



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its seventy-fourth session, 30 November-4 December 2015****Opinion No. 49/2015 concerning Ahmed Saad Douma Saad, Ahmed Maher Ibrahim Tantawy and Mohamed Adel Fahmi (Egypt)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 5 June 2014 the Working Group transmitted a communication to the Government of Egypt concerning Ahmed Saad Douma Saad, Ahmed Maher Ibrahim Tantawy and Mohamed Adel Fahmi. The Government replied to the communication on 24 July 2014. 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 sentence or despite an amnesty law applicable to him) (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 International Covenant on Civil and Political Rights (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

4. Ahmed Saad Douma Saad is a 24-year-old citizen of Egypt and usually resides at 16 Street, Al Said Mohamed, Al Basateen, Cairo. He is a prominent blogger and an activist who has been arrested and tried several times for his political activities in the past.

5. Ahmed Maher Ibrahim Tantawy is a 33-year-old citizen of Egypt and usually resides at 88 Street, Ahmed Zaki, Al Basateen, Cairo. He is a co-founder of the April 6 Youth Movement, an advocacy group established in 2008 to support workers on strike. He is also a prominent activist who participated in demonstrations against the then President Hosni Mubarak in 2011.

6. Mohamed Adel Fahmi is a 25-year-old citizen of Egypt and usually resides in Aga, Daqahlia. He is a political activist and a co-founder of the April 6 Youth Movement.

7. The three aforementioned individuals were sentenced by the Abdeen Misdemeanour Appeals Court to three years of imprisonment for having allegedly demonstrated without permission and assaulted the police. They are currently detained in Tora Prison.

Background — Demonstrations before the Shura Council and the new anti-protest law

8. On 26 November 2013, campaigners from the No Military Trials for Civilians group gathered in front of the Shura Council, the upper house of parliament in Egypt, in order to denounce the inclusion of military trials in the draft Constitution, which was finally approved on 18 January 2014. Among those protestors were Messrs. Douma, Maher and Adel.

9. According to the source, the police violently dispersed the peaceful demonstration and arrested about 50 activists.

10. That protest was the first to be held after the proclamation of the restrictive Law No. 107-2013 on the right to public meetings, processions and peaceful demonstrations. The law, which was issued on 25 November 2013 by the interim President Adly Mansour, places draconian restrictions on the right to freedom of assembly and of expression.

11. Adopted only 10 days after the lifting of the state of emergency, Law No. 107-2013 constitutes a tool to crack down on peaceful demonstrators and any voice of dissent against the military takeover.

12. Its article 7 prohibits participants in public assemblies from conduct that would constitute a threat to security and public order, disrupt the interests of citizens or obstruct the course of justice, all of which are very vague charges. On the basis of its article 19, any violation of the ban is punishable by two to five years of imprisonment.

13. Moreover, sit-ins are prohibited (art. 14), which demonstrates that the law does not take into account the notion of peacefulness of assemblies and the security forces can resort

to the use of force (art. 13), by means proportional to the extent of the danger posed to lives, capital or property, thus legalizing the use of violence against demonstrators.

14. Finally, the law requires protest organizers to seek authorization three days ahead of any planned demonstration (art. 8), which can be banned by the Ministry of the Interior if deemed a threat to peace and security (art. 10). It imposes jail terms and fines on individuals who break the law.

Arrest and detention

15. On 30 November 2013, Mr. Maher, accompanied by Mr. Douma, went to the Abdeen courthouse to turn himself in to the authorities, as he had learned that he was being sought by the police for allegedly having incited people to demonstrate on 27 November 2013. After they entered the courthouse, the police reportedly attacked Mr. Maher's supporters who had peacefully gathered in front of the courthouse.

16. Although Mr. Maher was released the next day, he was summoned on 2 December 2013 to the Zeinhom Court and interrogated, without the presence of a lawyer, about his alleged participation in an unauthorized protest in front of the Abdeen courthouse on 30 November 2013. The Public Prosecutor ordered his detention for four days and he was subsequently transferred to Tora Prison where he was detained in solitary confinement.

17. On 3 December 2013, Mr. Douma was arrested at his home without an arrest warrant. He was taken to the Al Basateen police station and then to the Zeinhom Court where the Public Prosecutor ordered his detention for four days for his alleged resistance to the authorities and vandalism in front of Abdeen Court. He was then transferred to Tora Prison, where he was kept in solitary confinement.

18. On 5 December 2013, Messrs. Maher, Douma and Adel were charged with taking part in an unauthorized protest, disturbing public order and assaulting police officers. The Abdeen Misdemeanour Court, located at the Tora Police Academy, ordered that Mr. Adel be apprehended, and the three men were summoned to appear before the Court on 8 December 2013.

19. During the hearing on 8 December 2013, the three men were tried on counts of co-organizing a protest without prior notice and attacking the security forces. Only witnesses for the prosecution were called to testify that Messrs. Maher, Douma and Adel had attacked police officers, while the three men maintained that they were only demonstrating peacefully and that the trial was politically motivated. Mr. Adel did not attend the hearing and was tried in absentia.

20. On 18 December 2013, National Security Agency officers and police officers raided the Egyptian Centre for Economic and Social Rights where Mr. Adel worked and violently arrested him and five of his colleagues. Mr. Adel and his colleagues were blindfolded and taken to an unknown location where they were forced to stand for nine hours. The following day, all except Mr. Adel were released. Mr. Adel remained in incommunicado detention for four days until 22 December 2013.

21. On 22 December 2013, Messrs. Maher, Douma and Adel were sentenced by the Abdeen Misdemeanour Court to three years of imprisonment and hard labour, with a three-year probation period after serving their terms, and a fine of LE50,000 (approximately US\$ 7,000) for taking part in an unauthorized protest, attacking the security forces and disturbing public order, in contravention of Law No. 107-2013 on the right to public meetings, processions and peaceful demonstrations.

22. The accused were imprisoned in Tora Prison and began a hunger strike on 26 December 2013 to protest against their sentence for having peacefully demonstrated and to denounce their inhumane conditions of detention in solitary confinement.

23. The three men filed an appeal against their sentence and appeared in the Abdeen Misdemeanour Appeals Court on 10 March 2014. It is alleged that they were severely beaten up and threatened by security guards inside the Court building before entering the courtroom. Mr. Adel and Mr. Douma tried to show the marks of beatings on their hands, legs and stomachs to the judges, who allegedly refused to see them. The judges also refused their lawyers' requests to refer the men to forensic examination.

24. On 7 April 2014, the Court upheld the judgement in the first instance and condemned the three men to three years of imprisonment with hard labour and a fine of LE50,000. They remain in detention in Tora Prison to date.

25. In addition, on 28 April 2014, the Abdeen Court for Urgent Matters declared that the April 6 Youth Movement was a prohibited organization, pursuant to articles 1 and 11/2 of Law No. 84 of 2002 on non-governmental organizations. The justification given to ban the movement was that it tarnished the image of the State and that its members conspired against the national interests of Egypt and made illegal contacts with foreigners.

26. The source argues that the detention of Messrs. Douma, Maher and Adel is arbitrary, as they were arrested, tried and convicted on the basis of their participation in peaceful demonstrations, their political activism and their denunciation of the repression of political dissidents. The source points out in this regard that Law No. 107-2013 on the right to public meetings, processions and peaceful demonstrations imposes extremely broad restrictions on the rights to freedom of expression and to freedom of peaceful assembly, and has been used by the authorities as a tool to repress peaceful demonstrators.

27. The source also submits that the detention of the three men is arbitrary, as it results from judicial processes that failed to meet international norms and standards guaranteeing the right to a fair trial. The three men were not shown an arrest warrant or informed of the reasons for their arrest, in contravention of article 9 (2) of the International Covenant on Civil and Political Rights. Nor were they given access to their lawyers prior to the trial to prepare their defence, contrary to article 14 (3) (d) of the Covenant. In this regard, the source points out that Mr. Adel in particular was held in incommunicado detention for four days following his apprehension until the sentencing date. Furthermore, the source questions whether the aforementioned persons have been afforded a fair and public hearing by a competent, independent and impartial tribunal established by law in accordance with article 14 (1) of the Covenant, as both the Abdeen Misdemeanour Court and the Abdeen Misdemeanour Appeals Court are located within the Tora Police Academy under the authority of the Ministry of the Interior. The source takes the view that this violates the principle of separation of powers, as it may lead to executive interference with the judicial process. The source also argues that the trial lacked impartiality, as the court only heard the witnesses for the prosecution and refused to investigate the defendants' claims that they had been mistreated.

Response from the Government

28. On 25 July 2014, the Government replied that it considered the arrests of Messrs. Maher, Douma and Adel lawful, since the authorities had prosecuted them for breaching the law on demonstrations by organizing unauthorized gatherings, disrupting traffic and public order, injuring policemen, stealing items belonging to the Ministry of the Interior, attempting to commit crimes and attacking public and private buildings.

29. The Government of Egypt emphasized its respect for the rights of peaceful assembly and demonstration by citing its Constitution and Law No. 107-2013 on the right to public assembly, processions and peaceful demonstrations.

30. Moreover, the Government stressed in its response that the new Constitution, approved in 2014, guaranteed that no civilians could be tried before military courts.

Further comments from the source

31. The source points out that the particularly elaborate and repetitive answers from the Government solely underline the authorities' point of view on the peaceful demonstration in front of the Shura Council on 26 November 2013 and in front of the Abdeen courthouse on 30 November 2013 that led to the arrest of hundreds of demonstrators, including the three aforementioned individuals.

32. The Government's answer fails to give convincing details on the subsequent prosecutions, trials and detentions of the accused that the source believes are arbitrary. It also abstains from commenting on the decision of the Court for Urgent Matters to ban the April 6 Youth Movement on 28 April 2014, under Law No. 84 of 2002 on non-governmental organizations.

33. Finally, the source highlights that the Government's response was written by the Prosecution's services, who are themselves in charge of prosecuting the aforementioned individuals, and not by the Government per se. Consequently, the facts described in the comments are also the ones that were used by the Prosecution to arrest and detain the accused. The source also points out that the Government's answer emphasizes that the peaceful demonstration on 26 November 2013 was against the new protest law and the possibility for military courts to try civilians, and not for other purposes.

34. The source stresses that the charges faced by the aforementioned individuals are similar to the ones held against other peaceful demonstrators in Egypt and to those that justified the arrest of thousands of civilians in 2013. For those who also happen to be Muslim Brotherhood supporters, such charges can lead to sentences to death.

35. The source reiterates its concern over the law on demonstrations adopted in November 2013, which formed the basis of the courts' decisions concerning the three men. The law's provisions are too broad and vague to offer proper guarantees to citizens and ensure their free enjoyment of the rights to freedom of expression and of peaceful assembly.

Discussion

36. The Working Group, upon assessing and analysing the information provided to it, notes with deep concern that the arrest and detention of the aforementioned persons, and the other acts of harassment faced by human rights defenders and journalists, relate to their legitimate human rights activities. It also expresses its concern for their physical and psychological integrity..

37. The Working Group points out that Messrs. Douma, Maher and Adel were ordinary citizens who in the exercise of their right to freedom of expression and opinion participated in a peaceful demonstration. The exercise of those rights by the detainees is guaranteed, inter alia, in articles 19 and 21 of the International Covenant on Civil and Political Rights, and articles 19 and 20 of the Universal Declaration of Human Rights.

38. During the course of the demonstration in question, if any unruly behaviour on the part of the participants ensues that would incur proportionate measures in accordance with domestic law, including arrest and detention, the individuals arrested or detained should be informed of the charges against them and brought promptly before a judicial authority, as well as afforded the right to a fair trial within a reasonable time.

39. The Working Group also points out that the three individuals were arrested and sentenced to three years of imprisonment on the basis of the restrictive Law No. 107-2013. The law appears to be used as a tool for cracking down on peaceful demonstrations. It places extremely broad restrictions on the right to freedom of expression and peaceful

assembly. The United Nations High Commissioner for Human Rights has called upon the authorities to amend or repeal what she characterized as a “seriously flawed new law”.¹

40. Law No. 107-2013 constitutes a clear violation of article 21 of the International Covenant on Civil and Political Rights as it imposes restrictions that are outside the scope of what is necessary in a democratic society in the interests of national security, public safety, or public order. Legal provisions incompatible with the fundamental rights and freedoms guaranteed under international human rights law would give rise to a qualification of detention as arbitrary.² In this regard, national courts have drawn upon the notions of arbitrariness as defined by the Human Rights Committee.³

41. The deprivation of liberty of Messrs. Douma, Maher and Adel clearly relates to their exercise of their right to freedom of expression and to peaceful assembly, as guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the International Covenant on Civil and Political Rights.

42. In addition, none of the above-mentioned individuals were shown an arrest warrant nor were they informed of the charges against them. That constitutes a violation of the right to be informed of the reasons for arrest, at the time of the arrest, and of any charge justifying it, as guaranteed by article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant.

43. The Working Group also points out that none of the aforementioned individuals were authorized access to their lawyers during the pretrial period of their deprivation of liberty, which violates their right to have access and be assisted by counsel from the very start of the criminal investigation as guaranteed by article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (d) of the Covenant.

44. Mr. Adel was detained incommunicado for four days. The intentional failure of the authorities to disclose his fate placed him outside the protection of the law, in violation of article 10 (1) of the Covenant, which stipulates that all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person, and of article 9 (3), according to which anyone arrested or detained on a criminal charge should be brought promptly before a judge. In this regard, secret and/or incommunicado detention constitutes the most severe violation of the international norm protecting the right to liberty of human beings under customary international law. Arbitrariness is inherent in this form of deprivation of liberty as the individual is placed outside the cloak of any legal protection.⁴

45. Furthermore, in article 14 (1) of the International Covenant on Civil and Political Rights it is stated that in the determination of any criminal charge everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. However, the appeal hearings of the three defendants were held on the premises of the Tora Police Academy, which operates under the Ministry of the Interior. A

¹ Office of the United Nations High Commissioner for Human Rights, press release, “New law on demonstrations in Egypt seriously flawed and must be amended — Pillay”, 26 November 2013.

² See, for example, opinions No. 25/2012 (Rwanda) and No. 24/2011 (Viet Nam).

³ See submission from the Government of Australia: in *Blundell v. Sentence Administration Board of the Australian Capital Territory*, Judge Refshauge drew upon notions of arbitrariness as applied by the Human Rights Committee in its communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997. Judge Refshauge identified disproportionality, capriciousness and lack of comprehensive reasons as the hallmarks of arbitrariness.

⁴ See the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42), p. 2.

court sitting in a building attached to a non-judicial authority violates the principle of separation of powers as it is clearly liable to interfere with the executive.

46. It also appears from the expedient nature of the trial that the investigation procedure was not impartial, that the judges were biased and only listened to the witnesses for the prosecution. The judges' failure to investigate the allegations of mistreatment by the defendants, the effects of which were visible in plain sight inside the courtroom, further demonstrates their partiality.

47. The source has provided convincing facts demonstrating that the judicial proceedings against Messrs. Douma, Maher and Adel are a consequence of the use of their right to freedom of expression and their activities as political activists and human rights defenders. The application of overly broad offences in the current case constitutes an unjustified restriction on the rights to freedom of expression and to a fair trial, and the deprivation of liberty falls into categories II and III of the categories applicable to the cases submitted to the Working Group.

48. The prohibition of arbitrary detention in articles 9 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, together with the right to an effective remedy in article 8 of the Declaration and article 9 (5) of the Covenant extend to all forms of deprivation of liberty. Due process rights are established in article 10 of the Declaration and article 14 of the Covenant. The proportionality review which determines whether a restriction on liberty can be justified is strict and takes into account the high value attached to personal liberty. The measures taken to restrict someone's liberty must satisfy the criteria of legality, necessity and proportionality.

49. The Working Group would like to remind the Government of Egypt of its duties to comply with international human rights obligations, in particular those that it has ratified, including the duty not to detain anyone arbitrarily, to release persons arbitrarily detained and to provide compensation to them.

Disposition

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

The deprivation of liberty of Messrs. Douma, Maher and Adel, being in contravention of articles 9-11 and 19-20 of the Universal Declaration of Human Rights and articles 9-10, 14, 18-19 and 21 of the International Covenant on Civil and Political Rights, is arbitrary, falling under categories II and III of the categories applicable to cases submitted for consideration to the Working Group.

51. Consequent upon the opinion rendered, the Working Group requests the Government to take, without delay, all necessary measures to guarantee that the rights and freedoms of the above-mentioned persons are respected.

52. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be the immediate release of the detainees and an enforceable right to remedy, including reparation and compensation, in accordance with article 9 (5) of the International Covenant on Civil and Political Rights.

53. In the light of the allegations of torture and other ill-treatment inflicted upon the detainees, the Working Group considers it appropriate, in accordance with article 33 (a) of its methods of work, to refer those allegations to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and to the Committee against Torture for appropriate action.

[Adopted on 3 December 2015]
