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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 87/2018 concerning Salah-Eldeen Abdel-Haleem Soltan, Ibrahim Ahmed Mahmoud Mohamed al-Yamani and Bassem Kamal Mohamed Ouda (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 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 13 July 2018 the Working Group transmitted to the Government of Egypt a communication concerning Salah-Eldeen Abdel-Haleem Soltan, Ibrahim Ahmed Mahmoud Mohamed al-Yamani and Bassem Kamal Mohamed Ouda. The Government submitted a late response on 11 October 2018. 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);
 - (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

(a) Salah-Eldeen Abdel-Haleem Soltan

4. Salah-Eldeen Abdel-Haleem Soltan is a political activist and was the Deputy Minister of Islamic Endowment under the presidency of Mohamed Morsi. He is married with children and usually resides in Al Basteen, Cairo.

5. Mr. Soltan was arrested on 21 September 2013 at Cairo International Airport by officers of the State security service, who did not present a warrant or explain the reasons for his arrest. He was handcuffed to a chair for 17 hours at the airport before being taken to Tora prison. Following his arrest, he was detained incommunicado for 15 days in Tora prison.

(i) Rabaa operation room mass trial

6. The source reports that on 23 September 2013, Mr. Soltan was charged by the State Security Prosecutor, in the absence of his lawyer, with “inciting violence”, “being part of a terrorist organization”, “plotting to cause chaos in the country”, and “spreading false information in order to weaken or harm the dignity and prestige of the State”, in the Rabaa operation room case (No. 2210/2014). He remained in pretrial detention until 1 April 2014, on the basis of article 143 of the Code of Criminal Procedure. During that period, he was denied the right to consult and receive visits from his lawyer.

7. Reportedly, on 1 April 2014, the Cairo Criminal Court conducted the first hearing of the trial, with subsequent hearings continuously postponed for a year. Mr. Soltan’s lawyer was not allowed to challenge the evidence, which consisted solely of a secret testimony made by an officer of the security service. Mr. Soltan’s lawyer was also denied access to relevant information from the prosecution file and was not allowed to challenge prosecution testimonies, cross-examine prosecution witnesses, present exculpatory evidence or call defence witnesses. All communications between the defendants and their lawyers were monitored. The defendants were kept in soundproof glass enclosures during the hearings. On 15 April 2015, Mr. Soltan was sentenced to death. That sentence was quashed by the Court of Cassation, which ordered a retrial on 3 December 2015. On 14 April 2018, the Court of Cassation upheld the sentence to five years’ imprisonment under maximum security. Both the retrial and the appeal process were marked by irregularities similar to those observed during the trial.

(ii) Al Fateh Mosque mass trial

8. The source submits that on 2 August 2015, Mr. Soltan was taken to the Cairo Criminal Court to attend a hearing at which he discovered that he was also being prosecuted in the Al Fateh Mosque case (case No. 8615/2013) together with 494 other co-defendants, and for which the criminal investigation had started two years previously. However, the charges were not official as he had never been presented before a prosecutor to be charged prior to the trial hearing. During the trial, Mr. Soltan was kept in a soundproof glass enclosure, preventing him from communicating freely with his lawyer and from challenging the accusations. His lawyer was not allowed to challenge the inculpatory evidence, which consisted solely of secret testimony made by an officer of the security service. On 18 September 2017, after a two-year trial, during which hearings were continuously postponed, he was sentenced to life imprisonment along with 42 other co-defendants on charges including “terrorism”, “murder”, “use of explosives” and “damage to public property”. Since the appeal was lodged with the Cairo Court of Appeal on 18 November 2017, no hearing has been scheduled.

9. The source highlights the fact that the alleged acts for which Mr. Soltan is being prosecuted in the two mass trials took place on the same day in two different places. In both trials, the sentences were based on testimonies of State security officers, which provided contradictory information on the whereabouts of the defendant. On 16 August 2013, Mr. Soltan was allegedly “attending a meeting to plan chaos” in the Rabaa operation room case, while at the same time, he was allegedly “at Al Fateh Mosque delivering a Friday sermon inciting violence against the State” in the Al Fateh Mosque case. The Court of Cassation did not take those inconsistencies into account.

(iii) Conditions of detention and reprisals

10. The source reports that since his arrest, Mr. Soltan has been transferred from one detention centre to another, without him, his family or his lawyer being informed of those transfers beforehand. He is not allowed to communicate by telephone with his wife or children, who are not living in Egypt. His visitation rights from other relatives every two weeks are regularly denied or shortened without any justification. Moreover, Mr. Soltan has been repeatedly subjected to torture and ill-treatment from the outset of his arrest to date. Although Mr. Soltan informed the judicial authorities about the torture to which he was subjected by security officers, no response was provided to his lawyer's requests to launch an inquiry and to carry out a medical examination. While suffering from a herniated disc, kidney and liver conditions and hepatitis C, Mr. Soltan has been denied appropriate medical treatment as a form of punishment.

11. The source reports that Mr. Soltan was subjected to severe reprisals, including in follow-up to his son's testimony in November 2015 before the United States Congress on human rights violations in Egypt. Mr. Soltan was taken from his cell and forcibly disappeared for a month and a half, during which time his fate and whereabouts remained undisclosed. He was placed in solitary confinement and subjected to severe torture by State security officers who told him that his treatment was the result of his son's treason in the United States Congress. Moreover, on 13 March 2016, Mr. Soltan was beaten until he lost consciousness and his jaw and two front teeth were broken. During the beating, the security officer told him that that treatment was only a hint of what was to come. In August 2016, he was subjected to long periods of solitary confinement in retaliation against his son's statements before the United States authorities and the European Parliament.

(b) Ibrahim Ahmed Mahmoud Mohamed al-Yamani

12. Ibrahim Ahmed Mahmoud Mohamed al-Yamani is an Egyptian citizen, born on 15 July 1987. He usually resides in 10th of Ramadan City, Sharqiyah Governorate. He is a medical doctor and prior to his arrest, he was a resident doctor at Al Hussein University Hospital in Cairo.

13. The source reports that on 17 August 2013, Mr. al-Yamani was arrested during the raid carried out by security forces on Al Fateh Mosque along with hundreds of other supporters of the Muslim Brotherhood, where he was present as a medical doctor treating and documenting protesters' injuries. He was beaten by security officers before being pushed with 74 other individuals into an overcrowded vehicle. He was taken to Tora Security Camp and then to the Dar al-Salam State Security Camp, where he was secretly detained for five days, interrogated and subjected to torture, including electrocution, beatings and food deprivation.

(i) Charge and prolonged pretrial detention

14. According to the source, while in secret detention, Mr. al-Yamani was brought, without the assistance of a lawyer, before the State Security Prosecutor of the Cairo Criminal Court and told that he was accused of "taking part in protests and supporting the overthrown regime". On 22 August 2013, he was moved to Wadi al-Natrun prison. His pretrial detention was renewed every 45 days on the basis of article 143 of the Code of Criminal Procedure, and lasted for two years.

(ii) Al Fateh Mosque mass trial

15. Reportedly, Mr. al-Yamani was prosecuted along with 494 co-defendants in the Al Fateh Mosque mass trial. The defendants were collectively accused of "killing 44 police officers", "protesting without permission" and "disturbing the public peace". Mr. al-Yamani's lawyer was denied access to, and was therefore unable to challenge, incriminating evidence or present exculpatory evidence. On 18 August 2017, Mr. al-Yamani was sentenced to five years in prison.

(iii) Conditions of detention

16. The source reports that while in pretrial detention in Wadi al-Natrun prison, Mr. al-Yamani was tortured and held in particularly inhumane conditions, denied all visits by his lawyer and regularly denied visits from his family, as well as being deprived of medical care. In March 2014, he was transferred to Tora prison where he was held with 15 other detainees in an underground cell measuring 2 by 3 m² with no light. He was later transferred back to Wadi al-Natrun prison where he is still detained.

17. Reportedly, in protest against his treatment, Mr. al-Yamani started a hunger strike in January 2014 and as a result, was held in solitary confinement in a cell without light and was deprived of sleep by means of flooding his cell with cold water in winter. He started coughing up blood, which also appeared in his urine, showing signs of renal failure. The high-ranking prison officers threatened to continue denying him medical care and to “leave him to die” if he did not end his hunger strike. On 17 January 2015, Mr. al-Yamani lost consciousness and burned a third of his back and his head after falling on water boiling on a cooker. He was eventually diagnosed with serious burns, but was not transferred to a hospital for treatment. He was returned to the cell, where he continued living in unhygienic conditions.¹

(c) Bassem Kamal Mohamed Ouda

18. Bassem Kamal Mohamed Ouda is an Egyptian citizen born on 16 April 1970. He is a professor of engineering and was the Minister of Supply and Internal Trade from 5 January to 4 July 2013 under the presidency of Mohamed Morsi, during which time he was known as “the minister of the poor.” He is married with four children.

19. The source reports that on 12 November 2013, Mr. Ouda was arrested at around 8 p.m. in a soap factory where he was hiding in Wadi al-Natroun, Buheira Governorate, by police officers who did not present a warrant and did not explain the reasons for his arrest. Reportedly, he had gone into hiding fearing reprisals after refusing to join the new Government after the military takeover. Prior to his arrest, in August 2013, State security forces had raided his home in his absence, breaking the entrance door and seizing documents without any mandate. Following his arrest, he was taken to an unknown location where he was secretly detained for 13 days. His family and his lawyer were denied information about his fate and whereabouts, resulting in his being in a state of enforced disappearance. Later, he reported that he was being detained in the Tora prison complex and brutally interrogated.

(i) Charge and pretrial detention

20. On 25 November 2013, Mr. Ouda was reportedly presented to the State Security Prosecutor in the presence of his lawyer and informed that he was accused, along with dozens of Muslim Brotherhood leaders, of “incitement to murder”, “belonging to a banned group” and “planning to damage public buildings” in three different cases, namely the Qalyub case, the Great Sea case and the Istiqama Mosque case. He was then transferred to Malhaq Al Mizraa prison, within the Tora prison complex, where he remains detained to date.

(ii) Mass trials

21. The source reports that in addition to the prosecutions in those three mass trials, Mr. Ouda was informed in late 2015 of his prosecution in the Rabaa dispersal case, along with 739 defendants, two years after the beginning of the investigations and when the trial was already ongoing. However, he was not officially informed of the exact charges against him and could not prepare his defence as he was denied the right to visits from his lawyer.

22. The source submits that during the mass trials, all hearings took place at the police academy in camera. Mr. Ouda has been denied the right to consult his lawyer during the whole pretrial period, as all visits were prohibited, and he was unable to prepare his defence or even access relevant information on the charges against him or on the incriminating evidence. He was able to talk only briefly to his lawyer prior to trial hearing sessions. During most of the trials sessions, defendants were kept in soundproof glass enclosures. While Mr. Ouda

¹ On 16 August 2018, after serving his five-year sentence, Mr. al-Yamani was released.

complained repeatedly about the torture and cruel treatment he was suffering, as well as his prolonged solitary confinement, no steps have been taken by the judicial authorities.

23. Reportedly, in the Qalyub trial, on 28 October 2016, the Court of Cassation upheld the life sentence against Mr. Ouda and 36 others. In the Istiqama Mosque case, the retrial started on 7 May 2017 before the Criminal Court of Giza, but the decision has been continuously postponed. In the Great Sea case, the retrial began on 13 November 2016 before the Cairo Criminal Court; the verdict hearing has been continuously postponed. In the Rabaa dispersal case, trial sessions have been continuously postponed since August 2015.

(iii) Conditions of detention

24. The source reports that Mr. Ouda has been subjected to severe acts of torture and has been held in solitary confinement since his arrest more than four years ago. He has been regularly denied the right to visits from both his family and his lawyer for long periods of time; his family was most recently allowed to visit him in November 2016. He has also been denied the right to perform prayers with other inmates, and to write and read. Mr. Ouda suffers from several health complications that require specific medical attention, of which he has been deprived since the beginning of his detention. In August 2017, Mr. Ouda went on hunger strike for two weeks in protest against the fact that he had been denied visitation rights for more than nine months.

(d) Analysis of the violations of the three individuals' rights

(i) Category I

25. The source submits that the circumstances of the three individuals' arrest and custody, which prevented them from challenging the legality of their detention, do not fulfil the criteria of legality set out in article 9 (1), (2) and (4) of the Covenant, thus rendering their detention arbitrary under category I.

26. The source recalls that the arrests of Mr. Soltan and Mr. Ouda were carried out without a mandate and that no reasons were provided for their arrests. The circumstances of their arrests do not show any reasonable cause for in flagrante delicto arrest.

27. Following Mr. Soltan's arrest on 21 September 2013, he was kept handcuffed to a chair for 17 hours in a detention room in the airport before being taken to Tora prison where he was detained incommunicado for 15 days. He was presented to the State Security Prosecutor on 23 September 2013 and charged while detained incommunicado.

28. Following Mr. Ouda's arrest on 12 November 2013, he was taken to an unknown location where he was secretly detained for 13 days. Given that his family and his lawyer were denied information on his fate and whereabouts during that period of time, he was essentially in a state of enforced disappearance. He reappeared only when he was presented to the State Security Prosecutor on 25 November 2013, in the presence of his lawyer.

29. While Mr. al-Yamani was present in the mosque when it was raided by the security forces, the source recalls that a unique feature of an arrest in flagrante delicto is that the circumstances of the arrest should make clear to anyone the cause of the arrest. Nevertheless, if the person arrested is not released, the authorities still need to make a formal notification of the charges once they have decided on a criminal course of action.² Following the raid, Mr. al-Yamani was detained in secret for five days, interrogated and subjected to torture. He was still in secret detention when he was brought, without the assistance of his lawyer, before the State Security Prosecutor and told that he was accused of "taking part in protests and supporting the overthrown regime".

(ii) Category II

30. The source submits that the deprivation of liberty of the three individuals should be characterized as arbitrary under category II, as it appears that they were arrested, prosecuted and sentenced to heavy penalties for having peacefully opposed the ousting of the former

² Opinion No. 41/2016, para. 26.

President, Mohamed Morsi, and the subsequent military takeover, in violation of their rights to freedom of expression (art. 19 of the Covenant) and to freedom of peaceful assembly and association (arts. 21 and 22 of the Covenant). Moreover, Mr. Soltan and Mr. Ouda's right to take part in the conduct of public affairs (art. 25 of the Covenant) was also violated.

31. According to the source, in the cases of Mr. Soltan and Mr. Ouda, the prosecution failed to prove either their presence at the location of the alleged acts of violence or failed to prove that they engaged in speech calling for protesters to commit acts of violence. In cases where the death penalty was quashed by the Court of Cassation or where the Grand Mufti refused to ratify the death sentence, the rationale behind those decisions was the lack of incriminating evidence of the accused's participation in acts of violence or calling for such acts, which led to the death and wounding of protesters and security agents.

32. The source recalls that under international law, gatherings and demonstrations must be presumed peaceful by the State (A/HRC/31/66, para. 18). Therefore, even isolated acts of violence during a demonstration should not lead to the collective incrimination of organizers and protesters for acts of violence.

33. The source submits that those arrests must be understood within the political context that followed the ousting of the former President, Mohammed Morsi, and the military takeover, during which the authorities carried out mass arrests of all political dissenters regardless of the fact that they did not carry out acts of violence or incite others to do so. The Muslim Brotherhood was banned shortly after the military takeover and, on 25 December 2013, in the absence of any judicial process, it was listed as a terrorist organization by the interim Government. As a consequence, all the members of the previous Government and all individuals who were deemed to support the Muslim Brotherhood were prosecuted on the charge of "belonging to a banned group" and "belonging to a terrorist organization", pursuant to article 86 bis of the Criminal Code. As a consequence, all forms of protest and sit-ins supporting the ousted Government, as well as any calls for such protests, were considered terrorist acts or incitement to carry out such acts under article 86, regardless of their peaceful character.

34. The source submits that Mr. Soltan and Mr. Ouda, two Muslim Brotherhood former ministers, are being prosecuted as leaders of a political party for having called upon their supporters to oppose the military takeover and the ousting of their Government. In addition, witnesses affirm that a few days prior to the raid on Al Fateh mosque, Mr. Soltan was addressing protesters, calling upon them not engage in violence and stressing the importance of the rule of law and peaceful protest. In the Rabaa operation room case, he was also prosecuted for, inter alia, "weakening or harming the dignity and prestige of the Egyptian State", pursuant to article 80 (d) of the Criminal Code, for having publicly characterized the military takeover as a "military coup". The source highlights that the reason for Mr. Ouda's arrest was his refusal to support the military takeover.

35. Mr. al-Yamani was arrested during the raid and kept in detention, despite the lack of evidence that he had engaged in any type of violence and despite his claims that he was only treating wounded protesters.

36. The source concludes that the nature of the charges and the lack of evidence of any violent act being carried out or called for by the three individuals show that the trials are politically motivated. Furthermore, the multiplication of mass trials constitutes a form of political persecution in the form of judicial harassment. Moreover, such mass trials disregard any evaluation of individual criminal responsibility for the violence that occurred following the military takeover and the fact that these men were prosecuted for their political affiliation.

(iii) Category III

37. The source submits that that Messrs. Soltan, al-Yamani and Ouda were victims of serious violations of their rights under articles 9 and 14 of the Covenant, which were of such gravity as to give their deprivation of liberty an arbitrary character, falling under category III.

Violations during the pretrial detention phase

38. The three individuals were detained in pretrial detention for long periods of time, pursuant to article 143 of the Code of Criminal Procedure. The source recalls that concerns

have previously been expressed regarding the conformity of that provision with the right of an accused to be tried without undue delay (art. 14 (3) (c) of the Covenant).³ Furthermore, the source highlights that on 26 September 2013, an amendment to article 143 was introduced by the interim President providing for unlimited pretrial detention of individuals awaiting either a ruling from the Court of Cassation or a retrial in cases in which life imprisonment or death sentences had previously been issued.

Violation of the right to adequately prepare one's defence

39. The source submits that for each trial, the defendants were not provided with adequate time and facilities to prepare their defence and they were denied the right to access prosecution files and to be assisted by their lawyers during all interrogations and hearings for the renewal of their pretrial detention.

40. Moreover, visitation rights for their lawyers and families were denied on a regular basis. In the few instances they were allowed, the meetings with the lawyers were held under the strict scrutiny of the security service or prison guards. Furthermore, State security prosecutors denied access to exculpatory evidence such as testimonies from security officers that were brought as secret evidence and which served as a basis to sentence the defendants. Those practices constitute a violation of article 54 of the 2014 Constitution, which prohibits the interrogation of any detainees in the absence of their lawyer, article 123 (b) of the Code of Criminal Procedure, which provides for the right of the person under investigation to be assisted by an attorney, and article 14 (1) and (3) of the Covenant.

Denial of the right to be informed of the charges

41. The source recalls that Mr. Soltan and Mr. Ouda were not informed of all charges brought against them, in violation of the right to be promptly informed of the charges enshrined in article 14 (3) (a) of the Covenant. Mr. Soltan was not informed that he was prosecuted in the Al Fateh Mosque case, let alone informed of the charges against him. Mr. Ouda found himself in a similar situation when he was told the day of the first hearing that he was also a defendant in the mass trial in the Rabaa dispersal case.

Violations occurring during the trial

42. The source submits that collectively charging hundreds of individuals in mass trials cannot ensure the fairness of the trials and the respect of defence rights. Furthermore, the collective criminal responsibility of a high number of defendants in mass trials also amounts to a violation of their right to be presumed innocent, guaranteed under article 14 (2) of the Covenant and article 96 of the Constitution of Egypt. The collective imposition of criminal responsibility, without providing the accused with meaningful ways to defend themselves, leaves no room for any benefit of the doubt for the accused and for charges to be proved beyond any reasonable doubt.

43. According to the source, the trials all involve similar systematic violations, including the fact that the judges denied the requests by the defence lawyers to order the prosecution to disclose evidence so that it could be challenged. In several trials, hearings were held in camera in police academy buildings. During the hearings, the defendants were kept in soundproof glass enclosures from which they could not freely communicate with their lawyers. Those practices, along with the systematic violations of defence rights, show that the complainants were prosecuted in a context of political unrest and that such conditions cannot guarantee the fairness of their trials.

Ill-treatment in detention

44. The source expresses particular concern at the three individuals' treatment in detention, which amounts to torture and cruel, inhuman and degrading treatment. The practices used against them constitute a form of reprisal and retaliation for their political affiliation and for having denounced the unfairness of their trials, the inhumane conditions of their detention and the denial of medical care. The source recalls that Mr. Soltan

³ Ibid.

disappeared and was tortured following his son's testimony before the United States Congress; Mr. al-Yamani was told that he would be "left to die" if he did not end his hunger strike; and Mr. Ouda was subjected to cruel abuse for protesting against his solitary confinement. Moreover, the judicial authorities failed to address the allegations made in that regard, in violation of articles 1, 4, 15 and 16 of the Convention against Torture and guideline 12 of the Guidelines on the Role of Prosecutors.

(iv) Category V

45. According to the source, the arrest, prosecution and treatment of the three individuals results directly from their political opinion and affiliation as leaders and supporters of the Muslim Brotherhood, giving their detention an arbitrary character under category V.

46. The source notes that the banning and listing of the Muslim Brotherhood political party as a terrorist organization have been used to systematically deny the fundamental rights of individuals considered to be members or supporters of that group. The source recalls that the Committee against Torture highlighted the fact that torture appears to occur particularly frequently following arbitrary arrests and is often carried out to obtain a confession or to punish and threaten political dissenters (A/72/44, para. 69). Moreover, it appears that judges deciding in mass trial cases have publicly stated their support for the military takeover and denied the existence of documented human rights violations, raising concerns over their independence from the executive.⁴ The source notes that several such statements demonstrate the discriminatory and politically biased treatment of those who opposed the authorities and violate the principle of equality before the law and presumption of innocence. The source concludes that while that discriminatory treatment is not applied exclusively to political opponents affiliated with the Muslim Brotherhood, but also to individuals considered to be critical or opposed to the Government, it appears that real or perceived affiliation with or support for the Muslim Brotherhood systematically results in a denial of equality before the law.

Response from the Government and additional comments from the source

47. On 13 July 2018, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting the Government to provide detailed information by 11 September 2018 concerning the current situation of Messrs. Soltan, al-Yamani and Ouda and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying their continued detention and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular the norms of international human rights law that bind Egypt. Moreover, the Working Group called upon the Government to ensure Messrs. Soltan, al-Yamani and Ouda's physical and mental integrity.

48. The Working Group regrets that it did not receive a timely response to the communication from the Government. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

49. The Government submitted its response on 11 October 2018, that is, after the deadline given by the Working Group. The response was transmitted to the source on 16 October 2018. The source provided additional comments on 31 October 2018. While the Working Group may render an opinion on the basis of all the information obtained, it is unable to accept the Government response as if it had been presented in a timely manner.

Discussion

50. 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,

⁴ See International Commission of Jurists, *Egypt's Judiciary: A Tool of Repression. Lack of Effective Guarantees of Independence and Accountability* (Geneva, 2016).

para. 68). The Working Group recalls that, where it is alleged that a person has not been afforded by a public authority certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.⁵

51. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.⁶ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant rules and standards of international human rights law.⁷

Category I

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

53. While the Government states in its late reply that Messrs. Soltan, al-Yamani and Ouda were arrested and detained in accordance with the law and due process, and that its laws provide for legal guarantees and judicial supervision, it has neither refuted the specific allegations nor presented credible evidence to show how its laws on paper function in practice in Messrs. Soltan, al-Yamani and Ouda's cases.

54. At the outset, the Working Group expresses its grave concern at the source's allegations of incommunicado detention: Mr. Soltan for a month and a half after his son's testimony before the United States Congress on the human rights violations in Egypt; Mr. al-Yamani for 5 days during his interrogation following his arrest on 17 August 2013; and Mr. Ouda for 13 days after his arrest on 12 November 2013. In Mr. Soltan's case, the Working Group notes that the concealment of his fate or whereabouts placed him outside the protection of the law. It is the Working Group's view that there can be no valid legal basis for deprivation of liberty that places detainees outside the protection of the law, under any circumstances, particularly because it deprives them of their rights to challenge the legality of their detention, in violation of article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant.

55. The source also submits, and the Government does not refute, that Messrs. Soltan, al-Yamani and Ouda were arrested without being shown an arrest warrant. The international norms on detention include the right to be presented with an arrest warrant, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁸ Any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of that Body of Principles.

⁵ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 55; and opinions No. 59/2016, para. 61; and No. 41/2013, para. 27.

⁶ General Assembly resolution 72/180, preambular para. 5; Commission on Human Rights resolutions 1997/50, para. 15, and 1991/42, para. 2; Human Rights Council resolutions 10/9, para. 4 (b), and 6/4, para. 1 (a); and opinions No. 38/2018, para. 60; No. 94/2017, para. 47; No. 83/2017, para. 51; No. 28/2015, para. 41; and No. 41/2014, para. 24.

⁷ Opinions No. 38/2018, para. 60; No. 94/2017, paras. 47–48; No. 33/2015, para. 80; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

⁸ Opinions No. 30/2018, para. 39; No. 3/2018, para. 43; and No. 88/2017, para. 27. See also the African Charter on Human and Peoples' Rights (art. 6) and the Arab Charter on Human Rights (art. 14 (1)).

56. The Working Group finds that, in order to ascertain a legal basis for deprivation of liberty, the authorities should have informed Messrs. Soltan, al-Yamani and Ouda of the reasons for their arrest, at the time of arrest, and of the charges against them promptly. Their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant.

57. The Working Group notes that Messrs. Soltan, al-Yamani and Ouda were not brought promptly before a judge or afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of their detention, in accordance with article 9 (3) and (4) of the Covenant. This also deprived them of an effective judicial remedy for the violation of their rights and freedoms, as provided for in articles 8 and 10 of the Universal Declaration of Human Rights and articles 2 (3) and 14 (1) of the Covenant. Pretrial detention without an individualized determination of the risk of flight, interference with the evidence or the recurrence of the crime, as well as consideration of less intrusive alternatives, such as bail, electronic bracelets or other conditions in accordance with the principle of necessity and proportionality, is devoid of legal basis.⁹

58. The Working Group therefore considers that Messrs. Soltan, al-Yamani and Ouda's arrest and detention lack a legal basis and are thus arbitrary, falling under category I.

Category II

59. The Working Group recalls that the rights to freedom of movement and residence, freedom to seek asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, legal equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities are among the most fundamental human rights, deriving from the inherent dignity of the human person, reaffirmed and ensured by the international community in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant.

60. The source alleges, and the Government does not refute, that Messrs. Soltan, al-Yamani and Ouda have been arrested, tried and convicted for expressing their opinion in the mass demonstrations organized by the Muslim Brotherhood after the 2013 coup d'état removed them from power. Their cases appear to fit the pattern of systematic, widespread and grave violations of freedom of opinion and expression and freedom of assembly, as identified by the Working Group in a series of complaints from the members of the ousted Government of Mohamed Morsi and their fellow supporters, as well as real or perceived protesters brought to its attention.¹⁰

61. Although freedom of opinion and expression is not without limitation, article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to the exercise of one's rights and freedoms must be for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. The Covenant similarly lists the few legitimate objectives in articles 12 (3), 18 (3), 19 (3), 21 and 22 (2).

62. Furthermore, the Working Group notes the observation by the Human Rights Committee, in its general comment No. 34 (2011) on the freedoms of opinion and expression, that restrictions on freedom of expression must not be overbroad. The Committee recalled that such restrictions must conform to the principle of proportionality: they must be appropriate to achieve their protective function; they must be the least intrusive instrument among those that might achieve their protective function; and they must be proportionate to the interest to be protected (para. 34). Moreover, the Committee emphasized that States parties should not prohibit criticism of institutions, such as the army or the administration (para. 38), and that the penalization of a media outlet, publishers or journalist solely for being

⁹ Opinion No. 61/2018, para. 50.

¹⁰ See opinions No. 27/2018, No. 78/2017, No. 30/2017, No. 41/2016, No. 7/2016, No. 6/2016, No. 53/2015, No. 52/2015, No. 49/2015, No. 17/2015, No. 14/2015, No. 35/2014, No. 10/2014 and No. 39/2013.

critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression (para. 42).¹¹

63. In the same vein, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has indicated that the right to freedom of expression includes expression of views and opinions that offend, shock or disturb (A/HRC/17/27, para. 37). Even persons who utter statements considered unacceptable, disrespectful and in extremely bad taste by the authorities are entitled to protection and cannot require persecution. In addition, the Human Rights Council, in its resolution 12/16, called upon States to refrain from imposing restrictions on discussion of government policies and political debate that are not consistent with article 19 (3) of the Covenant.

64. In the Working Group's view, the principle of necessity and proportionality that inheres in freedom of opinion and expression does so equally in other fundamental human rights. The Working Group, in its deliberation No. 9, confirmed that the notion of "arbitrary" *sensu stricto* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary (A/HRC/22/44, para. 61). In its jurisprudence, with regard to the application of the principle of proportionality, the Working Group has applied the four-pronged test of: (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.¹²

65. Given the Government's failure to provide *prima facie* credible evidence against Messrs. Soltan, al-Yamani and Ouda to implicate them in specific violent acts, the Working Group considers that Messrs. Soltan, al-Yamani and Ouda have been deprived of their liberty for their exercise of the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. The Working Group also considers that their detention violates their right to participation in political and public affairs as Messrs. Soltan and Ouda were serving as the Deputy Minister of Islamic Endowment and the Minister of Supply and Internal Trade respectively under the deposed Government of Mohamed Morsi and Mr. al-Yamani was protesting against the military's removal of that elected government. The Working Group finds no legitimate aim or objective in a free and democratic society for their deprivation of liberty.

66. The Working Group, therefore, considers that Messrs. Soltan, al-Yamani and Ouda's deprivation of liberty is arbitrary under category II, as it resulted from their exercise of the rights or freedoms guaranteed under articles 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 18, 19, 21, 22 and 25 of the Covenant.

Category III

67. Given its finding that Messrs. Soltan, al-Yamani and Ouda's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that none of the three should have been tried. However, given that the trials have taken place or are taking place, the Working Group will consider whether the alleged violations of the right to a fair trial and due process were grave enough to give their deprivation of liberty an arbitrary character, so that it falls within category III.

68. According to the information provided by the source, which the Government has failed to rebut with credible evidence, Messrs. Soltan, al-Yamani and Ouda were arrested without the presentation of a warrant and were not promptly informed of the reasons for their arrest or of any charges against them. While the Government states that they were arrested in accordance with the law and due process and that its laws provide for legal guarantees and

¹¹ Opinions No. 83/2018, para. 53; and No. 61/2018, para. 55.

¹² Opinions No. 88/2017, para. 35; No. 76/2017, para. 68; No. 58/2017, para. 48; No. 56/2017, para. 51; No. 41/2017, para. 86; and No. 54/2015, para. 89.

judicial supervision in accordance with international standards, it has failed to provide evidence to prove that any contact has been made with any of the three of them since their arrest.

69. In Mr. al-Yamani's case, the Working Group notes that temporary detention orders are not so temporary when they are renewed automatically and indefinitely. While the reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, in this instance the Government failed to provide, on the basis of the principles of legitimacy, necessity and proportionality, any justification for his pretrial detention, which has lasted for two years. The Working Group finds that the Government neither tried Mr. al-Yamani within a reasonable time nor released him, in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the Covenant. The prolonged and indefinite pretrial detention is an abuse of power that violates the right to personal liberty and the right not to be subjected to arbitrary detention under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, and the entitlement to a fair and public hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. The near-automatic extension of Mr. al-Yamani's pretrial detention by courts with no regard for his due process and fair trial rights also undermines the presumption of innocence guaranteed under article 11 (1) of the Universal Declaration of Human Rights and 14 (2) of the Covenant.¹³

70. Furthermore, the Government failed to respect Messrs. Soltan, al-Yamani and Ouda's right to legal assistance at all times, which is inherent in the right to liberty and security of person, and their right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant. The interrogations in the absence of their lawyers during their initial incommunicado detention deprived of them of their right to legal counsel at the critical stage of criminal proceedings and exposed them to torture and ill-treatment. The periodic incommunicado detention and the monitoring of communication between the defendants and their lawyers violates the essence of the right to legal assistance and preparation for defence and free communication with legal counsel under article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) and (c) of the Covenant.

71. During their trials, none of the three was given an adequate chance to confront the witnesses or evidence against them or to present their witnesses and evidence before the court, in violation of article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (d) of the Covenant. Messrs. Soltan and Ouda's trial while they were held in soundproof glass enclosures aggravates this violation. Mr. Ouda's in camera proceeding at the police academy, for which the Government failed to provide any justification, further violated his right to a public hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. Courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from in such exceptional circumstances, however, a hearing must be open to the general public as all trials in criminal matters must in principle be conducted orally and publicly.¹⁴ Secret proceedings without justification raise doubts about the equality of the parties and fairness of the hearing, as well as the competence, independence and impartiality of the tribunal, in accordance with article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

72. The source also contends, and the Government does not rebut, that the mass trials of hundreds of defendants undermine the due process and fair trial rights and the presumption of innocence guaranteed under article 11 (1) of the Universal Declaration of Human Rights and 14 (2) of the Covenant. The Working Group notes that the United Nations High

¹³ Opinion No. 37/2018, para. 32.

¹⁴ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 28–29.

Commissioner for Human Rights took the opportunity to criticize the most recent mass trial and the resultant death sentences by an Egyptian court as “a gross and irreversible miscarriage of justice”.¹⁵ The Working Group is also of the view that such mass trials are incompatible with the interests of justice.

73. The Working Group expresses its serious concern at the ill-treatment and denial of medical treatment endured by Messrs. Soltan, al-Yamani and Ouda, in violation of articles 5 and 25 of the Universal Declaration of Human Rights and articles 7 and 10 of the Covenant, as well as principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in addition to the relevant provisions of the Convention against Torture. Not only is torture a grave violation of human rights per se, but it seriously undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in light of the right not to be compelled to testify against oneself or to confess guilt under article 14 (3) (g) of the Covenant.

74. The Working Group notes with shock and dismay that Mr. Soltan has been subjected to severe beatings that broke his jaw and two front teeth, and to prolonged solitary confinement in retaliation for his son’s statements before the United States Congress and the European Parliament.

75. The Working Group refers to rule 45 (1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which stipulates that solitary confinement is to be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. Rule 44 defines prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days. The Working Group concurs with the Human Rights Committee, which noted that prolonged solitary confinement of a detained or imprisoned person may amount to acts prohibited by article 7 of the Covenant.¹⁶

76. Given the above, 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 deprivation of liberty of Messrs. Soltan, al-Yamani and Ouda an arbitrary character that falls within category III.

Category V

77. The Working Group will now examine whether Messrs. Soltan, al-Yamani and Ouda’s deprivation of liberty constitutes discrimination under international law with respect to category V.

78. First and foremost, the Working Group notes that all three detainees are the leading members and supporters of the outlawed Muslim Brotherhood. Neither the source nor the Government disputes that they have been arrested, tried and sentenced for their membership and activities in that organization. The Working Group is also aware from its jurisprudence about the collective punishment meted out to the real or perceived members of the Muslim Brotherhood by the Government and courts over the past five years. The series of publicized, mass trials also leaves no doubt about the collective nature of punishment.

79. The Working Group is thus of the view that discrimination by the Government on the basis of political opinion that aims at ignoring the equality of human beings is the only plausible explanation for the arrest, detention and imprisonment of Messrs. Soltan, al-Yamani and Ouda. The Working Group, therefore, concludes that the three individuals have been arbitrarily deprived of their liberty because of their support for the Muslim Brotherhood,

¹⁵ Office of the United Nations High Commissioner for Human Rights, “Egyptian death sentences result from unfair trial, should be reversed – Bachelet” (9 September 2018), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23517&LangID=E.

¹⁶ Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 6. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also called on the international community to impose an absolute prohibition on solitary confinement exceeding 15 consecutive days (A/66/268, para. 76).

in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and that their detention falls within category V.

80. 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 finds the Government to be in violation of its international human rights obligations.¹⁷ 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 may constitute crimes against humanity.

Disposition

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

The deprivation of liberty of Salah-Eldeen Abdel-Haleem Soltan, Ibrahim Ahmed Mahmoud Mohamed al-Yamani and Bassem Kamal Mohamed Ouda, being in contravention of articles 2, 5, 7, 9, 10, 11, 18, 19, 20, 21 and 25 of the Universal Declaration of Human Rights and articles 2, 7, 9, 10, 14, 18, 19, 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

82. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Messrs. Soltan, al-Yamani and Ouda without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

83. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Soltan and Ouda immediately and accord Messrs. Soltan, al-Yamani and Ouda an enforceable right to compensation and other reparations, in accordance with international law.

84. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Messrs. Soltan, al-Yamani and Ouda and to take appropriate measures against those responsible for the violation of their rights.

85. 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, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Working Group encourages the Government to ratify the Optional Protocols to the International Covenant on Civil and Political Rights.

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

Follow-up procedure

87. 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 Messrs. Soltan and Ouda have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Messrs. Soltan, al-Yamani and Ouda;
- (c) Whether an investigation has been conducted into the violation of the rights of Messrs. Soltan, al-Yamani and Ouda and, if so, the outcome of the investigation;

¹⁷ See, for example, opinions No. 27/2018, No. 26/2018, No. 83/2017, No. 78/2017, No. 30/2017, No. 60/2016, No. 54/2016, No. 42/2016, No. 41/2016, No. 7/2016 and No. 6/2016.

(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.

88. 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.

89. 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.

90. 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 23 November 2018]

¹⁸ See Human Rights Council resolution 33/30, paras. 3 and 7.