



FREEDOM NOW

Diego García-Sayán
Special Rapporteur on the Independence of Judges and Lawyers
Office of the United Nations High Commissioner for Human Rights
United Nations Office at Geneva
8-14 Avenue de la Paix
1211 Geneva 10, Switzerland

November 9, 2018

Re: Allegation Letter Regarding Mohammed Shaikh Ould Mohammed Ould Mkhaitir

Dear Mr. García-Sayán,

We write with regard to the continuing illegal detention of Mr. Mohammed Shaikh Ould Mohammed Ould Mkhaitir by the Islamic Republic of Mauritania, where Mr. Mkhaitir has been detained for over four and one half years. Regrettably, we do so on the anniversary of a decision of a Mauritanian Court of Appeals decision ordering his release.

Nearly two years ago, on November 28, 2016, we [wrote to your predecessor](#), Ms. Mónica Pinto, to request urgent action from the Office of the Special Rapporteur. We never received a response, and we are not aware of any action taken by the Office of the Special Rapporteur in connection with this matter. This letter provides a brief update as to the background and recent developments of Mr. Mkhaitir's detention, and it renews our request for urgent action on Mr. Mkhaitir's case.

Mr. Mkhaitir was arrested on January 2, 2014, and charged with apostasy under Article 306 of the Mauritanian Criminal Code because of a blog post that he published which provided a social critique and commentary on the nexus between religion, racism and discrimination. After nearly a year in pre-trial detention, Mr. Mkhaitir was convicted and sentenced to death on these charges on December 24, 2014.

Mr. Mkhaitir's conviction violated his human rights, including his right to freedom of thought, conscience, and religion; his right to freedom of opinion and expression; and his right to a fair trial. It also violated the international human rights law prohibition against criminalizing apostasy.

As such, in April 2017, during the pendency of Mr. Mkhaitir's appeal, the Working Group on Arbitrary Detention adopted Opinion No. 35/2017 (i) concluding that Mauritania had violated Mr. Mkhaitir's human rights under Articles 18 and 19 of the Universal Declaration of Human Rights and Articles 14(3), 18 and 19 of the International Covenant on Civil and Political Rights; (ii) calling for Mr. Mkhaitir's immediate release, and (iii) stating his right to seek compensation.

1750 K Street NW, 7th Floor • Washington, D.C. 20006 • +1 202.223.3733 • www.freedom-now.org
Our mission is to free prisoners of conscience through focused legal, political and public relations advocacy efforts.

Mauritania did not comply with the Working Group’s Opinion. Instead, Mr. Mkhaitir’s appeal was subject to several delays until, on November 9, 2017, the Nouadhibou Court of Appeals quashed Mr. Mkhaitir’s death sentence and sentenced him to two years of time already served.

Notwithstanding the Working Group’s Opinion, and despite the Court of Appeals’ order for his immediate release, today Mr. Mkhaitir continues to be held in extra-judicial detention. The government refuses to disclose his whereabouts or provide any information about its plans for his release.

Mr. Mkhaitir’s lawyers have not been able to communicate him regularly—and he has not been permitted to communicate with his attorneys at all—so little concrete information is known about his conditions of detention. However, we have recently received information that Mr. Mkhaitir’s health has deteriorated rapidly. He suffers from migraines and pulmonary issues severe enough to restrict his mobility, and he also suffers from severe abdominal pain. He has apparently received conflicting diagnoses as to whether the latter is symptomatic of appendicitis.

The conduct of the Mauritanian executive authorities shows a deep contempt for the rule of law and the Mauritanian judiciary has proved unwilling or unable to challenge the government’s blatant disregard for its rulings. This is likely due to the judiciary’s lack of independence from the executive branch. The UN Human Rights Committee has expressed concern that judiciary is so dependent on the executive branch that there can be no guarantee of an independent tribunal in Mauritania.¹ The judiciary’s subservience to the executive is exacerbated by the fact that members of the judiciary lack even “a common, university-level background,” let alone training in human rights and criminal procedure.²

Moreover, on April 27, 2018, Mauritania’s National Assembly passed a law to replace Article 306 of the Criminal Code which makes the death penalty mandatory for anyone convicted of “blasphemous speech” and acts deemed “sacrilegious.” The new law eliminates the possibility under Article 306 of substituting a prison term for the death penalty if the accused promptly repents. The law also extends the scope of application of the death penalty for apostasy to include “renegade acts.” There can be little question that this law, which was first proposed just one week after the Court of Appeals’ decision in Mr. Mkhaitir’s case, was a direct response to the order of Mr. Mkhaitir’s release.

The longer Mr. Mkhaitir is detained in violation of Mauritanian and international law, the more precarious his situation becomes. In addition to the serious risks to his health, while Mr. Mkhaitir remains in custody it is possible that he someday may be forced to face retrial under the revised Article 306.

¹ Human Rights Committee, Concluding observations on the initial report of Mauritania, U.N. Doc. CCPR/C/MRT/CO/1, ¶ 20 (21 Nov. 2013) (emphasis added).

² 2008 Working Group Report, *supra* note **Error! Bookmark not defined.**, ¶ 73; *see id.*, ¶ 20.

Mr. Mkhaitir's advocates respectfully requests the support of your office during this critical time. Freedom Now, together with Dechert LLP, represent Mr. Mkhaitir as his international *pro bono* counsel and we maintain contact with his family through his local counsel. In the pages that follow, we set forth more detailed information about Mr. Mkhaitir's case. We ask that your office grant the relief requested in Section III below.

We would welcome the opportunity to provide your offices with further information or to clarify any issues in relation to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kate Barth", with a stylized flourish extending to the right.

Kate Barth
Legal Director
Freedom Now

I. Summary of the Facts Surrounding Mr. Mkhaitir's Trial and Recent Appeal

Mohammed Shaikh Ould Mohammed Mkhaitir is a young accountant in Nouadhibou, an industrial city in the north of Mauritania. In December 2013, Mr. Mkhaitir published an anonymous article on www.aqlame.com, a Mauritanian news website whose anonymous posting format had given rise to a new forum for social and religious critiques. The article, entitled “Religion, Religiosity and Blacksmiths,”³ was a social commentary on the nexus between religion and discrimination. It denounced caste-based classism and racism, with the goal of challenging rampant discrimination against members of the Moulamine caste⁴—known as the “blacksmith” caste and considered the “lowest of the low.”⁵

Many Mauritanian Muslims took offense at the way in which Mr. Mkhaitir's article characterized certain actions of the Prophet Mohammed. Although Mr. Mkhaitir had published the article anonymously, the authorities managed to obtain Mr. Mkhaitir's name. On January 2, 2014, he was summoned to the local police station, where he was arrested. He was charged with the crimes of (1) insulting the Prophet Mohammed and (2) apostasy, as set forth in Article 306, Title II, Section IV of the of the Mauritanian Penal Code.⁶

Protests began immediately. The day after Mr. Mkhaitir's arrest, a businessman from Nouadhibou named Abi Ould Ali called for Mr. Mkhaitir's murder, placing a EUR 4,000 bounty on his head. Civil society groups that expressed support for Mr. Mkhaitir, such as The Organization for a Green and Democratic Mauritania, were accused of being “traitors to Islam.”⁷ The editor of *Aqlame* took down the article in response to angry comments and tried to absolve himself of responsibility by claiming that he had not read the article prior to publishing it.⁸ Mr. Mkhaitir's own family members so feared for their safety that they wrote a joint letter condemning the article and distancing themselves from Mr. Mkhaitir.⁹

³ The original article can be found at <http://www.yennayri.com/news.php?extend.973>. For translated excerpts and commentary, see Alice Bullard, *Religion, Race, and Repression in Mauritania: The Ould Mkhaitir Apostasy Affair*, JADALIYYA (May 29, 2014), http://www.jadaliyya.com/pages/index/17914/religion-race-and-repression-in-mauritania_the-oul.

⁴ See Jemal Oumar, *Mauritians Condemn Call to Kill Author*, ALL AFRICA (Jan. 10, 2014), <http://allafrica.com/stories/201401120133.html> (last visited July 2015) (“They are inciting people to kill a young man just because he wrote an analytical article in which he referred to some of the positions of the Prophet Mohammed. This means that Mauritania is on the verge of entering an era of terrorism . . .”) (quoting researcher Salihy Ould Ab).

⁵ *Call for Young Blogger's Death Sentence to be Quashed on Appeal*, REPORTERS WITHOUT BORDERS (Dec. 31, 2014), <http://en.rsf.org/mauritania-call-for-young-blogger-s-death-31-12-2014,47435.html> (“[H]e only wanted to defend the lowly ‘maalemine’ (blacksmith) caste, to which he belongs.”).

⁶ The Mauritanian Penal Code, established in 1983, can be found (in French) here: <http://www.droit-afrique.com/images/textes/Mauritanie/Mauritanie%20-%20Code%20penal.pdf>. See *Free Mohamed Cheikh! African youths sign petition to free journalist sentenced to death in Mauritania*, AMEYAW DEBRAH, (Jan. 6, 2015), <http://ameyawdebrah.com/free-mohamed-cheikh-african-youths-sign-petition-free-journalist-sentenced-death-mauritania>.

⁷ U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, MAURITANIA 2014 INTERNATIONAL RELIGIOUS FREEDOM REPORT, p. 4, <http://www.state.gov/documents/organization/238450.pdf>.

⁸ *Id.*

⁹ Zouhair Mazouz, *Mauritania. Writer, Blogger, “Apostate”*, FREE ARABS (Jan. 13, 2014) (citing Joint letter from Mkhaitir's family).

The government remained silent as street-corner fulminations became protest marches with participants numbering in the thousands, eventually escalating into violent clashes between angry mobs and police forces. Protesters gathered outside the court where Mr. Mkhaitir was to be tried. In one instance, the President of Mauritania dressed in traditional Mauritanian clothing and joined a protest related to Mr. Mkhaitir in order to communicate to the protestors that he was standing with them against Mr. Mkhaitir. When the protests became violent, the authorities were forced to reinforce security around the court.¹⁰

Mr. Mkhaitir was held for almost one year before his trial began on December 23, 2014 before the Criminal Court of Dakhlet Nouadhibou.¹¹ He was tried before a chamber of five judges, two of whom were popular designees selected by the Ministry of Justice.¹² Mr. Mkhaitir was represented by two public defenders.¹³ In contrast, seven attorneys from Islamic organizations appeared alongside the prosecution.¹⁴ The atmosphere of violence and intimidation continued through the two-day trial. A crowd gathered, both inside and outside the courtroom, to await Mr. Mkhaitir's conviction.

On December 24, 2014 the court declared Mr. Mkhaitir guilty of the crimes of (1) hypocrisy and (2) insulting the Prophet, and sentenced him to death by firing squad.¹⁵ When the verdict was read aloud, Mr. Mkhaitir fainted as the crowd cheered.¹⁶

Under Article 306 of the Mauritanian Penal Code in effect at that time, if the defendant repents, the maximum sentence for apostasy is two years. In its decision, however, the court failed to acknowledge Mr. Mkhaitir's multiple repentances, and instead found him guilty of hypocrisy, a crime with which he was never charged. Repentance is not a mitigating factor for the crime of hypocrisy. The court discussed what it considered to be historical inaccuracies in the article and took this as evidence that Mr. Mkhaitir's repentance was not sincere. Mr. Mkhaitir and his lawyers did not know until the verdict was read that the court was considering the crime of hypocrisy. Mr. Mkhaitir's defense team focused its defense on his repentance in reliance on the fact that Mr. Mkhaitir was being tried for apostasy, and they were therefore shocked when Mr. Mkhaitir was sentenced to death for a different crime altogether.

Mr. Mkhaitir's counsel filed an appeal on his behalf in October 2015, but the proceedings were delayed several times due to the court repeatedly requiring Mr. Mkhaitir's counsel to resubmit

¹⁰ *Id.*

¹¹ *In Mauritania, Blogger Sentenced to Death for Apostasy*, COMMITTEE TO PROTECT JOURNALISTS (December 26, 2014), <https://cpj.org/2014/12/in-mauritania-blogger-sentenced-to-death-for-apost.php> ("The trial began Tuesday but was postponed to Wednesday by the judge after an altercation broke out in court when the prosecutor admitted to being a member of the caste that the blogger criticized in his article . . . Mohamed belongs to a lower social class.").

¹² Private communication.

¹³ *See id.* (explaining that Mkhaitir's first lawyer, Maitre Icheddou, was the subject of numerous threats and resigned early on in his representation of Mkhaitir and that the two lawyers described here resigned post-conviction).

¹⁴ Mauritanian law does not permit human rights organizations to take part in criminal proceedings. An exception to this rule allows Islamic organizations to participate at the trial.

¹⁵ *The Islamic Republic of Mauritania*, THE ADVOCATES FOR HUMAN RIGHTS (Nov. 2015), http://www.theadvocatesforhumanrights.org/uploads/mauritania_hrc_dp_march_2015_2.pdf.

¹⁶ *Lawyers Appeal Death Sentence in Mauritania Apostasy Case*, AFRICA REVIEW (Dec. 29, 2014), <http://www.africareview.com/News/Lawyers-appeal-death-sentence-in-Mauritania-apostasy-case/-/979180/2572118/-/jf89oy/-/index.html>.

their requests for an appellate hearing. After months of delay, the Court of Appeals heard the appeal and rendered a decision on April 21, 2016.¹⁷ In a decision rendered the same day as the appellate hearing, the Court of Appeal simultaneously confirmed Mr. Mkhaitir's conviction and referred the case to the Supreme Court for consideration of (1) the qualification of the offense (*i.e.*, apostasy versus hypocrisy) and (2) the sincerity of Mr. Mkhaitir's repentance. The Court of Appeals indicated that Mr. Mkhaitir's actions constituted apostasy rather than hypocrisy, and that in cases of apostasy, the Supreme Court must assess the sincerity of the defendant's repentance.¹⁸

The Supreme Court of Mauritania heard Mr. Mkhaitir's appeal on November 15, 2016. Initially, Mr. Mkhaitir's defense counsel was optimistic that the Supreme Court would accept Mr. Mkhaitir's repentance and prevent his execution; after all, Article 306 of the Mauritanian Penal Code in effect at that time called for the death penalty to be cancelled if a convicted person repents, and Mr. Mkhaitir had publicly repented several times during the course of his trial. Even under Mauritanian law, it seemed clear that Mr. Mkhaitir's repeated apologies should prevent his execution.

However, in the days leading up to the hearing, the Forum of Imams and Ulema issued a fatwa demanding that the death sentence be carried out: "Kill him and bury him in conformity with the law of God."¹⁹ They asked that Mr. Mkhaitir be shown no mercy.²⁰ The statement reinvigorated public outrage, which had been rampant during Mr. Mkhaitir's initial trial. On the day of the appeal, an angry and threatening crowd of thousands gathered outside the courthouse to demand Mr. Mkhaitir's execution.²¹ One protester, who local Mauritania media reported to be the leader of an Islamist pressure group, was carrying a gun.²² Amidst the chaos, the Supreme Court delayed its verdict.

Ultimately, the Supreme Court remanded the case to the Court of Appeals for further findings. On November 9, 2017, the Nouadhibou Court of Appeals quashed Mr. Mkhaitir's death sentence and sentenced him to two years of time already served.

Nevertheless, Mr. Mkhaitir remains in custody and his whereabouts unknown. He has not been permitted to communicate with his attorney and can only speak with his family members sporadically. His health has deteriorated significantly, allegedly resulting in a brief hospitalization sometime in the summer of 2018. Mr. Mkhaitir was allegedly released from hospital and returned to detention without receiving the full care he needed.

¹⁷ Private communication.

¹⁸ Private communication.

¹⁹ *Mauritania: Muslim Leaders Call for Blogger's Death Sentence to be Upheld*, NEWSWEEK (Nov. 15, 2016), <http://europe.newsweek.com/mauritania-muslim-leaders-call-bloggers-death-sentence-be-upheld-520829?rm=eu>.

²⁰ *Mauritania Clerics Want 'Apostasy' Blogger Executed*, BBC (Nov. 14, 2016), <http://www.bbc.com/news/world-africa-37975552>.

²¹ *IHEU Briefing on Mohamed Cheikh Ould M'Kheitir Case*, IHEU (Nov. 16, 2016), <http://iheu.org/iheu-briefing-on-mohamed-cheikh-ould-mkheitir-case/>.

²² *Id.*

II. Legal Analysis Engaging the Special Rapporteur’s Mandate

International law has codified the necessity of fairness in trials, sentencing, and appeals. Pursuant to Article 10 of the UDHR, “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Similarly, Article 14 of the ICCPR guarantees criminal defendants “a fair and public hearing by a competent, independent and impartial tribunal established by law” and provides for review of any conviction by a higher tribunal. In interpreting Article 14 of the ICCPR, the UN Human Rights Committee has confirmed the necessity of protecting judges against intimidation.²³

The Basic Principles on the Independence of the Judiciary include the requirement that the judiciary “decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.” The Principles dictate that each Member State is responsible for providing “adequate resources to enable the judiciary to properly perform its functions.”

Mr. Mkhaitir did not receive a fair trial before the Mauritanian courts. Nevertheless, pursuant to the decision of the Nouadhibou Court of Appeals, he has served his sentence and must be released from custody. His continued detention is unlawful under Mauritanian and international law.

Mr. Mkhaitir’s circumstances clearly require judicial intervention. However, no such intervention appears to be forthcoming. The mandate of your office recognizes the link between the weakening of safeguards for the judiciary and the frequency of violations of human rights.

Here, the public outcry and protests in Mauritania calling for Mr. Mkhaitir’s death have rendered the Mauritanian courts impotent, creating a risk that Mr. Mkhaitir will remain in custody indefinitely. The significant threat of violence against Mr. Mkhaitir, his family, his lawyers and the members of the Supreme Court of Mauritania falls squarely within the type of improper influence and threat prohibited by international law. These circumstances directly engage your office’s mandate to work to ensure that the judiciary remains impartial and independent, and that it operates effectively to ensure compliance with judicial decisions.

III. Request for Urgent Action

In accordance with your mandate to “act[] on information submitted to his/her attention concerning alleged violations relating to the independence and impartiality of the judiciary and the independence of the legal profession by sending allegation letters and urgent appeals to concerned Governments to clarify and/or bring these cases to their attention,”²⁴ we request that your office act on the foregoing information and urge the government of Mauritania to faithfully carry out the decision of the Court of Appeals ordering Mr. Mkhaitir’s release. This matter

²³ General Comment 32, UN Doc. No. CCPR/C/GC/32, ¶19 (Aug. 23, 2007).

²⁴ Mandate of the Special Rapporteur on the Independence of Judges and Lawyers (2014), A/HRC/RES/26/7.

involves serious and ongoing risks to Mr. Mkhaitir's health and well-being and therefore satisfies your office's criteria for the issuance of an urgent appeal to the government of Mauritania.

Specifically, we seek the following actions from the Government of the Islamic Republic of Mauritania:

- to ensure that Mr. Mkhaitir is released immediately from detention;
- to ensure that Mr. Mkhaitir is afforded immediate access to satisfactory medical treatment; and
- to ensure the physical safety of Mr. Mkhaitir, his family, his lawyers, and all judicial personnel working in relation to Mr. Mkhaitir's case.

IV. Information Concerning Authors of Present Urgent Appeal

Freedom Now is a non-profit, non-governmental organization that works to free individual prisoners of conscience through focused legal, political and public relations advocacy efforts. Along with Dechert LLP, Freedom Now has been retained by Mr. Mkhaitir as his international *pro bono* counsel.