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EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK
RÉSEAU EURO-MÉDITERRANÉEN DES DROITS DE L'HOMME
الشبكة الأوروبية - المتوسطية لحقوق الإنسان

SYRIA:

The Trial of Human Rights Lawyer Haytham Al-Maleh Before the Second Military Court of Damascus - February – July 2010

Joint Trial Observation Mission Report



February 2011

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I. Summary

The International Commission of Jurists (ICJ), the Euro-Mediterranean Human Rights Network (EMHRN), and the Observatory for the Protection of Human Rights Defenders - a joint programme of the International Federation for Human Rights (FIDH) and the World Organisation Against Torture (OMCT) carried out six missions¹ to Damascus between February and July 2010 to monitor the hearings of the trial of **Haytham Al-Maleh**, an 80-year-old prominent Syrian human rights lawyer and former President of the Human Rights Association in Syria (HRAS). Haytham Al-Maleh was unlawfully arrested by officers of the General Intelligence Service on 14 October 2009 and prosecuted before the Second Military Court of Damascus on the grounds of "*transferring false and exaggerated news that weaken national sentiments*," "*spreading false or exaggerated information abroad which undermines the prestige of the State*," and "*slandering the judicial system*."

The missions' delegations sought meetings with Government officials, representatives of the judiciary and the legal profession, academics, lawyers, and other members of civil society in order to undertake a full assessment of the fairness of the trial of Haytham Al-Maleh, the state of the judiciary and the rule of law in Syria. Over the course of these missions, the observers met with the President of the Second Military Court, Brigadier General Ali Mohammed Hussein; the General Advocate, Ms. Amina Achamat; the President of the Syrian Bar Association, Nizar Assakkef; the military public prosecutor, other representatives of the Syrian judicial system, as well as human rights lawyers and members of the defence committee of Mr. Al-Maleh. Government officials declined to meet with the members of the delegations.

On 4 July 2010, the Second Military Court of Damascus convicted Haytham Al-Maleh and sentenced him to three years of imprisonment for "*transferring false and exaggerated news that weaken national sentiments*".² The charges arose from Al-Maleh's articles and the phone interview he gave to *Baradda* TV channel in which he criticised, amongst other things, the continued use of the emergency laws in Syria and the ongoing control of the Syrian authorities over the judicial system.

The report demonstrates that the trial of Al-Maleh failed to comply with international standards of fair trial. The entire procedure was marred by serious human rights violations from the time of arrest, through detention, trial and conviction. The observation of the trial before the Second Military Court of Damascus highlighted a series of violations of the right to fair trial, especially the right to be tried before an independent and impartial court, the right to defence, the right to be presumed innocent, and the principle of the equality of arms, though these rights are provided for in the International Covenant on Civil and Political Rights, which was ratified by Syria on 21 April 1969.

The trial of Al-Maleh also reflects Syria's policy and practice of criminalising the exercise of the right to freedom of expression and silencing human rights lawyers and defenders and other dissenting voices.

¹ The above-mentioned organisations observed the hearings which took place on 22 February, 8 April, 22 April, 3 June, 20 June and 4 July 2010.

² Under Articles 285 and 286 of the Syrian Criminal Code, see below.

II. Context: An adverse environment for human rights lawyers and defenders

Syrian human rights defenders have been subjected to harassment and persecution, leading in a number of instances to their prosecution and conviction for conduct of what is in effect the peaceful exercise of their rights to the freedoms of expression, assembly and association. The State of Emergency Act, which was promulgated in Legislative Decree No. 51 of 22 December 1962, as amended by Legislative Decree No. 1 of 9 March 1963, and which is still in force in Syria, together with the provisions of the Criminal Code continue to give Syrian authorities, especially the security services, sweeping powers to repress all critical voices, including through unfair judicial proceedings. The state of emergency law also provides for the creation of the Supreme State Security Court (SSSC) and extends the jurisdiction of the military courts to try civilians.³ Both the SSSC and military courts have been used to prosecute human rights defenders and political opponents.

Syria is a party to several universal and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the Arab Charter on Human Rights (the Arab Charter). Under these instruments, Syria has international obligations to ensure and protect a broad range of human rights, including the rights to freedoms of expression and association, the right to liberty and security and the right to a fair trial by a competent, independent and impartial tribunal established by law. Despite its international obligations, Syria has continued the practice of arbitrary arrest of human rights defenders, including lawyers. In many cases, the defenders have been secretly detained, leaving them no means to communicate with their families or their lawyers. They are constantly exposed to the security services' scrutiny; regularly summoned for interrogation, and persistently subjected to unfair trials. Syrian courts continue to impose heavy sentences on them using in particular, in addition to the provisions of the emergency law, Articles 285, 286 and 287 of the Criminal Code. These provisions contain extremely vague wording, in contravention of the principle of legality.⁴ Violations of the right to a fair trial are routine at all stages of judicial proceedings against human rights defenders.

One lawyer who has been subjected to repression under these laws and practices is **Anwar Al-Bunni**, Head of the Damascus Centre for Legal Studies and President of the Committees for the Defence of Political Prisoners. Anwar Al-Bunni has been detained since May 2006 after signing the Damascus-Beirut Declaration, a petition signed by more than 300 intellectuals and human rights defenders from Syria and Lebanon, calling for the improvement of the relationships between the two countries. He was sentenced on 24 April 2007, under Article 286 of the Criminal Code, to five years imprisonment.⁵ He is presently held in Adra Prison, Damascus. His lawyers cannot freely visit him in prison.

In 2009, lawyer **Muhannad Al-Hasani**, ICJ Commissioner and President of the human rights organisation "Sawasiyah", was arrested for having monitored several trials before the SSSC. On 10 November 2009, the Damascus Bar Association permanently disbarred him from practising law. On 23 June 2010, the Second Criminal Court of Damascus convicted Muhannad Al-Hasani and sentenced him to three years of imprisonment under Articles 285,

³ See Legislative Decree 51 of 1963.

⁴ Under these articles, any person who voluntarily spreads "information known to be false or exaggerated" or "weakening national sentiment" is liable to a sentence of three to fifteen years' imprisonment. Also, any Syrian who knowingly spreads false or exaggerated information abroad that damages the reputation of the State or its financial position will be condemned to prison for at least six months.

⁵ Article 286 of the Criminal Code provides that «Any person who transferred news that he knew to be false and would weaken national sentiments as with article 285. 2. If the perpetrator thought that the news was correct his punishment will be three months at least.»

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286 and 287 of the Criminal Code.⁶ He is also detained in Adra prison.⁷ He was physically assaulted in prison on 28 October 2010, only two weeks after he had been awarded the prestigious Martin Ennals Award for human rights defenders. Muhannad Al-Hasani was severely beaten by a prisoner who accused him of working against the interests of the Syrian nation. The prisoner was believed to have been acting at the behest of the Syrian security services.

On 12 December 2009, lawyer **Mustafa Ismail**, a Kurdish minority rights' defender was arrested after having been summoned by the local security office in Aleppo. He was detained at the Air Force Security Branch and subsequently charged on the grounds of undertaking actions with the purpose of partitioning off a part of Syrian territory in order to annex it to a foreign State under Articles 267 and 288 of the Criminal Code. His trial opened on 26 October 2010. On 7 November 2010, the Military Criminal Court of Aleppo sentenced Mustafa Ismail to seven years in prison (case No. 790, 2010). The sentence then was reduced to two and a half years.

The Syrian Bar Association has not only failed to protect these human rights lawyers, guarantee their rights, and "protect their professional integrity",⁸ but it has contributed to the State's repression, exerting, on a regular basis, additional pressures on them, thus showing its lack of independence. In the case of Muhannad Al-Hasani, following his arrest by State security services in July 2009, the Damascus Bar Association Disciplinary Committee decided on 10 November 2009 to permanently disbar him on the grounds, amongst other things, of "publishing false and exaggerated information that weakens the state and its reputation abroad," and for "attending and documenting the proceedings of the Supreme State Security Court without being the lawyer of those involved in these proceedings".⁹

In addition, during the trials of both Haytham Al-Maleh and Muhannad Al-Hasani, the Syrian Bar Association has refused, on several occasions, to authorise their lawyers to meet with them. This contravenes international standards that govern the functioning of bar associations. The UN Principles on the Role of Lawyers provide that "professional associations of lawyers shall [...] ensure that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics".¹⁰

6 Article 285 stipulates that "whoever in Syria in time of war or time of expecting war, does anything aiming at weakening national sentiments or encouraging racist or sectarian feelings, will be punished with temporary detention."

Article 287 states that "Every Syrian who spreads false or exaggerated information abroad, and which undermines the prestige of the State or its financial state, will be punished by a minimum of six months."

7 See Summary Report on the compliance of the trial of Muhannad Al-Hasani before the Second Criminal Court in Damascus with international standards of fair trial, ICJ, EMHRN and the Observatory, June 2010.

8 See UN Basic Principles on the Role of Lawyers, principle 24.

9 See Joint Press release issued by ICJ, EMHRN, the Observatory "Syria: Muhannad. Al-Hasani Disbarment signals continuing persecution and intimidation of lawyers and human rights defenders", 19 November 2009.

10 See UN Basic Principles on the Role of Lawyers, op. cit., principle 25.

III. The case of Haytham Al-Maleh, the pre-trial proceedings

Haytham Al-Maleh served as an investigative judge and judge at the criminal court of Damascus from 1958 until 1966. He was then, three years after the Baath party took power in Syria, dismissed from the judiciary for criticising political interference in judicial matters and the functioning of the judiciary. He thereafter assumed practice as a lawyer. In 1980, he was arrested, convicted and jailed for six years on charges related to his work as a human rights defender.

Over the course of years, Haytham Al-Maleh has been regularly summoned by State security services and subjected to various measures of intimidation due to his repeated calls for constitutional and democratic reforms in Syria. He has been subjected to a travel ban during the last six years. His office, telephone communications and e-mails have also been under constant surveillance by Syrian security forces.

On 13 October 2009, the Head of the Department of Political Parties and Associations within the General Intelligence services called Haytham Al-Maleh and summoned him to report to the Political Security branch in Damascus. He refused to comply with this order, and was consequently abducted as he was leaving his office on 14 October 2009. Civilian Officers, believed to be from the General Intelligence Service, forced him to get into a car declining to identify themselves. He was initially held for five days *incommunicado* at the headquarters of the General Intelligence services in Kafr Sousa, Damascus. No reason was given for his arrest.

On 21 October 2009, Haytham Al-Maleh was presented to the Military Prosecutor of Damascus who interrogated him and charged him with "Slandering the judiciary", "Slandering the President of the Republic"; "transferring false and exaggerated news that weaken national sentiments", and spreading "false or exaggerated information abroad which undermines the prestige of the State" under Articles 285, 286, 287, and 376 of the Syrian Criminal Code.

In its decision number 9205-20128 / 2009 of 3 November 2009, the first military investigative judge, Abdelrazzak El-Hemsi, decided to refer the case to the Second Military Court in Damascus on the charges of "Slandering the judiciary", "transferring false and exaggerated news that weaken national sentiments", and spreading "false or exaggerated information abroad which undermines the prestige of the State".

Haytham Al-Maleh's lawyers challenged this decision before the Criminal Military Chamber of the Cassation Court on the basis, amongst other things, that the defendant is a civilian, not a member of the military, and that he should not, consequently, be tried before a Military Court. On 31 January 2010, the defence motion was rejected.

Haytham Al-Maleh was transferred to Adra prison during the time of his trial. His lawyers were not allowed to meet him during this time without prior authorisation from the Syrian Bar Association, which is under the control of the Syrian authorities. On a number of occasions, such permission was refused. On several occasions his wife was not allowed access to the prison to visit him.

On 22 February 2010, Haytham Al-Maleh was brought again before the Military Prosecutor who informed him that an additional charge has been brought against him under Article 376 of the Criminal Code for "slandering the head of State." This charge was brought on the basis of a testimony of a detainee who shared Al-Maleh's cell in Adra prison. The charges were eventually dropped by a presidential amnesty decree.¹¹

The first hearing of the trial of Al-Maleh before the Second Military Court of Damascus was held on 22 February 2010. Five other hearings took place between 8 April and 20 June.¹² The final hearing was held on 4 July 2010.

¹¹ See Presidential Decree 22, issued on 23 February 2010.

¹² Hearings of 8 April, 22 April, 3 June, 20 June and 4 July 2010.

IV. Assessment of the trial of Haytham Al-Maleh

The Second Military Court before which Haytham Al-Maleh was tried is located within the Military Justice Headquarters in Damascus. The Headquarters, which include courtrooms, offices of judges and prosecutors, and administrative offices, is considered to be a military zone. Two international observers, lawyers Mario Lana and Vincenzo Drago, commissioned by the observer organisations to monitor one of the hearings of the trial were denied access to the Court. Military guards informed them that they needed formal authorisation from the Syrian Ministry of Foreign Affairs to attend the hearings of the trial. Representatives of the foreign diplomatic missions in Syria were also denied access to the Court on the same grounds. Lawyers and other civilians entering the Courtroom were searched.

The Court consisted of three members, presided by Military Judge Brigadier General Ali Mohammed Hussein, President of the Second Military Court of Damascus, a representative of the Military Prosecution, and a military officer acting as clerk.

In general, the hearings began promptly as scheduled. The military prosecution was not actively involved in the conduct of hearings and failed to give any credible evidence to support the accusations against Haytham Al-Maleh.

During the first hearing of 22 February 2010, the President of the Court detailed the charges against Haytham Al-Maleh, including the publication of several articles and an interview he gave to *Baradda* TV channel. Acknowledging that he gave the phone interview and wrote the articles mentioned by the President, Haytham Al-Maleh challenged the accusations on the basis that such acts were the expression of his right to the freedom of expression, and accordingly, could not be considered as crimes.

The defence lawyers also refuted the accusations against Haytham Al-Maleh, including "spreading false and exaggerated news that weaken national sentiments" under Article 285 of the Criminal Code. They stated that the accusations made against him were groundless, as the articles he published only reflected his personal views and opinions in accordance with Article 26 of the Syrian Constitution which states that: "Every citizen has the right to participate in the political, economic, social, and cultural life", as well as Article 38 which stipulates: "Every citizen has the right to freely and openly express his views in words, in writing, and through all other means of expression". The Emergency Law and the Criminal Code cannot repeal these constitutional provisions.

In addition, the defence lawyers argued that Syria is a State party to several international and regional conventions which guarantee the right to the freedom of opinion and expression. Indeed, Article 19 of the ICCPR states that "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals." Article 32 of the Arab Charter on Human Rights, to which Syria is a party, guarantees "the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries."¹³

Additionally, Al-Maleh's articles and interviews included facts he was aware of and which he considered being true and not false or exaggerated. His description of the political system and the continuing use of the emergency laws in Syria are a mere point of view

¹³ The Arab Charter on Human Rights was adopted by the Arab summit in Tunis in 2004, and entered into force on 16 March 2008, 60 days after ratification of the seventh member state of the Arab League. States that have ratified the Charter are Algeria, Bahrain, the United Arab Emirates, Jordan, Libya, Palestine and Syria.

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and an expression of opinion. Accordingly, Al-Maleh had no intent or purpose to spread any false or exaggerated information that might weaken the national sentiments.

Furthermore, the defence argued that the elements of Article 286 together with Article 285 of the Criminal Code were not fulfilled, as Syria is no longer in a state of war following the agreement that had been reached in 1974 after the war of 6 October 1973 against Israel.

However, Haytham Al-Maleh was convicted on the basis of the following "evidence":

- The Report of the General Intelligence Service, Bureau 285, No. 10409, of 19/10/2009;
- The Report of the Military Public Prosecution in Damascus;
- Haytham Al-Maleh's statements during the investigation carried out by the Military Investigating Judge of Damascus;
- Various press articles and statements written by Haytham Al-Maleh and published on the Internet and in the media;¹⁴

and on the basis of Articles 285 to 287 and article 376 of the Criminal Code.¹⁵

On 4 July 2010, the Second Military Court of Damascus convicted Haytham Al-Maleh for "*transferring false news that weaken national sentiments*" and sentenced him to three years imprisonment. Haytham Al-Maleh's lawyers challenged this decision before the Criminal Military Chamber of the Cassation Court. On 12 October 2010 the defence motion was rejected. He serves his sentence in Adra prison where he was repeatedly denied access to his proper medication. Al-Maleh, who suffers from diabetes and thyroid problems, remains in poor conditions despite repeated calls on Syrian President Bashar Al-Assad urging him to release Haytham Al-Maleh on humanitarian grounds.

14 Press articles and statements mentioned by the Military Prosecutor in its decision notably include the following articles "No real elections under an authoritarian regime in Syria", 11 December 2006; "An Open Letter to President Dr. Bashar Al-Assad", 30 January 2008; "The Baath Party does not rule Syria; it is a political cover for security", 6 July 2009; "Transparency and Accountability", 25 September 2008; a phone interview with *Baradda* TV, a satellite channel linked to the Damascus Declaration on 12 October 2010. All these articles can be accessed at: haithammalehfoundation.org.

15 Article 376 provides temporary detention "of one to three years for slander if the slander was directed to the Head of State, and the imprisonment of one year at most if the slander was directed to the courts or army or public administrations or to the officer exercising public authority".

V. The compliance of Haytham Al-Maleh's trial with international standards of fair trial

The conduct of the Second Military Court during the hearings of Al-Maleh's trial calls into question its independence and impartiality. Its President, Military Judge Brigadier General Ali Mohammed Hussein, did not request the prosecution to present any evidence to support the accusations against Al-Maleh and rejected all the defence arguments. The decision to convict Al-Maleh was based on secret reports of the General Intelligence Service and the articles and statements that Al-Maleh had made while exercising his right to the freedom of expression. These cannot be considered, under international and regional human rights standards, as evidence against him. During the hearings, several serious violations of the principles of a fair trial were observed.

1. **The right to be tried before a competent, independent and impartial tribunal established by the law**

Under international law, including under Article 14 of the ICCPR, all persons charged with a criminal offence have the right to be tried by an independent, impartial and competent tribunal established by law. Article 13 of the Arab Charter specifically provides that "everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations." Neither the judiciary nor the judges of which it is composed can be subordinate to any branches of the State. Judges must not only be independent, but must also be seen to be independent.

In Syria, although Article 131 of the Constitution stipulates that the judicial authority is independent, the state of emergency law provides for the extension of the jurisdiction of military courts to try civilians.¹⁶ Article 6 of the State of Emergency Act extends the jurisdiction of Military courts to try any violation of the Martial Governor Directives as well as any crime related to the security of the State, whether it is committed by a civilian or by a military officer.

During the hearings of Al-Maleh's trial, the Court did not take the defence's arguments into account and failed to ask the prosecution to provide supporting evidence for the accusations against Haytham Al-Maleh.

As the UN Human Rights Committee affirmed in its concluding observations on the compliance of Syria with its obligations under the ICCPR; "the procedures of the military courts do not respect the guarantees laid down in article 14 of the covenant".¹⁷ Syrian military judges cannot be considered independent and impartial because they are subject to the command structure of the armed forces. They are, under Article 39 of the Military Criminal Code, subordinated to the Ministry of Defence.¹⁸ The fact that military officers assume the role of judges while at the same time remaining subordinate to their superiors, in keeping with the established military hierarchy, is incompatible with core principles of the independence of the judiciary. This condition also undermines the Rule of Law principle of the separation of powers, which is the cornerstone of an independent and impartial justice system.

Civilian, independent, and impartial courts using international fair trial standards and procedures are a necessary guarantee of the right to a fair trial and provide the necessary independence and impartiality to ensure that justice is dispensed. The jurisdiction of military courts should be limited to offences of a strictly internal, military nature committed by military personnel, such as disciplinary offences. Under international standards and jurisprudence, the jurisdiction of military justice must not have competence to try civilians.¹⁹

16 See Legislative Decree 51 of 1963.

17 See Concluding observations of the Human Rights Committee: Syrian Arab Republic. 24/4/2001. CCPR/CO/71/SYR. §17.

18 See Legislative Decree No. 61 of 27 February 1950.

19 See Principle No. 8, Draft Principles Governing the Administration of Justice through Military Tribunals (the "Military Justice Principles"), adopted by the Former United Nations Sub-Commission on Human Rights and forwarded to the Commission on Human Rights, E/CN.4/2006/58.

2. The conduct of Military Prosecution

A substantive element of fair trial concerns the conduct of the prosecuting authority. Article 13 of the United Nations Guidelines on the Role of Prosecutors provides that “In the performance of their duties, prosecutors shall: (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination; (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.”

In the case of Al-Maleh, the Military prosecution did not perform its functions impartially, in an independent manner and with objectivity. Not only are military prosecutors subordinate to the Executive as mentioned above, but they are not independent in relation to the Presidents of the Courts as well. For instance, during the hearing of 22 April 2010, the President of the Court ordered the representative of the prosecution to “ask for adjournment”, although there were no sound reasons for such postponement. The representative of the prosecution executed the order and the trial was adjourned.

Furthermore, during the hearings, the prosecution failed to present any credible evidence in support of the elements of the criminal offences which made up the charges against Haytham Al-Maleh, including that he “weakened the national sentiments”; that he intended to do so; that he took any concerted action to do so; or that the intent and actions of Al-Maleh taken together led to the crime of weakening the national sentiments.

In addition, the Military Prosecution accusations were based on Al-Maleh’s articles and statements as well as on secret reports of the General Intelligence Service to whom Al-Maleh had no access to nor informed of their existence. Under international law, including Article 14 of the ICCPR, anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and notified without delay of any charges against him and of any legal and factual basis for depriving him of his liberty. Article 14 of the Arab Charter also provides that “anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him.”

Prosecutors should not initiate or continue prosecution, or should make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.²⁰

3. The principle of Legality

The principle of legality of offences is a fundamental element of the right to a fair trial. Under *nullum crimen sine lege*, in order for specific conduct to give rise to criminal responsibility, it must strictly be classified and established in law as a crime. The definition of any criminal offence must be precise and free of ambiguity.²¹

The offender, under this principle, must have fully committed the criminal behaviour in question as described precisely and unambiguously in criminal legislation. Definitions of criminal offences that are vague, ambiguous and imprecise contravene international human rights law and the “general conditions prescribed by international law”.²²

20 See Guideline 14 of the UN *Guidelines on the Role of Prosecutors*.

21 See Human Rights Committee, General Comment No. 29, *States of Emergency (Article 4)*, UN Doc.CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 7

22 See UN Special Rapporteur on the Independence of Judges and Lawyers, UN Document E/CN.4/1998/39/Add.1, para. 129. See also, Human Rights Committee: *Concluding Observations of the Human Rights Committee: Portugal (Macau)*, CCPR/C/79/Add.115, 4 November 1999, para. 12; *Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 11; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 8; *Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 12; *Democratic People’s Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14; *Belgium*, CCPR/CO/81/BEL, 12 August 2004, para. 24; *Iceland*, CCPR/CO/83/ISL, 25 April 2005, para. 10; *Estonia*, CCPR/CO/77/EST, 15 April 2003, para. 8; and *Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 12. See also: the Inter-American Court of Human Rights, Judgment of 30 May 1999, *Castillo Petruzzi et al v. Peru*, Series C, No. 52, para. 121; and the Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights, 1983-1984*, p.85, para. 7, and the *Second report on the situation of human rights in Peru*, *doc. cit.* 76, para. 80.

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The articles of the Criminal Code under which Al-Maleh was prosecuted are overly broad and vague, in contravention of this principle. In addition, the implementation of these articles may result in the criminalisation of the freedom of expression, in contravention of Article 19 of the ICCPR. Furthermore, Articles 285, 286, and 287 are to be applied in times of war or when expecting war, a condition which does not appear to be present in Syria.

Given the extremely vague wording of these articles, it is not possible to establish the elements of the crimes in any case. There is no definition contained in the articles as to what is meant by "national sentiments". Nor are any specific acts identified which would constitute the crime of weakening the national sentiments.

4. The right to be presumed innocent

Under international standards, the rules of evidence and conduct of the trial must ensure that the burden of proof rests with the prosecution throughout the trial. The right to be presumed innocent until proven guilty according to law is an absolute right, which may never be the object of a derogation, restriction or limitation.²³ It guarantees that guilt is not presumed; that charges must be proved beyond all reasonable doubt, and that the accused has the benefit of doubt.

During the hearings, Haytham Al-Maleh was presumed guilty and the burden of proof was placed on him, as the prosecution presented no evidence to support the accusations against him, with the exception of Al-Maleh articles and the interview he gave to *Baradda* TV channel.

5. The right to defence

The right to defence requires that the accused has the right to communicate and consult with his lawyers without interception or censorship and in full confidentiality.²⁴ Lawyers, under international standards, must be able to meet their clients in private and to communicate with them in conditions that fully respect the confidentiality of their communications.²⁵

Accused persons must also have adequate facilities for the preparation of their defence,²⁶ including access to documents and other evidence and all materials the accused requires to prepare his or her case; and also access to documents and other evidence, including all materials that the prosecution plans to offer in court either against the accused or that are exculpatory.

In the case of Al-Maleh, his lawyers were not allowed to visit and meet with him in jail without the authorisation of the Syrian Bar Association, which has showed its lack of independence. On several occasions they were refused such authorisation. The conviction of Al-Maleh was based on secret reports of the General Intelligence Service to which Al-Maleh had no access to or was not even informed of.

23 See Human Rights Committee, *General Comment No. 29*, para. 11, and *General Comment No. 32*, para. 6; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 247, 253 and 261; and Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, *Rodolfo Gerbert Asensios Lindo et al. (Peru)*, para. 86.

24 See *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principle 18 (3) and the *UN Basic Principles on the Role of Lawyers*, Principle 8.

25 See Human Rights Committee, *General Comment No. 32*, para. 34.

26 See Human Rights Committee: *General Comment No. 32*, paras. 32 *et seq.*; Views of 29 March 2005, *Morais v. Angola*, Communication No. 1128/2002, paras. 5.4 and 5.6; Views of 27 July 1992, *Wright v. Jamaica*, Communication No. 349/1989, para. 8.4; Views of 31 March 1992, *Thomas v. Jamaica*, Communication No. 272/1988, para. 11.4; Views of 1 November 1991, *Henry v. Jamaica*, Communication No. 230/87, para. 8.2; Views of 11 April 1991, *Michael Sawyers and Michael Desmond Mclean v. Jamaica*, Communication Nos. 226/1987 and 256/1987, para. 13.6; Views of 31 October 2005, *Chan v. Guyana*, Communication No. 913/2000, para. 6.3; Views of 20 October 1998, *Phillip v. Trinidad and Tobago*, Communication No. 594/1992, para. 7.2; and Views of 21 October 2005, *Quispe Roque v. Peru*, Communication No. 1125/2002, para. 7.3.

6. The principle of equality of arms

The principle of equality of arms in criminal proceedings requires that each party to the proceedings shall have the procedural opportunity to refute and contest all the arguments and evidence adduced by the opposing party.²⁷ This is to guarantee a procedural equality between the accused and the prosecution.

During the hearings, the prosecution did not present any evidence or have any witness to support its accusations against Al-Maleh. The prosecution was unable to refute the arguments presented by Al-Maleh and his defence. The judge abstained from requesting any evidence or witnesses from the prosecution. The President of the court also refused the evidence presented by the defence lawyers. By doing so, he placed them, at all stage of the proceedings, at a substantial disadvantage vis-à-vis the prosecution.

7. The right to appeal

Under Syrian law, the decision of the military courts can only be challenged before the Military Chamber of the Cassation Court that can review the case from the formal, procedural and legal aspects of the conviction only.

However, the right to appeal, under international law, including Article 14 of the ICCPR, guarantees to everyone convicted of a crime the right to have his conviction and sentence being reviewed by a higher tribunal which must legally have the opportunity to a full review of evidentiary as well as procedural aspects of the trial, the verdict reached and the sentence imposed.²⁸ In its General Comment No. 32, the Human Rights Committee concluded that “the right to have one’s conviction and sentence reviewed by a higher tribunal established under Article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.”²⁹

8. The right to Humane Treatment

Haytham Al-Maleh, who is 80 years old and known to suffer from diabetes and thyroid problems, remains in poor conditions in Adra prison as he has been repeatedly denied access to his proper medication.

Syria must ensure, under international law and standards, that all persons deprived of their liberty are treated with humanity, with respect for the inherent dignity of the human person and are not subjected to torture or cruel, inhuman or degrading treatment. Detainees should have access to the same level of health care afforded to those who are not in custody and shall receive medical care and treatment whenever necessary³⁰.

²⁷ See Human Rights Committee, Views of 3 April 2001, *Jansen-Gielen v. The Netherlands*, Communication No. 846/1999, para. 8.2, and Views of 24 October 2001, *Äirelä and Näkkäläjärvi v. Finland*, Communication No. 779/1997, para. 7.4.

²⁸ See Human Rights Committee, Views of 20 July 2000, *Cesáreo Gómez Vázquez v. Spain*, Communication No. 701/1996, para. 11.1.

²⁹ See Human Rights Committee, *General Comment No. 32*, para. 48.

³⁰ See Articles 7 and 10 of the ICCPR.

VI. The Recommendations

The above-mentioned organisations therefore call on the Syrian authorities to:

- Immediately and unconditionally release Haytham Al-Maleh;
- Ensure that as long as he remains in prison, the authorities fully respect his right to access to medical personnel and medical treatment, as well as access to his lawyers and family members;
- Guarantee, under all circumstances, his physical and psychological integrity and to this end, ensure that he is protected from any cruel, inhuman or other ill-treatment;
- Ensure that the Syrian judiciary acts with full conformity with international human rights standards;
- Stop all forms of interference in the judiciary by the Executive, which compromises the independence of the courts;
- Take all necessary steps to guarantee the independence and impartiality of the judiciary in Syria;
- Limit the jurisdiction of military courts exclusively to military offenses, and make sure that crimes committed by civilians are tried by ordinary courts using established procedures in line with international standards;
- Abolish the Supreme State Security Court and other special courts established under the emergency law;
- Repeal the sweeping powers of arrest and detention by the General Intelligence Services and its different branches;
- Ensure that the process leading to criminal prosecution of those arrested and detained on criminal charges meet the international standards of fair trial;
- Provide for independent judicial oversight over the grounds for detention and ensure the protection of detainees from abusive treatment during criminal investigations;
- End the practice of incommunicado detention that can in itself constitute a form of cruel, inhuman or degrading treatment;
- Strengthen the rights of defendants including by ensuring, under all circumstances, the right to be presumed innocent; by providing for legal counsel or representatives, and by allowing them to effectively challenge the evidence against them;
- Repeal the Emergency Law Act;
- Bring the Criminal Law and the Law of Criminal Procedure in compliance with the international human rights standards, particularly by allowing detainees to challenge the lawfulness of their detention before competent, independent and impartial courts;
- Repeal Articles 267, 285, 286, 287 and 376 of the Syrian Criminal Code;

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- Repeal all provisions of the Criminal Code that result in the criminalization of the rights to the freedom of expression and association;
 - Ensure that human rights lawyers and defenders can carry out their legitimate work without intimidation or harassment;
 - Put an immediate end to the persistent attacks on human rights lawyers and defenders;
 - Fully cooperate with the relevant United Nations (UN) mechanisms, and to this end accept the country visit requested by the UN Special Rapporteur on the situation of Human Rights Defenders in 2008 and 2010.

The Observatory for the Protection of Human Rights Defenders: a joint programme of FIDH and OMCT

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Created in 1997, the Observatory is an action programme based on the belief that strengthened co-operation and solidarity with and among human rights defenders and their organisations will contribute to break their isolation. It is also based on the absolute necessity to establish a systematic response from NGOs and the international community to the repression of which defenders are victims. The Observatory's activities are based on consultation and co-operation with national, regional, and international non-governmental organisations.

With this aim, the Observatory operates the following actions:

- a mechanism of systematic alert of the international community on cases of harassment and repression of human rights defenders, particularly when they require urgent intervention;
- the observation of judicial proceedings, and whenever necessary, direct legal assistance;
- international missions of investigation and solidarity;
- a concrete material assistance aiming at ensuring the security of defenders victims of serious violations of their rights;
- the publication and world-wide dissemination of reports on violations of the rights and freedoms of human rights defenders or organisations around the world, including its Annual Report;
- sustained action with the United Nations in particular with the Special Rapporteur on Human Rights Defenders, as well as sustained lobbying with various regional and international intergovernmental institutions.

To ensure its activities of alert and mobilisation, the Observatory has established a system of communication devoted to defenders in danger.

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EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK
RESEAU EURO-MEDITERRANÉEN DES DROITS DE L'HOMME
الشبكة الأوروبية - المتوسطية لحقوق الإنسان

Euro-Mediterranean Human Rights Network

A network of more than 80 human rights organisations, institutions and individuals based in 30 countries in the Euro-Mediterranean region.

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