rights

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. The Working Group conveys its appreciation to the Government for having forwarded the requisite information in good time.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
 - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
 - (iii) When the complete or partial non-observance of the relevant international standards set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned relating to the right to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).
4. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its additional comments.
5. Xanana Gusmao was arrested on 20 November 1992 and charged with leading an armed rebellion against the Government of Indonesia, disrupting national stability, and with illegal possession of firearms in alleged violation of article 1 (1) of Law No. 12 of 1951. Upon conclusion of his trial in Dili, East Timor, held from 1 February to 21 May 1993, Xanana Gusmao was sentenced by the Dili District Court to imprisonment for life. He was found guilty of attempted coup d'état (art. 106 of the Indonesian Penal Code (IPC)), of armed rebellion (art. 108 IPC) and conspiracy to commit a crime within the meaning of articles 104, 107 and 108 of IPC.

6. According to the source, Xanana Gusmao was held in secret military custody for 17 days before representatives of the International Committee of the Red Cross (ICRC) were permitted to see him. During Mr. Gusmao's interrogation, no lawyer was allegedly allowed access to him, in violation of article 54 of the Indonesian Code of Criminal Procedure. It is further alleged that though the Indonesian Legal Aid Foundation (LBH) obtained, on 22 December 1992, a power of attorney from Mr. Gusmao's family, the authorities prohibited LBH from having access to him. Subsequently, Xanana Gusmao declared that his lawyer, Mr. Sudjono, had been appointed by the Strategic Military Intelligence Agency (BAIS), whereas he wished to be represented by LBH, and that the letter mandating the latter had been intercepted by the military authorities and that he was forced to withdraw it and to sign a letter appointing Mr. Sudjono as his lawyer.

7. In the concluding stage of the trial, the court interrupted Mr. Gusmao soon after he started reading out his defence statement in Portuguese, despite the presence of interpreters in the court, thus preventing him from speaking in his own defence. It is further alleged that several witnesses for the prosecution were persons under detention, either awaiting trial or convicted for their role in the November 1991 demonstrations in Dili, which led to suspicions that they may have been testifying under pressure, in fear of reprisal against their relatives or themselves, making their testimonies less reliable. Those awaiting trial were said to be in a particularly delicate position, since their statements at Mr. Gusmao's trial could be used against them at their own trials.

8. The Government, in its response of 26 January 1994, argued that the allegations submitted to the Working Group had no foundation. According to the Government, while awaiting trial Xanana Gusmao was treated with consideration in a manner consistent with international standards. The Government's position is that when two legal aid organizations offered their services to Mr. Gusmao he turned them down, accepting instead the services of Mr. Sudjono of the Indonesian Advocates Association. Mr. Sudjono, who acted as Mr. Gusmao's lawyer, was apparently assisted by two other lawyers and a legal adviser who is a specialist in criminal law. It is also stated that during the trial Mr. Sudjono had been given full access to Mr. Gusmao.

9. The Government maintains that at the trial Mr. Gusmao was allowed to read his own defence before the court. The interruption in the reading of the statement was because the court viewed it as irrelevant to the legal argument. The Government's position is that what may be stated before the court as part of the defence of the accused is what is termed a "legal defence" and not any statement which may be called a defence statement. Such a statement must satisfy all the elements of a defence statement before being allowed to be read as such. The court, however, is said to have considered Mr. Gusmao's defence statement before giving its verdict. The allegation that several witnesses for the prosecution had testified under pressure was also denied by the Government. During cross-examination of these witnesses Mr. Gusmao is alleged to have admitted responsibility for various crimes, including murder and robbery committed by him and his men, as well as for illegal possession of arms.

10. The Government concludes that Xanana Gusmao's trial was carried out in full conformity under the Indonesian applicable laws, that it was fair and in accordance with the existing criminal procedure. There is, according to the Government, no legal basis for

questioning the verdict of the Indonesian tribunal. Though Mr. Gusmao had a right of appeal to a higher court, he chose not to avail himself of this right and instead appealed to the President for clemency, which the Government reports was granted by reducing his prison sentence from life imprisonment to 20 years, in accordance with article 14 of the Indonesian Constitution of 1945 and Law No. 3/1950.

11. The source, whose comments were sought on the Government's response, reiterated its position. It reaffirms that Xanana Gusmao was not permitted to be represented by a lawyer of his choice, the Indonesian Legal Aid Foundation. The LBH lawyers were apparently not permitted to visit him, despite having been given a power of attorney by his relatives. In a letter he wrote to LBH on 30 November 1993 he declared: "I was prohibited from accepting your offer of assistance". His alleged acceptance of LBH's offer is said to have been retained by the authorities. Mr. Sudjono is said to have been appointed six days before the trial. Inadequate translation services apparently handicapped Mr. Gusmao's defence. Not being fully conversant with either the Indonesian language or English, he could only understand in a general way the defence mounted by Mr. Sudjono. Even the clemency was apparently not sought by Mr. Gusmao, but by Mr. Sudjono without his instructions. The conduct of Mr. Sudjono as defence lawyer has also been questioned by Mr. Gusmao on the grounds that he colluded with the prosecution.

12. Having discussed the case at its tenth session, the Working Group adopted an interim decision on 30 September 1994 (No. 34/1994; see E/CN.4/1995/31/Add.2), stating that it considered itself to be insufficiently informed and deciding to postpone its decision to a later date so as to enable it to conduct an inquiry to ascertain the veracity of the allegations submitted to it and determine whether the Government's rebuttal was well-founded.

13. Aware that the Commission on Human Rights, by its resolution 1993/97, had urged, inter alia, the Government of Indonesia to invite certain special rapporteurs and the Working Group on Arbitrary Detention to visit East Timor and to facilitate the discharge of their mandates, in a letter dated 8 June 1995 the Working Group requested the Government of Indonesia to authorize one of its members to visit Indonesia and East Timor in order to clarify the case, in particular by visiting Xanana Gusmao.

14. It was ultimately possible to conduct the visit only because of the changes which had taken place since the election of President J.B. Habibie. A mission to Indonesia by a delegation from the Group took place from 31 January to 12 February 1999.

15. At his meeting with the delegation, Xanana Gusmao provided precise and detailed information essentially confirming the allegations submitted to the Group in 1993, especially regarding a point considered by the Group to be essential to the rights of the defence in a fair trial, specifically the role of the lawyer ultimately appointed to defend Xanana Gusmao.

16. He noted that when he had addressed the court in his own defence at the beginning of the trial, he had stated that the counsel who was to assist him had been appointed by the Military Intelligence Agency, whereas his own decision had been to be represented by the Indonesian Legal Aid Foundation, and, especially, that his letter giving the Foundation power of attorney

had been intercepted by the military authorities, who had forced him to withdraw it and to sign a letter appointing Mr. Sudjono instead, in violation of articles 54 to 60 of the Code of Criminal Procedure.

17. When Xanana Gusmao's lawyers met with the delegation, they also confirmed that no other lawyer had been authorized to assist him during questioning. Despite the fact that his family had designated the Foundation for that purpose, the authorities had consistently refused to comply with the request.

18. In the light of the information available and the verifications it has conducted, the Group notes that:

(a) Xanana Gusmao was held in solitary confinement for a period of 17 days after his arrest, which the Government's reply does not deny;

(b) Reasonable doubt exists concerning the reliability of the witnesses for the prosecution, as the Group ascertained through its meeting with Saturnino da Costa Belo, who had been detained for the purpose of testifying against Mr. Gusmao;

(c) Mr. Gusmao's freedom to choose his lawyer, which is one of the essential guarantees of the right to a fair trial, was violated under conditions so serious as to cast doubt on the fairness of the entire trial, infringing articles 1, 13 and 15 of the Basic Principles on the Role of Lawyers.

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

The deprivation of liberty of Xanana Gusmao is arbitrary, since it is contrary to articles 10 and 11 of the Universal Declaration of Human Rights and falls within category III of the categories applicable in the consideration of the cases submitted to the Working Group.

20. Having given this opinion, the Working Group requests the Government to take the necessary steps to remedy the situation, in accordance with the standards and principles set forth in the Universal Declaration of Human Rights.

Adopted on 21 May 1999