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DATE: 22 June 2020

A/TO: Ms. Dayani Mendis  
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REF: AL LKA 4/2020

PAGES: 12 (Y COMPRIS CETTE PAGE/INCLUDING THIS PAGE)

OBJET/SUBJECT: **JOINT COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a joint communication sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

I would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Dinesh Gunawardena, Minister for Foreign Affairs.



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**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on minority issues; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**

REFERENCE:  
AL LKA 4/2020

22 June 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on minority issues; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on freedom of religion or belief; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 34/18, 34/5, 34/6, 34/35, 40/10 and 40/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the seemingly arbitrary and unlawful arrest of Mr. Hejaaz Omer Hizbullah**.

Mr. Hizbullah is a prominent lawyer and a human rights defender, and member of the Muslim minority in Sri Lanka. Mr. Hizbullah has been involved in various high-profile cases,<sup>1</sup> including a widely-publicised case related to the dissolution of the Sri Lankan Parliament in 2018.

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<sup>1</sup> Some of the high-profile cases Mr. Hizbullah has appeared in include the following: SCFR 263/2019 - Fundamental Rights application in respect of the arrest and detention of a Muslim doctor falsely accused of sterilising women; SCFR 203/2016 – Fundamental Rights application in respect of the Aluthgama anti-Muslim violence in 2014; and SCFR 97/ 2014 – Fundamental Rights application in respect of a Muslim student who faced discrimination at her school.

.../2

His Excellency  
Mr. Dinesh Gunawardena  
Minister for Foreign Affairs

Mr. Hizbullah has also appeared in a number of cases relating to violence and discrimination towards the Muslim minority in Sri Lanka. He notably participated in several cases in relation to the Venerable Galagodaaththe Gnanasara Thero of the *Bodu Bala Sena*, a Sinhalese-Buddhist nationalist organisation.<sup>2</sup>

Since late March 2020, Mr. Hizbullah, along with senior doctors and a former Supreme Court Judge, has been working on a report regarding the mandatory requirement that all deceased persons suspected of being infected with the COVID-19 virus be cremated, and how this requirement had impacted the Muslim minority in Sri Lanka.<sup>3</sup>

According to the information received:

On 14 April 2020, Mr. Hejaaz Omer Hizbullah was arrested when he was at his home in Hokandara by the Criminal Investigation Department (CID) and detained without charge. He was among six individuals arrested for their alleged involvement in the 2019 Easter Sunday terrorist attack in the country.

Prior to the arrest, Mr. Hizbullah had received a phone call from an individual who had identified himself as an official of the Ministry of Health. Mr. Hizbullah was told by the caller to stay at home, with his family, and that they should expect a visit from Health Ministry officials, under the pretext that he had been exposed to the COVID-19 virus.

About an hour later, five individuals arrived at the residence. They identified themselves as officers of the CID, and handcuffed Mr. Hizbullah and searched the premises. Some of his case files were confiscated, violating attorney-client privilege.

After the search of his home and some questioning, Mr. Hizbullah was escorted to a CID police station where he was put under arrest without being informed of the charges or legal grounds of his arrest.

On 15 April 2020, during an evening press conference, a police spokesperson stated that Mr. Hizbullah had been arrested and detained due to his “involvement in the Easter Sunday terror attacks,” and that he had had “various contacts” with the bombers through several organisations. The spokesperson also admitted that the CID had acted without seeking advice or clearance from the Attorney General.

The detention order against Mr. Hizbullah is reportedly based on the Prevention of Terrorism Act (PTA), specifically its Section 9(1), and Article 4(b) of the Sri

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<sup>2</sup> Mr Hizbullah had specifically participated in SCFR 226/2019- Fundamental Rights application in respect of alleged hate speech by the Ven. Galagodaaththe Gnanasara Thero and DMR 1041/14 – District Court action for defamation against the Ven. Galagodaaththe Gnanasara Thero.

<sup>3</sup> Report on the RPSL Memorandum on the disposal of bodies of COVID-19 victims.

Lankan Constitution. Although the order was dated 17 April 2020, it was handed over to Mr. Hizbullah only on 25 April 2020, 11 days after his arrest.

The detention order is reportedly vague, and states that Mr. Hizbullah had “aided and abetted (...) the suicide bomber” of the Easter Sunday terrorist attacks and engaged in “activities detrimental to religious harmony among communities”, as well as having “knowingly concealed this information from the Sri Lankan police”. The detention order did not provide any concrete evidence to support these allegations.

Since his arrest, Mr. Hizbullah has been denied adequate opportunities, time and facilities to be visited by and to communicate and consult with his lawyers, without delay, without interception or censorship and in full confidentiality. He was permitted to meet legal representatives only on two brief occasions: the first one, on 15 April 2020, lasted only five minutes and the second one, on 16 April, lasted fifteen minutes. These meetings were conducted in the presence of police officers who demanded the conversations be in the Sinhala language so that the CID officials could understand what was being said, in breach of attorney-client privilege. During his second meeting with his lawyer, it is alleged that Mr. Hizbullah was specifically prohibited from disclosing certain information to him. The officer in charge interrupted the conversation and warned Mr. Hizbullah that he could not provide certain information to his lawyer, indicating that it “formed a part of the investigations.”

Mr. Hizbullah is being held in a building operated by the CID. He is reportedly held in solitary confinement and is only brought out of his cell for daily interrogations. He also has very limited interaction with his family. His wife had only been permitted to visit him twice in the six weeks following his arrest and he has only been allowed to make occasional and brief family phone calls, which are allegedly monitored by CID officials. All other requests by other family members to visit him have been denied by the CID. Due to his limited interaction with others, no information about his conditions of detention has been made available to us. Nevertheless, according a petition filed in the Supreme Court on his behalf, during a telephone conversation with his wife on 1 May 2020, Mr. Hizbullah sounded anxious and concerned about his safety.

On 2 May 2020, the CID claimed in a letter, that Mr. Hizbullah had been arrested for alleged phone calls made between him and one of the alleged attackers in the suicide bombings of Easter Sunday. However, it surfaced that Mr. Hizbullah was the legal counsel for a relative of the alleged attacker in two long-standing property cases and that this person had merely been the contact point for Mr. Hizbullah’s client. Moreover, Mr. Hizbullah had reportedly not been in touch with this individual in the period preceding the Easter Sunday attacks.

Later, the CID allegedly changed the focus of its investigation from Mr. Hizbullah’s involvement in the Easter Sunday terrorist attack to his

engagement with the ‘Save the Pearls’ charity, claiming that he had participated in the indoctrination of children through this organisation. Four minors who had been supported by the charity said that they had been intimidated, after Mr. Hizbullah’s arrest, into making false statements regarding the activities of the charity. The four children were reportedly taken without their parents to an unidentified location where they were held overnight and compelled to sign various papers after having been intimidated by several police officers. Three cases have been filed in respect of this matter as of 19 May 2020.

On 21 May 2020, three of Mr. Hizbullah’s counsel filed Fundamental Rights applications before the Supreme Court, alleging that the rights of Mr. Hizbullah had been violated as a result of his arrest and detention. The case is now scheduled for 23 June, at which point the Supreme Court will determine whether or not a prima facie case of a fundamental rights violation exists, and will consequently grant or refuse permission to proceed with the case. We do not know how long this process will take, and when any interim or final relief will be granted by the Supreme Court.

To date, Mr. Hizbullah, has still to be formally charged. Under section 9 of the PTA, Mr. Hizbullah could be detained for up to 18 months without charges, and thereafter remanded to jail indefinitely pending trial, unless the Attorney-General grants him bail. It is also important to note that since Mr. Hizbullah’s arrest, a number of media channels have disseminated unverified and misleading news stories that present Mr. Hizbullah as ‘guilty’ of engaging in terrorist activities while some channels have circulated “witness testimonials” by children who had been supported by the ‘Save the Pearls’ charity.

While we do not wish to prejudge the accuracy of these allegations, and while we fully understand the Government’s obligation to investigate the Easter Sunday attacks, we express our grave concern over the seemingly arbitrary arrest and prolonged detention of Mr. Hizbullah, which does not seem consistent with either Sri Lanka Constitution or its international human rights obligations under international law. In addition, we raise concerns about what may be a reprisal for his legal work and human rights advocacy, as his recent arrest, detention and terrorism-related charges may have been used as a means to prevent him from further engaging with ongoing fundamental rights cases in relation to rising hate speech, violence and discrimination against the Muslim minority in Sri Lanka.

The potential criminalisation of the legitimate work of a human rights defender and lawyer, as well as his right to hold and express opinions and carry out his work independently and without fear of intimidation, harassment or reprisals, is particularly troubling. Moreover, we are deeply concerned about the unfounded and vague terrorism charges which were brought against him, alleging that he had upset religious harmony and “aided and abetted” a terrorist bomber, despite the apparent lack of evidence proving that he had actually been connected with any unlawful activity. We are deeply troubled by the fact that Mr. Hizbullah may have been targeted due to his religious and ethnic identity as a member of the Muslim minority in Sri Lanka.

We also express our serious concern over the reported conduct of the CID and other relevant governmental agencies. Mr. Hizbullah was arrested, and some of his personal effects were confiscated, although no warrant or explanation of the reasons for his arrest were provided to him at the time, which seemingly contravened his rights to privacy and due process. When he was informed of the detention order against him, 11 days after his initial arrest and detention, the order did not comply with the PTA's requirement for a person detained under it to appear before a magistrate within 72 hours after his or her arrest. Furthermore, the detention order had been signed by the President, when the PTA makes clear that any detention order must be signed by the Minister of Defence, a position currently vacant, and the Sri Lankan Constitution seems to preclude the President from holding any ministerial portfolios.

We note our further concern that Mr. Hizbullah appears to be targeted for representing family members of a person charged with terrorism in unrelated legal matters. Such a practice would be inconsistent with the obligations of your Excellency's Government under international law, specifically with principles 16 and 18 of the UN Basic Principles on the Role of Lawyers.<sup>4</sup> We are also concerned that this arrest may be part of a larger trend of using counterterrorism or "emergency" laws to prosecute and thus limit the effectiveness of the work of human rights defenders.<sup>5</sup>

OHCHR and several United Nations Special Rapporteurs have repeatedly raised concerns about how the application of the Prevention of Terrorism Act has resulted in numerous arbitrary detentions and facilitated the torture of detainees and asked your Excellency's Government to consequently repeal the PTA and replace it with legislation that meets international standards for due process. The UN Special Rapporteurs have further expressed grave concerns that the PTA has been frequently applied in a discriminatory manner against individuals working on specific issues such as disappearances, land rights, access to resources and livelihoods. They have also described the definition of terrorism contained in section 2 of the Act as 'overly broad and vague'.<sup>6</sup> Moreover, section 9 of the PTA has been found to be particularly problematic given the duration of detention for preventative or investigatory purposes, all the more so, given the concerns concerning safeguards against ill-treatment in custody.<sup>7</sup> Such "lengthy administrative detention without any satisfactory judicial involvement is a clear violation of the prohibition of arbitrary deprivation of liberty and of the right to judicial review of the lawfulness of detention, both of which are non-derogable".<sup>8</sup>

Lastly, we regret that this case seems to illustrate a broader pattern of discrimination towards the Muslim minority in Sri Lanka. The Easter Sunday terrorist attacks have accentuated and, in some instances, legitimized the long-standing religious

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<sup>4</sup> Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, art. 16, 18 (Sept. 7, 1990).

<sup>5</sup> A/HRC/37/52.

<sup>6</sup> A/HRC/40/52/Add.3, para. 12.

<sup>7</sup> *Id.*, para 13.

<sup>8</sup> *Id.*, para 16.

and ethnic intolerance that have long affected certain segments of Sri Lankan society. We reiterate our deep concern about the seemingly discriminatory and punitive use of counter-terrorism legislation against a member of a religious minority and a human rights defender and recall that nobody should be convicted of participating in or facilitating a terrorist act unless it can be shown that that person knew or intended to be involved in terrorism as defined under national law, in compliance with international human rights norms and standards.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comments you may have on the above-mentioned allegations.
2. Please provide detailed information on the factual and legal grounds for the arrest and detention of Mr. Hizbullah.
3. Please provide information on the rationale for preventing Mr. Hizbullah from communicating and consulting with his lawyers without interception or censorship and in full confidentiality, and explain how the measures allegedly adopted are compatible with international standards relating to the right of detained person to have prompt access to a lawyer of their choice.
4. Please provide clarification about the exact nature of the charges that have been levied against Mr. Hizbullah. If he has been or will be charged for terrorist acts, please indicate how the charges against him are in line with a strict understanding of the definition of terrorism as elucidated by international law norms, including but not limited to United Nations Security Council Resolution 1566 (2004) and the model definition put forward by the Special Rapporteur on the promotion and protection of human rights while countering terrorism.
5. Please indicate what measures have been taken to ensure that human rights defenders in Sri Lanka, and in particular those advocating and working for the rights of persons belonging to religious minorities, are able to carry out their legitimate work in a safe and enabling environment without fear of threats or acts of intimidation, harassment and persecution of any sort.

6. Please provide information on the steps taken to tackle allegations of rising hate speech and discrimination against Muslims and other ethnic or religious minorities in Sri Lanka.
7. Please explain the rationale for your Excellency's Government's announcement, made in January 2020, to keep the PTA back in the statute book instead of repealing and replacing it with legislation that respects human rights and meets international standards for due process. Please explain how the Prevention of Terrorism Act is compatible with your Excellency's Government's international obligations under the various UN human rights treaties ratified by Sri Lanka.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of our highest consideration



David Kaye  
Special Rapporteur on the promotion and protection of the right to freedom of opinion  
and expression



Mary Lawlor  
Special Rapporteur on the situation of human rights defenders



Fernand de Varennes  
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Ahmed Shaheed  
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Fionnuala Ní Aoláin  
Special Rapporteur on the promotion and protection of human rights and fundamental  
freedoms while countering terrorism

**Annex**  
**Reference to international human rights law**

In connection with the above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In particular we would like to refer to the international standards relating to the freedoms of thought, conscience and religion or belief, opinion and expression, the rights of persons belonging to minorities and the principle to non-discrimination, the rights and responsibility of human rights defenders, as well as international standards relating to counter-terrorism

Article 19 of the Covenant protects the right to freedom of opinion and expression. The freedom of opinion is absolute and the freedom of expression is subject to limitations only in accordance with article 19 paragraph 3. Under articles 18 and 19, all restrictions must pursue a legitimate aim, in accordance with the law that is sufficiently clear, and conform to the requirements of legality, necessity and proportionality.

We would also like to respectfully recall that the ICCPR equally stresses that "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom [...] either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Furthermore, we wish to refer to the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in General Assembly resolution 47/135, which refers to the obligation of States to protect the existence and the identity of minorities within their territories and to adopt measures to that end (article 1) as well as to adopt the required measures to ensure that persons belonging to minorities can exercise their human rights without discrimination (article 4). Article 2 further establishes that persons belonging to minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely, without any interference or any form of discrimination and provides for the effective participation of minorities in cultural, religious, social, economic and public life, as well as in decision-making processes on matters affecting them.

We also wish to refer to your Excellency Government's obligations under the Convention on the Elimination of All forms of Racial Discrimination (ICERD), ratified by your Government Excellency's 1982. We recall that Article 2 (1) of ICERD obliges States Parties to prohibit and eliminate any act or practice of racial discrimination against persons and/or groups. Article 5 prohibits discrimination on the basis of race, colour, descent, nationality or ethnic origin and guarantees the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law. ICERD makes clear that Article 5 on equality without distinction guarantees extend to the enjoyment of all human rights, including (a) 11 the right to equal treatment before the

tribunals and all other organs administering justice (Art. 5(a)); rights to freedom of opinion and expression (Art. 5(viii)), and rights to freedom of peaceful assembly and association (Art. 5(ix)).

Similarly, we also would like to draw your Excellency's Government attention to the recommendations of the sixth session of the Forum on Minority Issues on "Guaranteeing the rights of religious minorities" (A/HRC/25/66) and in particular Recommendation 17, which calls on States to ensure that "there is no discriminatory treatment in regard to the legal and administrative recognition of all religious and belief groups. Any registration and administrative procedures, including those relating to the property and the functioning of places of worship and other religious-based institutions, should be conducted according to non-discrimination standards. International standards do not allow non-recognition of religious or belief groups to result in denial of their rights. Such standards require an inclusive approach to be taken".

United Nations (UN) human rights instruments recognize the right of access to counsel. Article 14(3)(b) of the International Covenant on Civil and Political Rights (ICCPR) protects the right of anyone facing a criminal charge "to communicate with counsel of his own choosing."<sup>9</sup> The UN Human Rights Committee (HRC) has interpreted this right to include prompt access to counsel, private and confidential attorney-client meetings and communications, and freedom of attorneys from "restrictions, influence, pressure or undue interference from any quarter."<sup>10</sup> ICCPR art. 14 is derogable in emergencies; however, the HRC has asserted that "The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights."<sup>11</sup>

The Basic Principles on the Role of Lawyers provide that all persons "are entitled to call upon the assistance of a lawyer of their choice", and that adequate protection of human rights and fundamental freedoms requires "that all persons have effective access to legal services provided by an independent legal profession". They recognise that the primary obligation to protect lawyers and enable them to exercise their functions freely lies with the State authorities. States are required to adopt all appropriate measures to ensure that lawyers are able to perform all of their professional functions "without intimidation, hindrance, harassment or improper interference". Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities (Principles 16 (a) and 17).

Furthermore, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "[a] detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel"<sup>12</sup> and provides for "[t]he right of a detained or imprisoned person to be visited by and to consult

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<sup>9</sup> International Covenant on Civil and Political Rights art. 14(3)(b), Dec. 16, 1966, 999 U.N.T.S 171.

<sup>10</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32, ¶ 34 (2007).

<sup>11</sup> *Id.* ¶ 6.

<sup>12</sup> Un Body of Principles, Principle 18(2).

and communicate, without delay or censorship and in full confidentiality, with his legal counsel.”<sup>13</sup> Only in the most exceptional circumstances may a State restrict or otherwise suspend this right, and such a restriction or suspension must be specified by law and “considered indispensable by a judicial or other authority in order to maintain security and good order.”<sup>14</sup> State violations of the right to confidential communication involve the deliberate monitoring or surveilling of lawyer-client communications. Protections for the right to confidential communication and consultation with legal counsel are also enshrined in the UN Basic Principles on the Role of Lawyers, which stipulate that communications and consultations with legal counsel should occur “without delay, interception or censorship and in full confidentiality”<sup>15</sup>

In addition, we would like to refer to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders, in particular articles 1, 2, 5(c), 6, 9 and 12.

In regard to the use of terrorism-related charges against a human rights defender, we would like to recall Human Rights Council resolution 22/6, which urges States to ensure that measures to combat terrorism and preserve national security are in compliance with their obligations under international law and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights. We would also like to remind your Excellency’s Government’s that the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism urged States to ensure that their counter-terrorism legislation is sufficiently precise to comply with the principle of legality, so as to prevent the possibility that it may be used to target civil society on political or other unjustified grounds. (A/70/371, para 46(c)). We stress, that as a matter of international law, the imperative of effective counter-terrorism cannot lawfully be misused as an excuse to quash public advocacy by peaceful critics, human rights activists and members of minority groups.

Finally, we would like to refer to Article 9 (1) of the ICCPR, which establishes that no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as established by law. Article 9 (2) and (3) specify that anyone who is arrested shall be informed, at the time of the arrest, of the reasons for such arrest and be brought promptly before a judge for the purpose of legal assessment and challenge of the detention. Article 14 (3) stipulates that, in the determination of any criminal charge, everyone should have adequate time and means to communicate freely with counsel of choice and to effectively prepare their defence. We would like to refer

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<sup>13</sup> [UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment] Principle 18(3).

<sup>14</sup> (Principle 18(3)).

<sup>15</sup> [UN Basic Principles on the Role of Lawyers]. Included under special safeguards in criminal justice matters, Principle 8 states, “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.”

your Excellency's Government of the Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court (A/HRC/30/37). These principles and guidelines, elaborated by the Working Group on Arbitrary Detention at the request of Member States of the Human Rights Council, provide universal guidance applicable to persons deprived of their liberty.