

## **OPINION No. 16/2008 (TURKEY)**

**Communication addressed to the Government on 20 July 2007.**

**Concerning: Mr. Halil Savda.**

**The State is 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 Commission resolution 1997/50, and confirmed by resolutions 2000/36, 2003/31, General Assembly resolution 60/251 and Human Rights Council decision 2006/102, as well as resolution 6/4. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - I. 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);
  - II. 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);
  - III. 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).
3. In the light of the allegations made, the Working Group welcomes the cooperation of the Government for having provided detailed information on the case concerned. The Working Group transmitted the reply provided by the Government to the source and received its comments.
4. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case, in the light of the allegations made and the response of the Government thereto, as well as by the observations of the source.
5. The case summarised below was reported to the Working Group as follows: Mr. Halil Savda, a Turkish citizen, addressed in Kocapinar Koyu, Sirnak/Cizre, was born in that city on 12 October 1974. He graduated from primary school. In 1993, he was arrested for a first time and held for a month in Sirnak/Cizre. During that month, he was repeatedly tortured. The State Security Court charged him with “supporting an illegal organisation” and sent him to prison. He was released in 1996.

6. Upon release from prison, he was called up for military service. He first went to his military unit for basic training, but he did not report to his unit at the end of the training. In 1997, he was again arrested and charged again with “membership in an illegal organisation”. He was then sentenced to 15 years of imprisonment by the Adana State Security Court.
7. On 18 November 2004, following a change in the Penal Code, Mr. Savda was released and sent handcuffed from prison to Antep Gendarmerie Station. He was considered to be a deserter from military service and was held incommunicado in a cell without a bed for six days. On 25 November 2004, he was transferred to a military unit in Çorlu-Tekirdag. Thereafter, he declared that because the torture he had to endure in 1993, he could not serve as a soldier. In a letter to the Commander of the Unit, he declared himself a conscientious objector.
8. On 16 December 2004, Mr. Savda was again arrested and questioned by the Çorlu Military Court. He was then formally charged with “insistence on disobedience to orders with intention of avoiding military duty” and transferred from the military unit to Çorlu Military prison. The Çorlu Military Court sentenced him to three months and 15 days of imprisonment in accordance with article 87 of the Military Penal Code (Case No. 2004/1601). Mr. Savda was released on 28 December 2004, while his trial on the charge of desertion was still pending. Later, on 13 August 2006, the Third Military Appeals Court annulled the local Court’s verdict based on procedural deficiencies and ruled in favour of a re-trial. The case was then referred back to the Çorlu Military Court.
9. Mr. Savda was again arrested on 7 December 2006 when he had voluntarily gone to attend his trial. The justification for his arrest was the suspicion that he would escape. According to the source, this can technically be seen as a re-arrest in the same case of 16 December 2004. On 25 January 2007, he was released to be tried without custody. However, instead of being released, Mr. Savda was sent to the Tekirdag Besiktepe 8th Mechanized Brigade. There, despite of the fact that he was being tried because he had declared himself to be a conscientious objector, he was again asked to wear a military uniform. After he had reiterated that he was a conscientious objector another case was opened. On 5 February 2007, he was charged of “insistent insubordination” by the Military Prosecutor and sent before the Çorlu Military Court. The Military Court decided that Mr. Savda would be tried without custody and he was sent back to the military unit again.
10. It was alleged that on 26 January 2007, Mr. Savda was subjected to ill-treatment at the disciplinary ward of the Tekirdag Besiktepe 8th Mechanized Brigade, which resulted in his face being swollen and his lips cracked and bleeding. The disciplinary officer, who was a sergeant major, together with two guardians and an officer, pushed Mr. Savda to the wall face-on, kicked his legs apart and began hitting him. While yelling “you are a traitor, you are a terrorist”, they tried to silence Mr. Savda by shoving a dirty gap in his mouth. Later, Mr. Savda was kept naked during three days in a room without chairs or a bed. He was forced to sleep on the cement and was not even given a blanket.
11. On 15 March 2007, Mr. Savda was sentenced by the Çorlu Military Court to 12 months of imprisonment for desertion and three and a half months for insubordination. These sentences were based on his charges of disobedience and desertion in 2004.

12. On 12 April 2007, the Çorlu Military Court sentenced Mr. Savda to a further six months' imprisonment on the same charge of insubordination, based on his disobedience as of 25 January 2007, bringing his total prison term up to 21 and a half months. The Military Court did not go into the reasoning for the sentence. The source concludes that even after his eventual release from prison, Mr. Savda will not be free: He will be send back to his military unit.
13. In its response, the Government notes at the outset that article 72 of the Constitution of Turkey provides that "patriotic service is a right and a duty for every Turkish citizen. The conditions in which that service shall be performed or deemed to have been performed in the armed forces or public service shall be prescribed by law". Section 1 of the Military Service Act reads: "... every man of Turkish nationality shall be obliged to perform military service." The Military Penal Code stipulates that once conscripts have been placed on the muster rolls for military service, they are required to report to the designated military unit. Failing to do so is considered as unlawful absence and entails criminal liability under article 63 of the Military Penal Code.
14. Any further acts of disobedience fall under article 87 of the Military Penal Code and constitute the crime of "persistent disobedience/insubordination". Disobedience carries a penalty of one month to one year of imprisonment. Those who explicitly disobey an order or those who do not carry it out even though it has been repeated are liable to imprisonment between three months and two years. Acts of persistent disobedience carried out with the intention of evading military service fall under article 88 of the Military Penal Code, which reads in part: "Whoever commits the insubordination offences laid down in article 87, ... with the intention of evading military service partially or fully, shall be punished with six months to five years imprisonment." Finally, the offence of desertion is punished by article 66 of the Military Penal Code. According to its paragraph 1 (a), whoever deserts his unit, regiment or duty post for more than six days without permission is sentenced to one to three years' imprisonment.
15. The Government confirms that it is not possible to be exempted from military service on grounds of conscientious objection under Turkish legislation in force and that there is no alternative civil service scheme provided for by law. The Government asserts that conscientious objection has not been recognised as a right under international law, neither by the European Convention on Human Rights and Fundamental Freedoms nor by the International Convention on Civil and Political Rights, and makes extensive reference to the jurisprudence of the European Court of Human Rights.
16. Turning to the case of Mr. Halil Savda, the Government informs that a case was initiated against him following indictment No. 2004/1488/897, issued by the Office of the Military Prosecutor of the 5th Army Corps Command Headquarters on 17 December 2004, on the charge of persistent disobedience for his successive refusal to enforce the orders of his superior officers on 6 and 7 December 2004. He was arrested on 16 December 2004 by the Military Court of the 5th Army Corps Command Headquarters in Çorlu and later released on 28 December 2004. After his trial, Mr. Halil Savda was sentenced to three months and 15 days of imprisonment for persistent disobedience under article 87 of the Military Penal Code by decision of the Court No. 2005/640-1 E.K., dated 4 January 2007.

17. Upon his appeal, the Military Court of Cassation, in its judgment of 13 June 2006, reversed the decision of the Military Court on procedural grounds since a psychiatric examination had not been conducted, and referred the case back to the Military Court of first instance.
18. After his release on 28 December 2004, Mr. Halil Savda was instructed to join his military unit no later than 31 December 2004, failing which an arrest warrant was issued against him. He attended the hearing before the Military Court on 7 December 2006, where the Court decided to arrest him pursuant to article 71 of the Law on the Establishment and Trial Procedure of Military Courts No. 353 for the purposes of military discipline and to prevent his escape, pursuant to article 100, paragraph 2 (a) of the Criminal Procedure Code No. 5271. The Court further decided that the necessary documents for the psychiatric examination be submitted to the Court and that a psychiatrist be present at the next hearing. The warrants that had previously been issued for his apprehension were withdrawn.
19. The Government further informs that Mr. Halil Savda was charged for the crime of desertion by the Office of the Military Prosecutor of the 5th Army Corps Command Headquarters pursuant to indictment No. 2006/1974-1359 E.K., dated 11 December 2006, for his absence between 30 December 2004 and 7 December 2006. This case was merged with the other case initiated on the charges of persistent disobedience. Mr. Halil Savda was therefore tried under two separate charges registered in a joint case file.
20. During the period of 7 December 2006 and 25 January 2007 Mr. Halil Savda remained in detention. The status of his detention was examined by the Court in hearings held every 30 days as prescribed by law. On 18 January 2007, the proceedings concerning the judicial observation were completed and Mr. Halil Savda was released at the next hearing, held on 25 January 2007, as the judge concluded that the grounds for his arrest and detention no longer existed. His trial was conducted without holding Mr. Halil Savda in custody.
21. On 15 March 2007, the Military Court of the 5th Army Corps Command Headquarters rendered a motivated judgement in the joint case No. 2007/331-254, according to which Mr. Halil Savda was sentenced to imprisonment on accounts of persistent disobedience with the intention of fully evading military service in December 2004, according to article 88 of the Military Penal Code, and of desertion from 30 December 2004 until 7 December 2006, according to article 66, paragraph 1 (a) of the said Code. The Court sentenced him to three months and 15 days of imprisonment for persistent disobedience with the intention of fully evading military service and for one year of imprisonment for desertion, and ruled that the imprisonment could not be converted into alternative penalties. The time spent in detention between 16 and 28 December 2004 and 7 December 2006 and 25 January 2007 and a further seven day disciplinary penalty imposed upon Mr. Halil Savda, were reduced from the overall sentence. The judgment was upheld by the Military Court of Cassation.
22. Mr. Halil Savda was transferred to his military unit upon his release on 25 January 2007, where he refused to wear a uniform, to shave and to join military assemblies. Therefore, a further investigation was initiated and, on 15 February 2007, he was brought before the Military Court of the 5th Army Corps Command Headquarters and arrested pursuant to article 71/1 of the Law on the Establishment and Trial Procedure

of Military Courts No. 353 for the purpose of military discipline. Subsequently, a case was initiated against Mr. Halil Savda by the Office of the Military Prosecutor of the 5th Army Corps Command Headquarters by indictment No. 2007/250-203 E.K., dated 13 February 2007, on the charge of persistent disobedience with the intention of fully evading military service for his conduct between 25 January and 5 February 2007.

23. Mr. Halil Savda was tried again and the Military Court rendered a motivated judgement on 12 April 2007 (No. 2007/742-396) according to which he was sentenced to six months of imprisonment under article 88 of the Military Penal Code. The Court decided that the prison term could not be converted into alternative penalties. The period he had spent in custody between 26 January 2007 and 2 February 2007 as well as the period of detention beginning 5 February 2007, were deducted from the overall sentence. The Military Court of Cassation upheld the judgment on 19 June 2007 in its decision No. 2007/1531-1523, which became final on 26 June 2007.
24. Mr. Halil Savda was released on 28 July 2007 pursuant to a decision of the Military Court dated 23 July 2007 and was transferred to his military unit in order to complete his remaining service. However, Mr. Halil Savda has not yet joined his unit and the Government informed that he is still being considered a deserter.
25. The Government upholds that, contrary to the allegations reported by the source, the detention proceedings against Mr. Halil Savda have been carried out in accordance with the existing legislation, and that he had not been convicted or detained twice for the same offence in particular.
26. As regards the allegations of ill-treatment of Mr. Halil Savda made by the source, the Government informed that he complained to the Military Court during a hearing held on 5 February 2007 considering the application for an arrest warrant by the military prosecution, that he had been subjected to ill-treatment during the period of detention of seven days imposed upon him as a disciplinary measure. Subsequently, an investigation was initiated by the Military Prosecution Office of Çorlu in connection with his complaint. In the course of this investigation, the statement of the complainant was taken by the Military Prosecutor along with 12 other witnesses' statements. An *in-situ* examination was conducted in the disciplinary ward where Mr. Halil Savda was held. According to the Government, it was established that he had been allowed to contact his lawyer in prison and that he had rejected any food and medical assistance offered to him. The medical examination carried out before his transfer to military prison on 5 February 2007, did not indicate any pathological findings to suggest that he had sustained physical injuries, contrary to his allegations. On the basis of the evidence obtained during the investigation the Military Prosecution Office concluded that there was no ground to proceed with the prosecution concerning the allegations of ill-treatment.
27. In its observations to the response of the Government, the source points out that the Government does not challenge the allegation that Mr. Halil Savda has been tried and sentenced three times on charges based on his conscientious objection and that he is indeed a conscientious objector.
28. On 21 April 2008, the source provided an update on the case of Mr. Savda, according to which he was re-arrested on 27 March 2008 by police forces on the basis of an arrest warrant that was issued against him on charges of desertion. The arrest warrant

was issued after he had failed to report to his military unit within 48 hours following his release on 28 July 2007. He is currently being detained at Çorlu Military Prison.

29. The source finally confirms that his appeal against the sentence of 15 and a half months of imprisonment by the Çorlu Military Court dated 15 March 2007 on charges of insubordination and desertion occurring in 2004, has been rejected.
30. In the light of the foregoing, the Working Group observes at the outset that the facts of this case, with the exception of the allegations of ill-treatment allegedly sustained by Mr. Halil Savda on 26 January 2007 at the Tekirdag Besiktepe 8th Mechanized Brigade, have been confirmed by the Government (as far as it has commented on the allegations of the source, namely concerning the period starting with Mr. Savda's arrest on 16 December 2004 and ending with his release on 28 July 2007, and leaving aside the slight discrepancy regarding the date of the judgment of the Military Court of Cassation, which was indicated by the source as being 13 August 2006 rather than 13 June 2006 as stated by the Government).
31. It is therefore established that Mr. Savda has already been sentenced twice in two separate judgments, one of which concerning a joint file, on accounts of persistent disobedience in terms of article 88 of the Military Penal Code and of desertion pursuant to article 66, paragraph 1 (a) of this Code. He was sentenced to total of 21 and a half months of imprisonment, whereby the time he had spent in pre-trial detention before the judgments became final and binding after his appeals, as well as one week of disciplinary detention were credited to the respective overall sentence. He has served a prison term and his disciplinary penalty of about seven months in total during three different periods until he was released on 28 July 2007.
32. In the absence of any reason to question the credibility of the information received by the source and in the light of the confirmation of the Government in its reply that Mr. Savda has still been considered a deserter after his release from prison on 28 July 2007 for having failed to report to his military unit, it has also been established, in the view of the Working Group, that Mr. Savda was re-arrested on 27 March 2008 and is currently being held in detention at Çorlu Military Prison.
33. All criminal sentences relate to Mr. Savda's conviction as conscientious objector, meaning his refusal for reasons of his conscience, to serve in the armed forces, including in units which would not be directly engaged in combat such as, assumingly, the Tekirdag Besiktepe 8th Mechanized Brigade, where he was sent on 25 January 2007.
34. In its response to the source's assertions, the Government did not challenge the fact that Mr. Savda is indeed a genuine conscientious objector. The Government further confirms that military service is compulsory for every Turkish citizen; that there is no possibility for exemption from military service on grounds of conscientious objection; that there is no alternative scheme for community service in place and that acts of conscientious objection are tantamount to criminal prosecution as acts of insubordination, disobedience or desertion and that, accordingly, every single of such acts entails criminal liability.
35. The Government, however, errs when it claims that a right to conscientious objection has not yet been recognised as a human right under international law. It has to be

recalled that the Human Rights Committee, in its view of 23 January 2007<sup>1</sup>, unequivocally stated the following:

“The Committee recalls its previous jurisprudence on the assessment of a claim of conscientious objection to military service as a protected form of manifestation of religious belief under article 18, paragraph 1 [of the International Covenant on Civil and Political Rights]. It observes that **while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with article 18, paragraph 3, against being forced to act against genuinely-held religious belief.** The Committee also recalls its general view expressed in General Comment 22 that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of article 18. The Committee notes, in the instant case, that the authors' refusal to be drafted for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief.”  
(**emphasis added**).

36. The Working Group concurs with this view of the Human Rights Committee that genuinely held beliefs of conscientious objection fall within the ambit of article 18, paragraph 1 of the ICCPR as manifestations of one's religion, The Working Group, in addition, qualifies them as manifestations of conscience as protected by the same article. In as far as the Working Group's Opinion No. 24/2003<sup>2</sup> could be interpreted as holding that the evolution towards recognition of a right of an individual to refuse, on grounds of religious beliefs or conscience, to serve in the military, has not reached a stage where the rejection by a State of the right to conscientious objection is incompatible with international law, the Working Group clarifies that this statement was related to the necessary balancing act, which an assessment of the limitation clause of article 18, paragraph 3 ICCPR, involves. The outcome of the application of this test might be that in some States in general, or in individual cases in particular, restrictions on the exercise of the right to freedom of religion or belief in the context of conscientious objection might be justified, in other situations it might not.

37. As pointed out by the Human Rights Committee in its view referred to above, restrictions on the right to freedom of religion or belief must be prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, within the meaning of article 18, paragraph 3 of the ICCPR:

“Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question.”

38. The Government of Turkey has not put forward any arguments justifying the absence of any legislation accommodating conscientious objectors, possibly allowing for alternative services as a substitute for military service, as is the case in many other States, and for the necessity of criminal prosecution of conscientious objectors, which might potentially provide justification for a limitation on the right to freedom of

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<sup>1</sup> *Mr. Yeo-Bum and Mr. Myung Chin Choi v Republic of Korea* (CCPR/C/88/D/1321-1322/2004), para. 8.3., (footnotes omitted).

<sup>2</sup> Opinion No. 24/2003 (Israel), adopted 28 November 2003, E/CN.4/2005/6/Add.1, p. 18, 21, para. 27. See also Opinion 36/1999 (Turkey), adopted on 2 December 1999, E/Cn.4/2001/14/add.1, p. 53.

religion or belief in terms of article 18, paragraph 3 of the ICCPR for the purpose of protecting public safety, order, health, or morals or the fundamental rights and freedoms of others. In the view of the Working Group, it has been established that the limitations on Mr. Savda's right to freedom of religion or belief as a genuine conscientious objector is not justified in the present case, and is, thus, in violation of article 18 of the Universal Declaration of Human Rights and of article 18, paragraph 1 of the ICCPR. Accordingly, the criminal prosecution, sentencing and deprivation of liberty of Mr. Savda for holding and manifesting his belief and conscience is arbitrary in terms of category II of the Working Group's categories.

39. The Working Group, on previous occasions<sup>3</sup>, has already declared arbitrary the detention of conscientious objectors following a second conviction on the grounds that this would be tantamount to compelling a person to change his or her convictions and beliefs for fear of not being subjected to criminal prosecution for the rest of one's life, being incompatible with the principle of double jeopardy or *ne bis in idem*, thus violating article 14, paragraph 7 of the ICCPR, and falling into category III. Consequently, under the circumstances of this case, also Mr. Savda's second conviction to a prison term of six months by the Military Court on 12 April 2007 for insubordination since 25 November 2007, as upheld by the Military Court of Cassation, violates his right to fair trial. However, it does not transpire, from the information before the Working Group, whether Mr. Savda has already served this sentence, or parts thereof; if he had to it would be tantamount to arbitrary deprivation of liberty.
40. Turning to the allegations of ill-treatment Mr. Savda has reportedly suffered from on and after 26 January 2007, when he was serving his disciplinary penalty, the Working Group observes that they are described by the source in much detail with respect to the date, the duration and the modes of ill-treatment allegedly applied to Mr. Savda, the persons reportedly involved, and the injuries sustained. On the other hand, the Government has provided equally detailed information on the measures taken following the allegations put forward by Mr. Savda during the court hearing on 5 February 2007, namely the investigation opened by the Military Prosecution Office; the number of witnesses heard; the *in situ* examination conducted and the medical examination carried out, which led to the conclusion that there were no sufficient reasons to proceed with any prosecution.
41. The Working Group has repeatedly held that investigation of allegations of ill-treatment inflicted upon detainees in violation of the prohibition of torture and the right to physical integrity generally falls within the scope of its mandate only in so far as it is used in order to obtain a confession of guilt of the pre-trial detainee or otherwise impairs his or her exercise of the right to a proper defence. Albeit serious and not to be taken lightly, the Working Group concludes that it is not necessary to further examine the allegations of ill-treatment as they do not seem to relate to any of the situations just described and have not been argued by the source accordingly.
42. Having found a violation of the right not to be arbitrarily deprived of liberty, it is not necessary to examine whether Mr. Savda could have been tried before a civilian rather than a military court.

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<sup>3</sup> Op. cit., note 2. See also General Comment No. 32 of the Human Rights Committee, 23 August 2007, CCPR/C/GC/32, para. 55, endorsing the Working Group's Opinions, and the view of the Committee in the case of *Mr. Yeo-Bum and Mr. Myung Chin Choi v Republic of Korea*, op. cit., note 1.



43. In accordance with paragraph 17 (a) of its methods of work<sup>4</sup>, the Working Group considers that the case in question warrants the rendering of an Opinion also regarding the periods Mr. Savda spent in detention between 16 and 28 December 2004, between 7 December 2006 and 2 February 2007, as well as between 5 February 2007 and 28 July 2007. The reasons for this position are the Group's wish to develop its jurisprudence on a matter of principle and particular importance. It is very likely that Mr. Savda will be arrested, detained and imprisoned time and again and may spend years after years in prison for failing to serve in the Army at least until he has reached the age limit, if any, after which Turkish citizens are not more obliged to perform their military service. Such scenario is real, taking into account the provisions of the Military Penal Code as it is in force at present, unless the country changes its laws, including possibly its Constitution, in order to provide for an alternative to military service for conscientious objectors or implements any other measure to bring the situation into conformity with the international human rights instruments accepted by the Republic of Turkey, or seizes to make it a crime or a disciplinary offence to refuse performing such service. Moreover importance is attached to the matter beyond Mr. Savda's individual fate.

44. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Halil Savda during the periods between 16 and 28 December 2004, between 7 December 2006 and 2 February 2007, as well as between 5 February and 28 July 2007 was arbitrary. His deprivation of liberty since 27 March 2008 is also arbitrary, being in contravention of articles 9 and 18 of the Universal Declaration of Human Rights and of articles 9 and 18 of the International Covenant on Civil and Political Rights from which the Republic of Turkey is a State Party, falling under category II of the categories applicable to the consideration of cases submitted to the Working Group. In addition, it also falls under category III of the categories applied by the Working Group, as far as Mr. Savda would have to serve his prison term following his conviction by judgement No. 2007/742-396.

45. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Halil Savda and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 9 May 2008.

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<sup>4</sup> Paragraph 17 (a) of the methods of work reads as follows: "If the person has been released, for whatever reason, following the reference of the case to the Working Group, the case is filed; the Group, however, reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the persons."