United Nations A/HRC/WGAD/2019/65

General Assembly

Distr.: General
23 January 2020

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019

Opinion No. 65/2019 concerning Ammar Yasser Abdelaziz el-Sudany, Belal Hasnein Abdelaziz Hasnein and two other minors[1] (Egypt)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 9 August 2019, the Working Group transmitted to the Government of Egypt a communication concerning Ammar Yasser Abdelaziz el-Sudany, Belal Hasnein Abdelaziz Hasnein, Minor A and Minor B. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

[1] Two of the four individuals agreed to their name being published in an official public opinion by the Working Group and in a public report to the Human Rights Council.

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Ammar Yasser Abdelaziz el-Sudany, born on 10 August 1999, is an Egyptian citizen and former secondary school student from the village of Tanbasha, Berket El-Sabaa, in the Monofiyah governorate, in Egypt. He was a minor at the time of the arrest.

5. Belal Hasnein Abdelaziz Hasnein, born on 17 February 1999, is an Egyptian citizen from Kafr Mit Bashar, Minya El-Qamh, in the Sharqiyah governate, in Egypt. He was a minor at the time of the arrest.

6. Minor A, an Egyptian citizen and former secondary school student, was a minor at the time of the arrest.

7. Minor B, a secondary school student, was a minor at the time of the arrest.

(a) Arrest and detention

8. According to the source, Mr. El-Sudany was arrested at his home on 4 December 2016. At the time of his arrest, his parents were not at home and he was alone with his minor siblings. Allegedly, Mr. El-Sudany was arrested while bathing and was beaten in the course of his arrest. He was blindfolded and taken to the headquarters of the National Security Agency centre in Shebin El-Kom, Monofiyah. The previous day, a family member had been arrested and interrogated for his political affiliations. The latter had been told that, if he did not confess, Mr. El-Sudany, would be tortured. Mr. El-Sudany was tortured in front of the aforementioned family member between approximately 4 and 11 December 2016. At the instruction of his interrogators, Mr. El-Sudany eventually made a false verbal confession of being a member of the Muslim Brotherhood.

9. Reportedly, on 8 March 2017, Mr. El-Sudany was brought before the Supreme State Security Prosecution, where he did not repeat the verbal confession he had made earlier to national security officers. Mr. El-Sudany was not allowed the presence of a lawyer at that time. It was also effectively the date of his first pretrial detention renewal hearing.

10. According to the source, on the same day, Mr. El-Sudany was transferred to the Shebin El-Kom Transfer Prison, where he stayed for one month. The source explains that his family was allowed to speak to him at that time for one minute. At the facility, he was also detained alongside adults and denied access to medical care. On 7 October 2017, Mr. El-Sudany was transferred to the high-security Al-Aqrab 2 Unit of the Tora prison complex. The source indicates that Mr. El-Sudany had seven pretrial detention renewal hearings before his trial began.

11. With regard to Minor A, the source reports that he was arrested on 9 September 2016 in Minya El-Qamh, while on his way to school. Two plainclothes police officers exited from an unmarked car, blindfolded Minor A and beat him. Minor A's family believes that no warrant was presented during his arrest.

12. Following his arrest, Minor A was taken to the National Security Agency headquarters in the Zagazig Security Directorate. Neither at the time of his arrest nor subsequently have Minor A or his family been informed of the reason for his arrest. Minor A was allegedly tortured from 9 September to 3 November 2016 and was forced to sign a confession of being a member of the Muslim Brotherhood.

13. The source reports that, on 3 November 2016, Minor A was brought before the Supreme State Security Prosecution. It is not clear whether Minor A repeated his false confession to a prosecutor at that point. It was also effectively the date of his first pretrial detention renewal hearing. He was denied the presence of a lawyer at the hearing.

14. Reportedly, from 4 November 2016 to 3 February 2017, Minor A was held at the El-Marg Juvenile Detention Centre. On 8 November 2016, Minor A's family was allowed to visit and to speak to him for the first time since his arrest. Subsequently, he was allowed weekly visits by family members. On 3 February 2017, Minor A was transferred to the Zagazig Police Station, where he was held until 3 April 2017. During those two months, his family was permitted to visit him only once, for a period of five minutes. On 3 April 2017, Minor A was transferred to Tora prison, where he has been held since then.

15. Minor A had 14 pretrial detention renewal hearings before his trial began. At each hearing, his detention was renewed for a further 15 or 45 days.

16. With regard to Minor B, the source indicates that, on the night of 25 August 2016, national security officers forcibly entered Minor B's home without a warrant, looking for his relative. Unable to find him, they allegedly abducted Minor B. They blindfolded him and beat him as they put him in their car. They took him to the National Security Agency headquarters in the Zagazig Security Directorate.

17. On 5 November 2016, Minor B was reportedly brought before the Supreme State Security Prosecution. He was not allowed the presence of a lawyer. It was also effectively the date of his first pretrial detention renewal hearing.

18. The source explains that, between 5 November 2016 and 14 October 2018, Minor B was held in the El-Marg Youth Penal Institution. On 9 November 2016, his family was allowed to visit and to speak to him for the first time since his arrest. Prior to that point, his family did not know whether he was alive. On 14 October 2018, he was transferred to the Zagazig Police Station for an unknown period of time, in preparation for his transfer to Tora prison. Sometime in November 2018, he was transferred to Tora prison, where he remains.

19. Minor B had 14 pretrial detention renewal hearings before his trial began. At each hearing, his detention was renewed for a further 15 or 45 days.

20. With regard to the case of Mr. Hasnein, the source reports that, on 24 August 2016, Mr. Hasnein was arrested in the village of Kafr Mit Bashar, while on his way to meet friends at Mahatta Square. Three plainclothes police officers exited a minibus, blindfolded Mr. Hasnein, beat him and forced him into the minibus. Mr. Hasnein was then taken to the National Security Agency headquarters in the Zagazig Security Directorate.

21. Reportedly, on 3 November 2016, Mr. Hasnein was brought before the Supreme State Security Prosecution. He was not allowed the presence of a lawyer at the hearing. It was also effectively the date of his first pretrial detention renewal hearing. Around that time, Mr. Hasnein's family were allowed to visit and to speak to him for the first time. Until that date, they did not know whether he was alive.

22. According to the source, between 3 November 2016 and 17 February 2017, Mr. Hasnein was held in the El-Marg Youth Penal Institution, where he was allowed weekly one-hour family visits. On or around 17 February 2017, Mr. Hasnein was transferred to the Zagazig Police Station, where he was held until March 2017. In March 2017, Mr. Hasnein was transferred to Tora prison, where he has been held since.

23. Mr. Hasnein had 14 pretrial detention renewal hearings before his trial began. At each hearing, his detention was renewed for a further 15 or 45 days.

24. The source also reports that the four individuals were tortured and mistreated following their arrests. The source alleges that Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B were hung from the ceiling and severely beaten and that some of them were administered electric shocks to their genitals. Mr. El-Sudany was left suspended from the ceiling for three days. Minor B was subjected to threats of physical violence. As a result of the torture and mistreatment, Minor A sustained injuries to his right hand and right foot and Mr. Hasnein has lasting cognitive deficiencies, including with speech and memory.

25. It was also reported that the four individuals were subjected to enforced disappearances for periods of between approximately two and three months after their arrests.[2] The source explains that, for the entirety of that time, the four individuals were kept blindfolded. They were denied access to medical care, and food, water, bathroom facilities and clothing were restricted. They were held in a 2-metre by 3-metre cell with approximately 25 adult inmates and were tied with a rope or with a chain connected to other inmates. During that period, they were not able to contact their lawyers or their families.

26. With regard to the conditions of detention in Tora prison, the source indicates that the four individuals are imprisoned in narrow cells lacking ventilation with one or multiple other prisoners. There is no ventilation, and they are not allowed to go outdoors at any time. They are prohibited from seeing a doctor. They are given very little food and have been exposed to repeated beatings. They are forced to sleep on the floor of their cells with a blanket and no mattress.

27. The source also reports that the four individuals have never been permitted to meet with a lawyer. They were allowed the presence of a lawyer at trial, since their second pretrial detention renewal hearing, but they have been prevented from conferring, meeting or speaking with counsel in private.

(b) Charges and trial

28. The source alleges that the four individuals are among the 304 defendants in case number 64/2017 in the North Cairo Military Court. The indictment lists 34 charges in total. On 12 October 2017, the prosecution ordered that all defendants be referred to the Military Criminal Court. The four individuals are charged under two counts of the indictment related to terrorism and joining an armed gang.[3]

29. The source explains that the charging document setting out the offences with which the four individuals are charged is vague. The document does not indicate when each offence is alleged to have occurred and describes a broad alleged criminal conspiracy without establishing the four individuals' individual culpability or even describing their specific alleged involvement – evidenced by the fact that the only two charges levied against the four individuals are also ascribed to all 304 defendants in the trial.

30. Reportedly, the trial began on 6 November 2017 at the Institute of Police Secretaries in Tora prison. A total of 59 trial hearings had taken place as at the date of the submission of the source. Proceedings are closed to the public, and little information is available on the progress of the hearings. The four individuals' families were permitted access only to the

[2] The source indicates that Mr. El-Sudany was subjected to enforced disappearance for approximately three months after his arrest; Minor A was subjected to enforced disappearance from 9 September 2016 to 3 November 2016; Minor B was subjected to enforced disappearance between 25 August 2016 and 5 November 2016; and Mr. Hasnein was subjected to enforced disappearance from 24 August to 3 November 2016.

[3] Count 1: joining a terrorist organization with the purpose of disrupting public peace and disabling public institutions; acquiring and possessing automatic weapons for the purposes of terrorism; acquiring and possessing ammunition for automatic firearms without a license; acquiring and possessing 9-mm firearms without a license; acquiring and possessing ammunition for 9-mm firearms without a license; acquiring and possessing explosives without a license; participating in a criminal agreement whose purpose was to commit crimes to destroy public property, to destroy armed forces and police property, to kill anyone belonging to the police and armed forces, to possess automatic weapons and explosives with the intent to use them in activities to undermine security and the Government and to disable the functioning of the Constitution; and agreeing to join an armed gang, which is the subject of the third charge. They distributed roles among themselves and drew up a plan for implementation. They formed armed groups seeking to implement the plans of the Muslim Brotherhood and establish control over the reins of Government under the pretext of the "Islamic caliphate". Count 2: joining an armed gang formed in contravention of the law with the purpose of disabling the functioning of the Constitution and the law, preventing State institutions from functioning, assaulting the personal freedom and general rights of citizens, targeting police officers and soldiers and carrying out assaults in public places and facilities.

first hearing. Lawyers for the four individuals indicated that they had submitted to the court at the earliest opportunity proof that their clients were juveniles at the time of their arrests, made the court aware that their clients were tortured into making false confessions and requested that their clients receive forensic medical examinations for signs of torture and mistreatment. However, the court has not responded to those requests. On 8 October and 12 November 2018, the judge addressed the four individuals directly, at which point, the source confirms that at least Mr. El-Sudany reiterated to the judge that he had been tortured into making a false confession.

31. The source specifies that the number of co-defendants being tried en masse and the failure to make the trial public make it difficult to determine the exact procedural status of the trial, but the source has been informed that, at the hearing held on 25 February 2019, the court finished hearing prosecution witnesses. A verdict was reportedly to be delivered on 30 November 2019.

(c) Legal analysis

32. As a preliminary matter, the source explains that, at the time of their arrests, the four individuals were all under 18 years of age. It is therefore submitted that the breaches of their right to be free from arbitrary arrest and detention, explained below, are aggravated by the failure to recognize the fact that they were juveniles at all stages of the proceedings.

(i) Category I

33. The source alleges that there is a failure to produce a warrant for the arrest of the four individuals. As explained above, none of the four individuals were arrested in flagrante delicto, therefore the Egyptian authorities failed to comply with article 40 of the Code of Criminal Procedure, by failing to present an arrest warrant at the time of each arrest.

34. Furthermore, allegedly, the four individuals were all subjected to enforced disappearance, for periods ranging from two to three months, following their arrests by Egyptian authorities, and the four individuals were subjected to torture and mistreatment. During those periods, none of the four individuals were formally charged with any offence, nor were they informed of the specific offences for which they had been arrested. That treatment amounts to a clear breach of articles 37 (c) and 40 (2) (b) (ii) of the Convention on the Rights of the Child.

35. The source also reports that the four individuals have been in continuous detention for periods ranging from 29 to 32 months without any attempt by the Egyptian authorities to sanction or review their detention in line with domestic legislation and article 37 of the Convention on the Rights of the Child. Indeed, the four individuals were brought before the prosecutor on multiple occasions for the renewal of their detention. On 6 November 2017, their trial began, and they were brought before a judge for the first time. At that hearing, they were not provided with an opportunity to challenge the legality of their arrest or detention. The source further specifies that, during those periods of pretrial detention, the authorities did not act on the authorization of the Court of Cassation and therefore acted in direct contravention of articles 142 and 143 of the Code of Criminal Procedure. In further contravention of article 143 of the Code, no official request for the four individuals' continued detention after their arrest has ever been presented to them, their families or their legal counsel.

36. In addition, the source notes that, given that the four individuals have been incarcerated for periods ranging from 29 to 32 months, since the dates of their arrests, and remain incarcerated pending the outcome of the trial – the date of which is unknown – their detention does not comply with article 9 (3) of the International Covenant on Civil and Political Rights and is not within a "reasonable time" frame.

37. In view of those facts, the source considers that the four individuals have been detained, charged and tried without regard to due process of law, rendering their deprivation of liberty arbitrary under category I.

(ii) Category II

38. The source argues that Mr. El-Sudany's detention amounts to a reprisal against his family member for his perceived political affiliation and is therefore arbitrary within the meaning of category II.

39. According to the source, that motivation is evident in the unlawful treatment of Mr. El-Sudany and, in particular, the torturing of Mr. El-Sudany in front of his family member between approximately 4 and 11 December 2016 at the National Security Agency centre in Shebin El-Kom.

(iii) Category III

40. The source argues that the failure to observe international norms relating to the right to due process and fair trial renders the four individuals' detention arbitrary within the meaning of category III.

41. First, the source claims that the mass trial, with 300 other defendants, violates the four individuals' rights to a fair trial protected by article 10 of the Universal Declaration of Human Rights, article 40 (2) (b) (iii) of the Convention on the Rights of the Child and articles 9 (1)–(4), 14 (2) and (3) (a)–(c) and (e) of the Covenant. The source argues that the mass trial procedure does not allow for the four individuals' individual responsibility in the alleged offences to be determined. Consequently, a decision on culpability beyond reasonable doubt cannot be reached. Those breaches are aggravated by the fact that none of the four individuals have been able to properly speak to their lawyers during the trial proceedings, therefore prohibiting them from access to legal representation.

42. Second, the source argues that the four individuals are being tried in a military court, despite the fact that all four are civilians, which violates article 10 of the Universal Declaration of Human Rights, article 40 (2) (b) (iii) of the Convention on the Rights of the Child and articles 9 (1)–(4) and 14 (2) and (3) (a)–(c) and (e) of the Covenant. The source recalls that military courts operate under the purview of the Ministry of Defence and, as such, typically deny defendants basic civilian rights such as access to a lawyer, prompt hearing before a judge and the right to be informed of the charges against them. Furthermore, the Military Judiciary Law grants entities within the Ministry the authority to regulate it. As a result, any military officers serving as judges are professionally and culturally obstructed from material independence.

43. Third, the source challenges the failure to recognize the fact that the four individuals are juveniles and their protection as prescribed in national law.[4] The source recalls that, at the time of their arrest, the four individuals were between 15 and 17 years of age and therefore juveniles under domestic and international law. As such, Egypt was obliged to comply with the special rules for dealing with juveniles alleged to have infringed the penal law, as stipulated in articles 37 and 40 of the Convention on the Rights of the Child.[5]

44. The source emphasizes that, given that the four individuals were juveniles at the time of their arrest, they should have been tried in a juvenile court unless there was reason for them to be tried as adults in a military court, pursuant to article 122 of the Child Law. The source notes, however, that that provision is contrary to the United Nations Standard

[4] Egypt, Law No. 12/1996 (Child Law), in particular articles 2, 95, 111 and 122; and article 80 of the Constitution.

[5] The source claims that the authorities: (a) tortured the four individuals in order to force them into signing confessions; (b) subjected them to other cruel, inhuman and degrading treatment, including holding them in overcrowded cells with other inmates, both adults and juveniles, and denying them access to food, water and sanitary facilities, in breach of articles 37 (a), and (c) and 40 (2) (b) (iv) and (vii) of the Convention on the Rights of the Child; (c) failed to provide them with a warrant, in breach of article 37 (b) of the Convention; (d) failed to allow the four individuals contact with their families, in breach of article 37 (c) of the Convention; and (e) failed to allow the four individuals access to a lawyer or other legal assistance throughout their detention; they have only been able to speak with a lawyer during trial hearings. The foregoing conduct is in breach of articles 37 (d) and 40 (2) (b) (ii) of the Convention.

Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the Convention on the Rights of the Child[6] and constitutes discrimination against the four individuals. Moreover, the source argues that, as a result of the four individuals being tried as adults in a military court, in accordance with article 122 of the Child Law, their rights enshrined in the Child Law have been violated.[7]

45. The source acknowledges that the four individuals have not been charged with any lethal offence. However, they may be sentenced to death for the alleged commission of a number of non-lethal offences which nonetheless carry the death penalty under Egyptian law. If handed down, the four individuals' death sentences would run counter to the duty of Egypt under international law to ensure that capital punishment is only ordered for offences which meet the "most serious crimes" threshold. The source further argues that there may therefore be a violation of the prohibition on the application of the death penalty for juveniles. Moreover, the four individuals have not been charged with any offences that meet the internationally recognized threshold of the "most serious crimes". The source notes that Egypt is bound to ensure that charging practices are in line with that threshold and that the death sentence is only applied in cases in which the offence resulted in loss of life.

46. In addition, the source submits that there is a violation of the right to a public trial before a competent, impartial court, as enshrined in article 14 (1) of the Covenant. Indeed, the source claims that the North Cairo Military Court, in its failure to apply the Child Law, is not competent. Had the Court been competent, it would have applied the Child Law, Egyptian legislation whose application would have had a significant impact on the procedural safeguards afforded to the four individuals as juveniles. Furthermore, the source submits that the fact that the families of the four individuals have been denied access to all of their hearings demonstrates that there was a violation of the four individuals' right to a public trial.

47. The source also claims a violation of the right to be informed promptly of the charges and to be tried without delay. Reportedly, long periods of time elapsed before each individual was informed of the charges against him (95 days, 56 days, 73 days and 72 days), and no arrest warrants were presented to them. To the source, that is a violation of the four individuals' right to be promptly informed of the charges against them, as enshrined in article 14 (3) (a) of the Covenant. Furthermore, the four individuals were not brought before a judge until long after their arrests (339 days, 424 days, 439 days and 438 days) and the date of issuance of the trial judgment is unknown. The source therefore concludes that that is a violation to the right to be tried without delay, as enshrined in article 14 (3) (c) of the Covenant.

48. As explained above, the four individuals have allegedly not been afforded the opportunity to prepare their defence with a lawyer and were not able to consult their lawyers in advance to challenge the legality of their arrests or detentions, contrary to their rights enshrined in article 14 (3) (b) of the Covenant and article 37 (d) of the Convention on the Rights of the Child.

49. The source also submits that there is a violation of the right to be free from self-incrimination, torture and ill-treatment. The source explains that, at trial, the four individuals' lawyers raised the issue of their torture and/or ill-treatment upon arrest,

[6] The source refers to Committee on the Rights of the Child, general comment No. 10 (2007) on children's rights in juvenile justice, para. 36.

[7] The source argues that the rights infringed, which are protected under the Child Law, are the following: restrictions on who is permitted to attend their trial (article 126); the right to have a guardian or custodian attend their trial (article 126); the right to be exempt from a trial and have a guardian or custodian attend in their place (article 126); the right for social observers to attend their trial and open a file for them containing a comprehensive assessment of their education, psychological, mental, physical and social status (article 127); the requirement for the court to deal with the case in the light of the information in the file compiled by a social observer (article 127); and the right to be in a special punitive institution for children (until the age of 21) following a penalty restricting their freedom (article 141).

including that it was used for the purpose of forcing confessions from some of them. No steps have been taken by the courts to investigate any of the four individuals' allegations ex officio as required by articles 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is expected that that will result in a reliance at trial on the confessions of Mr. El-Sudany and Minor A as evidence, in violation of article 15 of the Convention against Torture. The court's reliance on such evidence would amount to a violation of both defendants' right to be free from self-incrimination.

50. The source recalls that the four individuals have been tortured, beaten and detained in small, severely overcrowded and unsanitary prison cells. They are denied all medical treatment and outside clothing and have little access to food. Family visits are extremely limited. For the source, such prison conditions amount to ill-treatment, place the four individuals at risk and are in clear violation of their rights to be free from such treatment and to be treated with dignity and respect under articles 37 and 40 of the Convention on the Rights of the Child and article 5 of the Universal Declaration of Human Rights. Therefore, their continued detention under those conditions places the four individuals at serious risk of further ill-treatment, amounting to an egregious violation of their human rights.

51. The source also recalls that pretrial detention must only be used as a last resort, however, immediately following their arrests, the four individuals were deprived of liberty and housed in crowded cells with dozens of adult inmates in national security offices. The source argues that those facilities are not designated as juvenile detention facilities by the Government of Egypt. This placed the four individuals at risk of ill-treatment and violated their rights under article 37 (c) of the Convention on the Rights of the Child.

52. The State has allegedly failed to afford the four individuals any protection of their rights under article 11 of the Universal Declaration of Human Rights and article 14 of the Covenant, concerning the right to be presumed innocent. The source argues that, following their arrests, all four of the individuals were subjected to periods of enforced disappearance, which amounted to an arbitrary and illegitimate use of detention powers and a violation of the four individuals' right to be presumed innocent.

(iv) Category V

53. The source explains that the four individuals have been discriminated against, as Egyptian authorities have failed to afford them enhanced protections associated with their status as juveniles. Furthermore, given that the motivation for Mr. El-Sudany's arrest, detention and trial is a form of retribution against his family member, it amounts to discrimination contrary to article 2 of the Convention on the Rights of the Child. For those reasons, their arrests are arbitrary under category V.

Response from the Government

54. On 9 August 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 8 October 2019, detailed information about the current situation of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B and any comments on the source's allegations. The Working Group also called upon the Government to ensure the physical and mental integrity of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B.

55. The Working Group regrets that it did not receive a response from the Government to that communication, nor did the Government request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

Discussion

56. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

57. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be

understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

Category I

58. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without any legal basis being invoked.

59. The source submits, and the Government does not contest, that at the time of their arrests – Mr. El-Sudany on 4 December 2016, Minor A on 9 September 2016, Minor B on 25 August 2016 and Mr. Hasnein on 24 August 2016 – the four individuals were not presented with arrest warrants or informed of the reasons for arrest. As the Working Group has previously stated, in order for the deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.[8]

60. The Working Group finds that, in order to invoke a legal basis for the deprivation of liberty, the authorities should have informed Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B of the reasons for their arrest, at the time of arrest, and of the charges against them promptly.[9] Their failure to do so for 95 days in the case of Mr. El-Sudany, 56 days in the case of Minor A, 73 days in the case of Minor B and 72 days in the case of Mr. Hasnein violates article 9 of the Universal Declaration of Human Rights, article 9 (2) of the Covenant and article 37 (b) of the Convention on the Rights of the Child, as well as principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders their arrests devoid of any legal basis.

61. The fact that Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B were minors at the time of their arrest requires the authorities to be held to a higher level of scrutiny, as imposed by articles 37 and 40 of the Convention on the Rights of the Child. As juveniles, their heightened vulnerability adds an extra level of due diligence necessary for the State to comply with their international obligations. Indeed, the fact that no guardian was present at the time of the arrests, nor informed of the arrests, is in violation of article 40 (2) (b) (ii) of the Convention. The absence of warrants at the time the arrests of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B therefore is a double violation of the Covenant, with regard to the requirements of prompt information on the reasons for arrest and of the special measures of protection relating to minors.

62. The source further maintains, and the Government again does not dispute, that Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B were held incommunicado – for three months in the case of Mr. El-Sudany, two months in the case of Minor A and two and a half months in the cases of Minor B and Mr. Hasnein – following their arrests by the authorities. Such deprivation of liberty entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention lacks any valid legal basis under any circumstance and is inherently arbitrary as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

63. Incommunicado detention is always per se arbitrary because it places the individual outside all judicial control. It prevents access to a lawyer, to family and to a guardian in the case of minors and blocks any possibility of judicial oversight during that period.

64. Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty[10] and is essential in ensuring that there is a legal basis for the detention. Given that Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B were minors at the time of

[8] See opinions No. 46/2019, No. 33/2019, No. 9/2019, No. 46/2018, No. 36/2018, No. 10/2018 and No. 38/2013.

[9] See opinion No. 10/2015, para. 34; and opinion No. 46/2019, para. 51.

[10] United Nations 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), paras. 2–3.

their arrests, article 9 (3) of the Covenant and article 37 (d) of the Convention on the Rights of the Child apply, bringing down the 48-hour standard to 24 hours for the prompt presentation before a judge.[11] In the present case, the Working Group notes that Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B were not brought promptly before a judge in accordance with the international standard. In fact, they were not brought before a judge for 339 days in Mr. El-Sudany's case, 424 days in Minor A's case, 439 days in Minor B's case and 438 days in Mr. Hasnein's case. They were also not afforded the right to take proceedings before a court to challenge the legality of their arrests so that it could decide without delay on the lawfulness of their arrests and detention, in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights, articles 2 (3) and 9 (1), (3) and (4) of the Covenant, article 37 (d) of the Convention on the Rights of the Child and principles 11, 32 and 37 of the Body of Principles.

65. For those reasons, the Working Group considers that the deprivation of liberty of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B lacks a legal basis and is thus arbitrary, falling under category I.

Category II

66. On the basis of the information obtained to date, the Working Group finds that it is not in a position to determine that the detentions of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B fall within category II of arbitrary deprivation of liberty. The source's argument does not appear to refer to the exercise of any rights falling under category II.

Category III

67. The Working Group will now consider whether the alleged violations of the right of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B to a fair trial and due process were grave enough that their deprivation of liberty was of an arbitrary nature, thereby falling within category III.

68. The Working Group notes that Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B were, as previously mentioned, held incommunicado for periods ranging from two to three months following their arrests by the authorities. As a consequence, they were not able to prepare their defences because they were placed outside the protection of the law and were not given access to lawyers. The Working Group finds that that violated their right to be recognized as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant. It also includes violation of their right to contact with the outside world under principles 15, 16 (1) and 19 of the Body of Principles and rule 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

69. In addition, the Working Group notes that the fact that their detention was repeatedly ordered and renewed by a prosecutor is contrary to the provisions of article 9 (3) of the Covenant and paragraph 32 of general comment No. 35 (2014) on liberty and security of person of the Human Rights Committee, given that the determination with regard to detention cannot be decided by the same authorities who lead the investigation.

70. The Working Group expresses its gravest concern at the allegations of torture and ill-treatment, which would amount to violations of articles 5 and 25 (1) of the Universal Declaration of Human Rights, articles 7 and 10 (1) of the Covenant and articles 24 (1) and 37 (a) and (c) of the Convention on the Rights of the Child.

71. In the present case, the Working Group notes that the source presents serious allegations that confessions were extracted through torture. In the Working Group's view, not only is torture a grave violation of human rights per se, but it also undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in the light of the right to be presumed innocent under article 14 (2) of the Covenant and the right not to be compelled to confess guilt pursuant to article 14 (3) (g) of the Covenant, articles 2, 13, 15 and 16 of the Convention against Torture and article 40 (2)

[11] Committee on the Rights of the Child, general comment No. 10, para. 83.

(b) (iv) of the Convention on the Rights of the Child. The Working Group is specifically alarmed at the reports of the extraction of confessions as a result of torture and their introduction into the court proceedings as evidence, which would render the entire proceedings highly unjust.[12]

72. In accordance with paragraph 33 (a) of its methods of work, the Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for further consideration.

73. The Working Group notes, as the source explains, that Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B did not have the opportunity to prepare their defence with a lawyer and were not able to consult their lawyers in advance to challenge the legality of their detention, contrary to their rights under article 14 (3) (b) and (d) of the Covenant and article 37 (d) of the Convention on the Rights of the Child.

74. The source also contends, and the Government does not rebut, that the mass trial conducted together with 300 defendants undermined the rights of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B to due process, a fair trial and the presumption of innocence guaranteed by article 10 of the Universal Declaration of Human Rights, articles 9 (1)–(4), 14 (2) and (3) (a)–(c) and (e) of the Covenant and article 40 (2) (b) (i) and (iii) of the Convention on the Rights of the Child.

75. The Working Group stresses that the mass trial procedure can hardly meet the standard for a fair trial, given that it would make it impossible to conduct a specified legal assessment of individuals in accordance with the standards of the international norms on detention. In the present case, the breaches of the right to a fair trial are aggravated by the fact that none of the four individuals have been able to properly consult with their lawyers during the trial proceedings, therefore prohibiting them from access to legal representation. The Working Group is of the view that such mass trials are incompatible with the interest of justice or human rights.

76. The Working Group sees no justification for the trial of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B, who are civilians, having taken place in a military court that operates under the purview of the Ministry of Defence. The Working Group therefore finds that the trials of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B conducted by the military court violate article 10 of the Universal Declaration of Human Rights and articles 9 (1)–(4), 14 (2) and (3) (a)–(c) and (e) of the Covenant.

77. The Working Group has previously warned that the intervention of a military judge who is neither professionally nor culturally independent is likely to produce an effect contrary to the enjoyment of human rights and the right to a fair trial with due guarantees (A/HRC/27/48, para. 68). In its jurisprudence, the Working Group has consistently argued that the trial of civilians by military courts is in violation of the Covenant and of customary international law and that, under international law, military tribunals can be competent to try only military personnel for military offences.[13] The Working Group has set out the following minimum guarantees for military justice, which the authorities failed to observe in the present case:

(a) Military tribunals should only be competent to try military personnel for military offences;

(b) If civilians have also been indicted in a case, military tribunals should not try military personnel;

(c) Military courts should not try military personnel if any of the victims are civilians;

[12] Opinion No. 52/2018, para. 79 (i); opinion No. 34/2015, para. 28; and opinion No. 43/2012, para. 51.

[13] A/HRC/27/48, paras. 67–68; and opinions No. 44/2016 and No. 30/2017.

(d) Military tribunals should not be competent to consider cases of rebellion, sedition or attacks against a democratic regime, because, in those cases, the victims are all citizens of the country concerned;

(e) Military tribunals should never be competent to impose the death penalty.[14]

78. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

79. The Working Group stresses again the fact that, at the time of their arrest, the four individuals were between 15 and 17 years of age and therefore minors under international law. As such, they should have been tried in a juvenile court, not in a military court. Their trials conducted by the military court are also made in breach of the Beijing Rules and article 40 (2) (b) (iii) of the Convention on the Rights of the Child.[15]

80. Given the foregoing, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give the minors' deprivation of liberty an arbitrary character that falls within category III.

Category V

81. The Working Group will now examine whether the deprivation of liberty of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B constitutes discrimination under international law with respect to category V.

82. The Working Group is aware of the collective punishment meted out by the Government and courts over the past six years to the real or perceived members of the outlawed Muslim Brotherhood, and the Working Group has repeatedly disapproved of such practices in its jurisprudence. The series of publicized, mass trials also leaves little doubt about the collective nature of the punishment.[16] The cases of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B appear to fit that pattern of widespread and systematic persecution.

83. In particular, Mr. El-Sudany's arrest, detention and trial also appear to be a form of retribution against his family member. The Working Group reaffirms that no one should be deprived of his or her liberty for the crimes, real or not, committed by his or her family member by birth or marriage, in a free, democratic society.

84. The Working Group is therefore of the view that guilt by association and discrimination by the Government on the basis of political opinion that is aimed at ignoring the equality of human beings is the only plausible explanation for the deprivation of liberty of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B.

85. The Working Group also notes that the arrest and detention of Mr. El-Sudany may be considered as collective punishment for his guilt by association with his family member and lacking any legal basis, and similarly, for Minor B on the basis of his association with his relative. Not only do such deprivations of liberty and other collective acts of reprisal violate international law that protects individuals from discrimination on the basis of birth and family ties, they also qualify as flagrant violations of the right to liberty and security of person, as enshrined in articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant, and to freedom from arbitrary or unlawful interference with the family and home, as enshrined in article 12 of the Universal Declaration of Human Rights and article 17 of the Covenant.

86. For those reasons, the Working Group considers that the deprivation of liberty of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant on the grounds of discrimination based on their perceived association with the Muslim Brotherhood. Their deprivation of liberty therefore falls under category V.

[14] A/HRC/27/48, para. 69. See also E/CN.4/2006/58.

[15] The source refers to Committee on the Rights of the Child, general comment No.10, para. 36.

[16] Opinion No. 87/2018, para. 79; and opinion No. 83/2017.

87. The Working Group notes that the present opinion is only one of many other opinions in the past five years in which the Working Group has found the Government to be in violation of its international human rights obligations.[17] The Working Group is concerned that that indicates a systemic problem with arbitrary detention in Egypt, which, if it continues, could amount to a serious violation of international law. The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law could constitute crimes against humanity.

88. In relation to the present case, the Working Group further wishes to warn that capital punishment would run counter to the duty of Egypt under international law that ensures that the death sentence can only be ordered for offences which meet the "most serious crimes" threshold, as established in article 6 (2) of the Covenant. The Working Group also stresses that the death penalty should not be meted out to juveniles. In that regard, the Working Group takes note of the recommendations of the Committee on the Rights of the Child urging Egypt not to carry out the death penalty on children or on persons who were under the age of 18 at the time of the commission of the crime, in compliance with its obligations under international and domestic law (CRC/C/EGY/CO/3-4, para. 39).

Disposition

89. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Ammar Yasser Abdelaziz el-Sudany, Belal Hasnein Abdelaziz Hasnein, Minor A and Minor B, being in contravention of articles 2, 3, 7 and 9–11 of the Universal Declaration of Human Rights and articles 2 (1), 7, 9, 10, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

90. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child.

91. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law, and to prevent the application of the death penalty in all of their cases, whatever the outcome.

92. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B and to take appropriate measures against those responsible for the violation of their rights.

93. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

94. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

95. The Working Group also requests the Government to provide an invitation to the Working Group for a country visit.

[17] See opinions No. 6/2016, No. 7/2016, No. 41/2016, No. 42/2016, No. 54/2016, No. 60/2016, No. 30/2017, No. 78/2017, No. 83/2017, No. 26/2018, No. 27/2018, No. 47/2018, No. 63/2018, No. 82/2018, No. 87/2018, No. 21/2019, No. 29/2019, No. 41/2019 and No. 42/2019.

Follow-up procedure

96. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B have been released and, if so, indicate the date of release;

(b) Whether compensation or other reparations have been made to Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B;

(c) Whether an investigation has been conducted into the violation of the rights of Mr. El-Sudany, Mr. Hasnein, Minor A and Minor B and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Egypt with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

97. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

98. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

99. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[18]

[*Adopted on 19 November 2019*]

[18] Human Rights Council resolution 42/22, para. 3.