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HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

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 the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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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; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to General Assembly resolution 60/251 and to Human Rights Council resolutions 16/4, 15/21, 16/5 and 16/23.

In this connection, we would like to bring to your Excellency's Government's attention information we have received concerning the promulgation of the "**Essential National Industries (Employment) Decree**", and the **on-going repression against trade unionists**.

An urgent appeal was sent on 3 March 2011, 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; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment regarding the pattern of arrests, arbitrary detentions, torture and ill-treatment of trade unionists and other Fijians, at least in part, in an attempt to prevent plans for a peaceful demonstration scheduled to take place in Fiji's capital, Suva, on 4 March 2011. We acknowledge receipt of the letter of your Excellency's Government on 21 March 2011, and look forward to receiving a substantive response from your Excellency's Government to the series of concerns raised in the urgent appeal.

According to the information received:

On 25 July 2011, a decree entitled "Essential National Industries (Employment) Decree" (the Decree) was reportedly signed into law by Fiji's President, and

gazetted on 29 July 2011, putting serious restrictions on the operation of unions in the country. It is alleged that the Decree will close down all the most active unions currently working in the country.

The following points of the Decree appear to be controversial:

- The Decree covers “Essential National Industries”, which are industries that are “vital to the present and continued success of the Fiji national economy or gross domestic product or those in which the Fiji Government has a majority and essential interest” (article 2), and which are declared as such by the Minister (Prime Minister). The definition is very broad and determined at the discretion of the Minister. Since the Fiji Government is a large employer of people in the country, including in the national airline service (Air Pacific), the sugar, forestry, mining industries, health service provision (such as in hospitals in Suva, Labasa, and Lautoka, district health centres and other health facilities), and provider of other services (such as water, electricity, roads, and policing), this Decree will affect large numbers of workers, and impact directly on most currently active unions.
- The Decree makes it illegal to be a professional unionist. Workers’ representatives are only allowed if they work within the “designated corporation.” If they are fired, then they are no longer able to be a workers’ representative (article 7).
- Bargaining Units will be established and these Units will elect a representative to bargain with the employer. The composition of these Units will be determined by the Minister (article 11). The Bargaining Unit will be a group of at least 75 workers employed by the same employer who performs similar types of work for the employer (article 1(1)).
- Job actions, strikes, sick outs, slowdowns or other financially or operationally harmful activities are banned, with the exception of allowing a strike or a lock-out if 28 days prior notice is given and the prior written approval of the Minister is obtained beforehand (article 27).
- No decisions made by the Minister or a State official, or a designated corporation under the Decree, can be challenged in a court, tribunal or commission. The Decree itself can also not be legally challenged (article 30).
- In the case of disputes regarding collective bargaining, they will go to the employer’s designated reviewing officer, and then referred onto the Minister for a final and binding determination, with no recourse to any judicial or quasi-judicial body (article 26).

In addition, on 4 August 2011, Mr. **Daniel Urai**, President of the Fiji Trades Union Congress (FTUC), and Mr. **Dinesh Gounder**, Hotels Union staff member, were arrested and charged under the Public Emergency Regulations for holding a meeting without a permit. Both were released on bail, and are due to appear in court on 2 September 2011.

On 7 May 2011, the Ministry of Labour arbitrarily refused the nomination of Mr. **Felix Anthony**, National Secretary of the FTUC, for the Workers' delegation to a session of the International Labour Organisation (ILO) Conference.

On 22 June 2011, Mr. **Mohammed Khalil**, President of Fiji Sugar & General Workers Union, Ba Branch, was reportedly brutally assaulted by army officers who threw him in the mud, stomped on him, and dragged him around in front of his colleagues. The army officers allegedly accused Mr. Mohammed Khalil of being a "strongman of the union".

Serious concerns are expressed that the promulgation of the Essential National Industries (Employment) Decree may illegitimately restrict the exercise of workers' rights to freedom of association and of expression, right to collectively bargain and right to strike. This Decree appears to form part of a wider campaign by the State authorities to curtail the activities of trade unions in the country. Grave concern is expressed about the physical and mental integrity of Mr. Mohammed Khalil amid allegations that he was assaulted by army officers. Finally, further concern is expressed that the on-going repression against trade unionists may be directly related to their work in defence of human rights, in particular due to their promotion of rights at work.

On 8 August 2011, the Director-General of ILO issued a statement in which he "expressed serious concern about developments in Fiji where recent days have seen the arrest and charging under Public Emergency Regulations of two trade union leaders for holding a meeting without a permit, and the gazetting of a decree concerning Essential National Industries (Employment) which trade unions say would make it impossible for them to function normally".

While we do not wish to prejudge the accuracy of these allegations, we would also like to draw the attention of your Excellency's Government to article 20(1) of the Universal Declaration of Human Rights which provides that "[e]veryone has the right to freedom of peaceful assembly and association".

Similarly, we would like to bring the attention of your Excellency's Government on article 23(4) of the same Declaration which states that "[e]veryone has the right to form and to join trade unions for the protection of his interests".

In addition, we would like to remind your Excellency's Government that Fiji ratified ILO Conventions No. C87 on Freedom of Association and Protection of the Right to Organise (1948), and No. C98 on Right to Organise and Collective Bargaining (1949):

ILO Convention No. C87:

- Article 2: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation”.
- Article 3: “1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof”.
- Article 4: “Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority”.
- Article 5: “Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers”.
- Article 6: “The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations”.

ILO Convention No. C98:

- Article 1: “1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. 2. Such protection shall apply more particularly in respect of acts calculated to-- (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours”.
- Article 2: “1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration. 2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article”.
- Article 3: “Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles”.
- Article 4: “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers'

organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”.

Moreover, Fiji, through the 1998 ILO Declaration on Fundamental Principles and Rights at Work, has a commitment to “respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions, [including]... freedom of association and the effective recognition of the right to collective bargaining”.

Furthermore, we would like to appeal to your Excellency's Government to take all necessary steps to secure the right to freedom of opinion and expression in accordance with fundamental principles as set forth in article 19 of the Universal Declaration of Human Rights, which provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Regarding the case of Mr. Mohammed Khalil, we would like to appeal to your Excellency's Government to seek clarification of the circumstances surrounding this case. We would like to stress that each Government has the obligation to protect the right to physical and mental integrity of all persons. This right is set forth inter alia in the Universal Declaration of Human Rights.

In this context and with respect to the allegation indicating that Mr. Mohammed Khalil was brutally assaulted by army officers who threw him in the mud, stomped on him, and dragged him around in front of his colleagues, we would like to draw the attention of your Excellency's Government to paragraph 1 of Human Rights Council Resolution 16/23 which “Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment.”

We would also like to draw your Excellency's Government's attention to paragraph 7b of Human Rights Council Resolution 16/23, which urges States “(t)o take persistent, determined and effective measures to have all allegations of torture or other cruel, inhuman or degrading treatment or punishment investigated promptly, effectively and impartially by an independent, competent domestic authority, as well as whenever there is reasonable ground to believe that such an act has been committed; to hold persons who encourage, order, tolerate or perpetrate such acts responsible, to have them brought to justice and punished in a manner commensurate with the gravity of the offence, including the officials in charge of the place of detention where the prohibited act is found to have been committed; and to take note, in this respect, of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the updated set of principles for the protection of human rights through action to combat impunity as a useful tool in efforts to prevent and combat torture.”

Furthermore, we would like to refer to the attention of your Excellency's Government to the fundamental principles set forth in 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, and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that "each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice."

In this context, we would like to bring to the attention of your Excellency's Government the following provisions of the Declaration:

- article 5, point a) which establishes that for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels, to meet or assemble peacefully;

- article 5, points b) and c) which provide that for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right to form, join and participate in non-governmental organizations, associations or groups, and to communicate with non-governmental or intergovernmental organizations; and

- article 12, paras 2 and 3 of the Declaration which provide that the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.

We would also like to refer to the report A/62/225 of the Special Representative of the Secretary General on the situation of human rights defenders to the General Assembly, which states that "[h]uman rights defenders play a pivotal role in ensuring that protest and criticism are expressed in a peaceful and constructive manner. States should legitimize and empower human rights defenders in this role and encourage defenders to take full ownership of this role" (para. 102).

We urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of the aforementioned persons are respected and that accountability of any person guilty of the alleged violations is ensured. We also request that your Excellency's Government adopts effective measures to prevent the recurrence of these acts.

Moreover, 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. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the above summary of the case accurate?
2. Please indicate the legal basis of:
 - a) the Essential National Industries (Employment) Decree;
 - b) the arrest of Mr. Daniel Urai and Mr. Dinesh Gounder, and the charges brought against them; and
 - c) the refusal to nominate Mr. Felix Anthony for the Workers' delegation to a session of the International Labour Organisation Conference, and how this measure is compatible with international human rights norms and standards.
3. Please indicate how the measures listed under 2. a), b), and c) are compatible with the aforementioned international human rights norms and standards.
4. In relation to the reported assault against Mr. Mohammed Khalil by army officers:
 - a) please provide the details, and where available the results, of any investigation, medical examination, and judicial or other inquiries carried out in relation to this case. If no inquiries have taken place, or if they have been inconclusive, please explain why.
 - b) please provide the full details of any prosecutions which have been undertaken. Have penal, disciplinary or administrative sanctions been imposed on the alleged perpetrators?

We would appreciate a response within sixty days. We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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