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Working Group on Arbitrary Detention

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Opinion No. 42/2021 concerning Hisham Abdelaziz Gharib and Bahaaeldin Ibrahim Nemaalla Elsayed (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,¹ on 10 May 2021 the Working Group transmitted to the Government of Egypt communication concerning two journalists, Hisham Abdelaziz Gharib and Bahaaeldin Ibrahim Nemaalla Elsayed. The Government has not replied to the communication. Egypt 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).

¹ [A/HRC/36/38](#).

Submissions

Communication from the source

4. According to the source, two journalists, Mr. Gharib and Mr. Elsayed, are allegedly being held in arbitrary detention in Egypt solely because of their profession. The source claims that since 2013 a significant number of journalists in Egypt have spent years in detention without trial or have been sentenced to long jail terms as part of a clampdown on free speech.

5. Mr. Gharib is a citizen of Egypt born in 1977. He is married and has three children. Mr Gharib once worked as a journalist and producer for Al-Jazeera in Doha.

6. According to the information received, on 20 June 2019, at around 6 p.m., Mr. Gharib arrived at Cairo International Airport from Qatar with his family. He was apprehended by an immigration officer and taken to the National Security Agency, where he was interrogated for six hours. His personal belongings and the luggage of his family were reportedly searched. Although he was released, his passport and mobile telephone were confiscated.

7. Upon arrival at his residence in Cairo, Mr. Gharib reportedly received a telephone call from a national security officer who instructed him to return to the airport to have his passport handed back to him. At the airport, National Security Agency and police officers, some in uniform and some in plainclothes, allegedly kidnapped Mr. Gharib and dragged him to an unknown location, where he was subjected to enforced disappearance for four days. It is believed that this location was in fact the National Security Agency headquarters in the Fifth Settlement.

8. The source claims that, on 24 June 2019, after the prosecution had accused Mr. Gharib of allegedly belonging to a prohibited group and spreading false news (case No. 1365/2018), his family learned that he was being held in Tora Prison.

9. According to the source, Mr. Gharib's pretrial detention was "renewed periodically for 15 days" until 5 December 2019, when it was ordered that he be released on a 20,000 Egyptian pound bail. However, the actual release did not take place. While finalizing his release procedures at Hadaeq al-Qubbah police station on 11 December 2019, Mr. Gharib was reportedly subjected to enforced disappearance for a second time, to a place unknown to his family or his lawyers, for 41 days, allegedly at the National Security Agency premises in the Fifth Settlement. He reappeared before the prosecution on 20 January 2020 and was accused, in a new (case No. 1956/2019), with exactly the same charges in connection with which his release had been ordered, namely for joining a prohibited group and spreading false news.

10. Subsequently, Mr. Gharib's pretrial detention in Tora Prison was reportedly renewed over and over again pending investigations. No trial date was set.

11. The source claims that Mr. Gharib's lawyer was only allowed to attend Mr. Gharib's hearings in September 2019, three months after his first arrest, and was prohibited from visiting him in detention.

12. After his arrest, Mr. Gharib was allowed to receive family visits once a week. However, on 10 March 2020, under the pretext of restrictions imposed in response to the coronavirus disease (COVID-19) pandemic, the Egyptian authorities reportedly suspended family visits. Mr. Gharib's family members were denied any access to him until 22 August 2020, when visits resumed. Since then, Mr. Gharib's family has been allowed to visit him once a month. It is alleged that Mr. Gharib is being detained in very poor conditions, in a small, overcrowded cell with no water, sanitation or hygiene facilities or adequate ventilation.

13. According to the information received, Mr. Gharib's health started to seriously deteriorate after he was placed in detention. He now suffers from glaucoma in both eyes and elevated eye pressure. He also suffers from a hearing impairment. He has almost completely lost the ability to hear in his left ear and is gradually losing his hearing in his right ear. He is at grave risk of losing his hearing and vision.

14. Mr. Gharib was examined twice by a medical doctor in the prison's hospital. He has also been examined by a medical doctor in Al-Qasr al-Ayni hospital. However, the

examinations have been superficial and no treatment has been provided. His family has requested that Mr. Gharib be pardoned, given his critical health situation. However, the request has never been granted.

15. It is reported that on 15 and 17 December 2019 Mr. Gharib's family submitted official complaints to the Attorney General concerning his second enforced disappearance. They have not received a response.

16. Mr. Elsayed too is a citizen of Egypt, born in 1976. He used to live in Faisal, Giza. He is married and has two children. He used to be a producer for Al-Jazeera and Nile TV International and is a member of the International Press Institute.

17. According to the information received, in mid-December 2018 Mr. Elsayed travelled from Doha, where he lived and worked, to Egypt for a one-week vacation. On 31 December 2018, while at Cairo International Airport to travel back to Doha, his passport was confiscated and he was banned from travelling, without being provided with any reason. He was also instructed to go to National Security Agency headquarters on 6 October 2018 to get his passport back.

18. Mr. Elsayed allegedly went to National Security Agency headquarters several times to get his passport to no avail, until in March 2019, when it was finally given back to him. While at the airport to take a flight back to Doha for a second time, his passport was again confiscated and he was again not allowed to travel.

19. According to the source, on 22 February 2020, after he had managed to obtain a new passport, Mr. Elsayed attempted for a third time to travel to Doha, this time through Burj al-Arab Airport in Alexandria. On that day, his family lost contact with him, as he was allegedly arrested and subjected to enforced disappearance by National Security Agency and police officers, some in uniform and some in plainclothes, for nearly three months. Reportedly, it later emerged that he may have been taken to National Security Agency headquarters in Abis and the central security camp in Marghem.

20. The source claims that, after 75 days of having been held in a place undisclosed to his family and legal representatives, Mr. Elsayed appeared before the prosecution on 6 May 2020. He was charged with joining a terrorist group while knowing its objectives and with spreading false news (case No. 1365/2018).

21. Since then, Mr. Elsayed's pretrial detention at Tora Prison has been "renewed periodically for 15 days" pending investigations. No trial date has been set.

22. The source argues that, during the 75 days of his enforced disappearance, Mr. Elsayed was subjected to torture. He was allegedly held in solitary confinement, blindfolded and handcuffed, throughout that period and was electrocuted all over his body. Reportedly, the torture was carried out to coerce him into confessing that he belonged to a Muslim Brotherhood media committee.

23. Mr. Elsayed is reportedly being detained in very poor conditions, in a small and overcrowded cell, with no water, sanitation or hygiene facilities or adequate ventilation. He has been allowed to receive family visits only once a month and has been denied the right to be visited by his lawyer in detention.

24. On 22 February 2020, Mr. Elsayed's family submitted official complaints to the prosecutor concerning the enforced disappearance of Mr. Elsayed.

25. Based on the information provided, the source claims that the two journalists' detention constitutes arbitrary deprivation of liberty under categories I, II and III.

Category I

26. The source claims that the arrests of Mr. Gharib and Mr. Elsayed were arbitrary under category I, as no legal bases or justifications were provided. The prohibition of arbitrary arrest, guaranteed under article 9 of the Universal Declaration of Human Rights, is aimed at protecting the right to liberty, provided under article 3. In its general comment No. 35 (2014), the Human Rights Committee has stated that persons deprived of their liberty should be

informed, at the time of arrest, of the reasons for the arrest and that this requirement applies broadly to the reasons for any deprivation of liberty.

27. Furthermore, in accordance with principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, anyone who is arrested should be informed at the time of arrest of the reason for the arrest and should be promptly informed of any charges him or her. The same requirement is reflected in article 14 (3) of the Arab Charter on Human Rights.

28. The source claims that the two journalists were arrested without having been shown a warrant or having been provided with a legal explanation for the reasons for their arrests, which renders the arrests arbitrary and in violation of the two men's right to liberty.

29. The source states that the right of persons not to be subjected to enforced disappearance is considered non-derogable, even in a state of emergency. According to the International Convention for the Protection of All Persons from Enforced Disappearance, people deprived of liberty must be held only in a place of detention that is officially recognized. States must ensure that no one is held secretly in detention and should provide the detainee's family and lawyer with accurate information on the detention.

30. The source claims that Mr. Gharib was forcibly disappeared for four days after his first arrest and for another 41 days following his release order. Mr. Elsayed was forcibly disappeared following his arrest for three consecutive months.

31. According to the source, the Government has increasingly turned pretrial detention from an exceptional legal measure to a punitive tool used systematically against journalists, human rights defenders and members of the political opposition in general. Instead of being released, Mr. Gharib was accused under a second case, while he was completing his release procedures under the previous case.

32. The source claims that the purpose of this systematic practice is to keep opposition members and critics behind bars indefinitely. This practice has come to be known as "the recycling of cases" or "rotation". It is alleged that the new charges faced by Mr. Gharib were simply revived versions of the old charges. This allegedly confirms that the prolonged detention of Mr. Gharib is arbitrary, without legal basis and politically motivated and that, as such, it has fundamentally jeopardized his right to liberty, in violation of article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.

Category II

33. The source claims that the arbitrary detentions of Mr. Gharib and Mr. Elsayed are attributable to their profession as journalists and are part of a crackdown on freedom of expression in Egypt.

34. The source claims that journalists in Egypt have been targeted for detention and sentencing under terrorism-related charges. These practices allegedly constitute violations of the obligations of Egypt under international law to protect and promote the right to freedom of expression enshrined in article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Moreover, any restrictions imposed on this right should only be such as are provided by law and necessary on the grounds set out in article 19 (3) of the Covenant.

Category III

35. According to the source, the detentions of Mr. Gharib and Mr. Elsayed are arbitrary because the two men have been denied their right to due process.

36. The source submits that, in accordance with principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, communication of the detained or imprisoned person with the outside world, and in particular his or her family or counsel, should not be denied for more than a matter of days. Furthermore, in its general comment No. 32 (2007) the Human Rights Committee stated that a detainee has the right to have prompt access to legal counsel, which means that a lawyer is granted the right to have private communication and meetings with the detainee and to attend all the investigations without interference or restrictions.

37. Detainees should also have access to effective counsel. In accordance with the Basic Principles on the Role of Lawyers, this means that it is the duty of the competent authorities to ensure that lawyers have access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients and that such access should be provided at the earliest appropriate time. The effectiveness of legal counsel is fundamentally related to the principle of equality of arms, which is enshrined in article 11 of the Universal Declaration of Human Rights and which draws on the right of detainees to be given the time and facilities necessary to prepare and present their defence with counsel, for when the trial takes place.

38. In the cases of Mr. Gharib and Mr. Elsayed, the source claims that the right to have prompt access to effective legal counsel has been denied, as the two men have been prevented by the authorities from communicating with their lawyers while in detention.

39. The rights of all detainees to communicate with the outside world and to be visited by family are fundamental safeguards against any attempts by the authorities to violate their human rights, including through torture or other ill-treatment and through enforced disappearance.

40. According to article 17 (2) (d) of the International Convention for the Protection of All Persons from Enforced Disappearance, detained and imprisoned individuals have the right to communicate and be visited by their families. The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused. In line with principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, this right could be subject only to reasonable conditions and restrictions as specified by law or lawful regulations.

41. The source claims that Mr. Gharib and Mr. Elsayed have been prevented from receiving family visits and that, when such visits have been allowed, they have been subject to restrictions (for example, they can occur only once a month) with no legitimate aim.

42. As stipulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, detainees should be protected from any practices that violate their right to be free from any acts that could cause severe pain or suffering, whether physical or mental, and that are inflicted intentionally on a person. According to the Committee against Torture, the right to freedom from torture and other ill-treatment or punishment is absolute. In other words, it applies in all circumstances and may never be restricted, including in times of war or during states of emergency. No exceptional circumstances whatsoever, including threats of terrorism or other violent crimes, may be invoked to justify torture or other ill-treatment. That prohibition applies irrespective of the offence allegedly committed by the accused person.

43. According to the source, Mr. Gharib and Mr. Elsayed have been subjected to torture and other ill-treatment by the authorities to coerce them into confessing their guilt and to humiliate them. Torture and other ill-treatment have reportedly caused severe bodily pain to the detainees and endangered their mental and physical well-being.

44. Every detainee has the right to the highest attainable standard of physical and mental health. This right extends not only to timely and appropriate health care but also to underlying determinants of health, such as adequate food, water and sanitation. Moreover, sick prisoners whose health conditions require specialist treatment should be transferred to specialized institutions or civil hospitals. Failure to provide access to adequate medical care violates the right to health.

45. Mr. Gharib and Mr. Elsayed have allegedly been denied adequate medical attention and treatment by the prison authorities despite suffering from grave health conditions that need urgent and effective medical care.

Response from the Government

46. In accordance with its methods of work, on 20 May 2021, the Working Group transmitted to the Government of Egypt a communication concerning Mr. Gharib and Mr. Elsayed. The Government has not replied, however, to the communication, nor has it requested an extension of the time limit for its reply as provided for in paragraph 16 of the

Working Group's methods of work. In the absence of a response or a request for an extension from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

47. In determining whether the detentions of Mr. Gharib and Mr. Elsayed are arbitrary, the Working Group has recourse to the principles established in its jurisprudence for dealing with evidentiary questions. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government, if it wished to refute the allegations.²

Discussion

48. The source claims that the detentions of Mr. Gharib and Mr. Elsayed are arbitrary under categories I, II and III.

Category I

49. The source claims that the detentions of Mr. Gharib and Mr. Elsayed are arbitrary under category I because they are without legal basis or justification. According to the source, the prohibition of arbitrary arrest and detention, guaranteed under various provisions of international human rights law, has been totally disregarded. In particular, the fact that the arrests were allegedly carried out without a warrant being shown to the men and that no reason was provided for the arrests render the arrests arbitrary and in violation of the right to liberty. The source refers to general comment No. 35 (2014), in which the Human Rights Committee stated that any person should be informed, at the time of arrest, of the reasons for the arrest and that this requirement applies broadly to the reasons for any deprivation of liberty.

50. Furthermore, in accordance with principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, anyone who is arrested should be informed at the time of arrest of the reason for the arrest and should be promptly informed of any charges against him or her.

51. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, the authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant. According to international human rights law and its safeguards against arbitrary detention, the right to be presented with an arrest warrant, particularly in cases that do not involve arrests made in flagrante delicto, serves to ensure the exercise of effective and objective control by a competent, independent and impartial judicial authority. This is procedurally inherent in the right to liberty and security and the prohibition of arbitrary detention enshrined in articles 3 and 9 of the Universal Declaration of Human Rights, article 9 of the Covenant and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.³ The Working Group considers that these international provisions were not respected in the present case.⁴

² A/HRC/19/57, para. 68.

³ The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6–7; No. 3/1993, paras. 6–7; No. 4/1993, para. 6; No. 5/1993, paras. 6 and 8–9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; and No. 44/1993, paras. 6–7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; No. 82/2018, para. 29; No. 6/2020, para. 40; No. 11/2020, para. 38; No. 13/2020, para. 47; No. 14/2020, para. 50; No. 31/2020, para. 41; No. 32/2020, para. 33; No. 33/2020, para. 54; and No. 34/2020, para. 46. See also article 14 (1) of the Arab Charter on Human Rights.

⁴ See, for example, opinions No. 93/2017, para. 44; No. 10/2018, paras. 45–46; No. 36/2018, para. 40; No. 46/2018, para. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No.

52. According to the information received, on 20 June 2019 Mr. Gharib was deceived into returning to Cairo International Airport to get his passport back, only to be apprehended at the airport by an immigration officer and taken to the National Security Agency to be interrogated for six hours. Mr. Gharib had his personal belongings searched, his family's luggage was searched and his passport and mobile telephone were confiscated. He was later kidnapped by National Security Agency and police officers, some in uniform and some in plainclothes, and dragged to an unknown location, possibly the National Security Agency headquarters in the Fifth Settlement. The reasons for his arrest and detention were not made known to him at the time of arrest, nor was a warrant presented to him. It was not until 24 June 2019 that his family came to learn that he was being held at Tora Prison for allegedly belonging to a prohibited group and spreading false news.

53. Mr. Gharib's pretrial detention was "renewed periodically for 15 days" until 5 December 2019, when his release on bail was ordered. Despite having satisfied the bail conditions, Mr. Gharib was not released but reportedly subjected to enforced disappearance for 41 days, allegedly at the National Security Agency premises in the Fifth Settlement and only appeared before the prosecution on 20 January 2020. This time, he was presented with new but similar charges, in other words he was accused of joining a prohibited group and spreading false news.

54. The Working Group finds that Mr. Gharib was placed in pretrial detention in the absence of a judicial review of its legality, in violation of the right to be brought promptly before a judicial authority enshrined in article 9 (3) of the Covenant. In reaching this conclusion, the Working Group reiterates that failure to afford a detainee the right to judicial review of his or her detention is inconsistent with international human rights law. Thus, the pretrial detention of Mr. Gharib, which commenced without a warrant and was not been judicially controlled or reviewed, lacked legal basis.

55. In respect of Mr. Elsayed, the source reports that he was arrested at the airport after he had obtained a new passport and as he was seeking to travel to Doha for a third time. Mr. Elsayed was then subjected to enforced disappearance by a number of National Security Agency and police officers, some in uniform and some in plainclothes, for nearly three months, allegedly at National Security Agency headquarters in Abis and the central security camp in Marghem.

56. The source claims that, after 75 days of being held in a place undisclosed to his family and legal representatives, Mr. Elsayed appeared before the prosecution on 6 May 2020. He was accused of joining a terrorist group while knowing its objectives and of spreading false news (case No. 1365/2018). After that time, his pretrial detention at Tora Prison was "renewed periodically for 15 days" pending investigations.

57. The Working Group finds that, in order to invoke a legal basis for the deprivation of liberty, the authorities should have exhibited a warrant or, at a minimum, informed Mr. Gharib and Mr. Elsayed of the reasons for the deprivation of their liberty at the time of the arrest and should have promptly informed them of the charges against them. Their failure to do so violated article 9 of the Universal Declaration of Human Rights, article 9 of the Covenant and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. It also renders their arrests devoid of any legal basis.

58. The Working Group reiterates that, according to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the norm. Moreover, it should be ordered for the shortest time possible. Detention pending trial must thus be based on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.

59. The Working Group notes the source's submission that Mr. Gharib and Mr. Elsayed were not brought promptly before a judge during their detention – that is, within 48 hours of

44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51; No. 65/2019, para. 59; No. 71/2019, para. 70; No. 72/2019, para. 40; No. 82/2019, para. 74; No. 6/2020, para. 39; No. 11/2020, para. 37; No. 13/2020, para. 46; No. 14/2020, para. 49; No. 31/2020, para. 40; No. 32/2020, para. 32; No. 33/2020, paras. 53 and 71; and No. 34/2020, para. 44.

their arrest. It recalls that, in line with the 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, the right to challenge the lawfulness of detention before a court is a self-standing human right essential to the preservation of legality in a democratic society. Its absence constitutes a human rights violation. This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty. Judicial oversight of the deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.

60. The Working Group observes that Mr. Gharib and Mr. Elsayed were not afforded the right to take proceedings before a court so that it could decide without delay on the lawfulness of their detention, in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights, article 9 of the Covenant and principles 11, 32, 37 and 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group finds that, in the present case, these rights and principles have been violated.

61. The Working Group has also asserted that holding persons at secret and undisclosed locations violates the right to effectively challenge the legality of the detention before a court or tribunal, enshrined in article 9 (4) of the Covenant. Mr. Gharib and Mr. Elsayed have in fact been prevented from challenging their detentions before a court. Consequently, their right to an effective remedy, set out in article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant, have been violated. They have also been placed outside the protection of the law, in violation of the right to be recognized as persons before the law, enshrined in article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

62. Both Mr. Gharib and Mr. Elsayed have been held at locations unknown to their families and lawyers for a considerable period of time. The Working Group considers that any deprivation of liberty that entails the wilful refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention lacks any valid legal basis under any circumstance. In the present context, the enforced disappearances to which the two men have been subjected are considered to violate numerous substantive and procedural provisions of the Covenant and constitute a particularly aggravated form of arbitrary detention.⁵ They are also intrinsically arbitrary, as they have placed the two men outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights. The Government's failure to notify the men's families of the arrests and the locations of detention also violated principle 16 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

63. Consequently, the Working Group finds that the Government has failed to establish a legal basis for the detentions of Mr. Gharib and Mr. Elsayed and that the detentions are thus arbitrary under category I.

Category II

64. The source claims that the detentions of Mr. Gharib and Mr. Elsayed are arbitrary under category II, as they are a consequence of their profession as journalists and were carried out as part of a crackdown on freedom of expression in Egypt. According to the source, journalists in Egypt have been targeted for detention and sentencing under terrorism-related charges. These practices allegedly constitute violations of international law, in relation to the protection and promotion of the right to freedom of expression, according to article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Any restrictions on this right should only be such as are provided by law and necessary on the grounds set out in article 19 (3) of the Covenant.

65. The Working Group considers that the conduct of Mr. Gharib and Mr. Elsayed, as well as their work as journalists, is protected by the Universal Declaration of Human Rights and the Covenant, both of which recognize that everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek,

⁵ Human Rights Committee, general comment No. 35 (2014), para. 17.

receive and impart information and ideas through any media, and is commonly exercised in connection with the rights to freedom of peaceful assembly and association (arts. 19, 20 and 21 of both instruments).

66. The source claims that journalists have been targeted for detention and sentencing under terrorist-related charges in Egypt. These practices allegedly constitute violations of Egypt's obligations under international law in relation to the protection and promotion of the right to freedom of expression, according to article 19 of the Universal Declaration of Human Rights and in article 19 of the Covenant. Any restrictions on this right shall only be such as provided by law and necessary on the grounds set out in article 19 (3) of the Covenant.

67. The Working Group notes that both journalists were charged with crimes related to spreading false news. The Government, despite having the opportunity, did not explain how and why these charges have required the imposition and renewal of pretrial detention. According to article 19 (3) of the Covenant, restrictions on the right to freedom of expression can only be imposed when they are necessary to ensure the respect of the rights of others or for the protection of national security, public order or public health or morals. The Working Group is not convinced that these requirements have been met; in fact, the case presented by the source, not rebutted by the Government, leads it to reach the opposite conclusion.

68. In addition, the source claims that the detentions of Mr. Gharib and Mr. Elsayed are part of a broader systematic pattern of the Government repeatedly using vague laws and detention to silence journalists and suppress freedom of expression in the country. In this context, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has observed that legislation on false news often fails to meet the three-pronged test of legality, necessity and legitimate aims often does not define with sufficient precision what constitutes false information or what harm it seeks to prevent.⁶ In relation to Egypt, the Special Rapporteur has noted that human rights defenders and journalists have been prosecuted for spreading false news after having published reports on the human rights situation in the country.⁷

69. The Working Group concludes that the detentions of Mr. Gharib and Mr. Elsayed have resulted from the peaceful exercise of their right to freedom of opinion expression, assembly and association, as well as their right to take part in the conduct of public affairs, and were contrary to articles 19, 20 and 21 of the Universal Declaration of Human Rights and articles 19, 21, 22 and 25 of the Covenant. Their detentions are arbitrary under category II. The Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression for further consideration and, if necessary, appropriate action.

Category III

70. The source contends that the detentions of Mr. Gharib and Mr. Elsayed are arbitrary in accordance with category III because the two men have been denied their right to due process, which includes the right to gain access to counsel. In fact, Mr. Gharib and Mr. Elsayed have been prevented by the authorities from communicating with their lawyers, both after their arrest and during detention. Additionally, the source claims that Mr. Gharib and Mr. Elsayed have been prevented from receiving family visits and that, when such visits have been allowed, they have been subject to restrictions (for example, they occur only once a month) with no legitimate aim.

71. The source also alleges that Mr. Gharib and Mr. Elsayed have been subjected to torture and other ill-treatment by the authorities, to coerce them into confessing their guilt and to humiliate them. Such torture and ill-treatment has reportedly caused severe bodily pain to the detainees and endangered their mental and physical well-being.

72. As the source has submitted, principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that communication of the detained or imprisoned person with the outside world, and in particular his or her

⁶ A/HRC/47/25, para. 54.

⁷ Ibid., para. 55.

family or counsel, should not be denied for more than a matter of days. Furthermore, in its general comment No. 32 (2007), in which it interpreted article 14 of the Covenant, the Human Rights Committee stressed that a detainee has the right to have prompt access to legal counsel, which means that a lawyer must be granted the appropriate access and facilities to have private communication and meetings with the detainee and to attend all the investigations without interference or restrictions. A detainee ought also to have access to effective counsel. In accordance with principle 2 of the Basic Principles on the Role of Lawyers, this means that it is the duty of the competent authorities to ensure that lawyers have access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients and that such access should be provided at the earliest appropriate time. The effectiveness of legal counsel is fundamentally related to the principle of equality of arms, which is enshrined in article 11 of the Universal Declaration of Human Rights and article 14 of the Covenant, which protect the right of detainees to be given the time and facilities necessary to prepare and present their defence with the appropriate legal assistance, for when the trial takes place.

73. In the cases of Mr. Gharib and Mr. Elsayed, the right to prompt recourse to effective legal counsel has allegedly been denied, as the two men have been prevented by the authorities from communicating with their lawyers during detention. The Government has failed to rebut these credible allegations made by the source.

74. The rights of all detainees to communicate with the outside world and to be visited by family, are fundamental safeguards against any attempts by the authorities to violate their human rights, including through torture or other ill-treatment and through enforced disappearance.

75. The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused. In line with principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, this right could be subject only to reasonable conditions and restrictions as specified by law or lawful regulations.

76. As stipulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, detainees should be protected from any practices that violate their right to be free from any act that could cause severe pain or suffering, whether physical or mental, and that are inflicted intentionally on a person. According to the Committee against Torture, the right to freedom from torture and other ill-treatment or punishment is absolute. In other words, it applies in all circumstances and may never be restricted, including in times of war or during states of emergency. No exceptional circumstances whatsoever, including threats of terrorism or other violent crime, may be invoked to justify torture or other ill-treatment. Such prohibition applies irrespective of the offence allegedly committed by the accused person.

77. The source alleges that Mr. Gharib and Mr. Elsayed have been denied, by the prison authorities, adequate medical attention and treatment despite suffering from grave health conditions that need urgent and effective medical care.

78. Every detainee has the right to the highest attainable standard of physical and mental health. This right extends not only to timely and appropriate health care but also to underlying determinants of health, such as adequate food, water and sanitation. Moreover, sick prisoners whose health conditions require specialist treatment should be transferred to specialized institutions or to civil hospitals. In the present case, the Working Group considers that the failure to provide access to adequate medical care when needed, in addition to being detained under conditions that could amount to torture or ill-treatment, while facing a criminal trial, has created a situation in which it cannot be considered that the fundamental principle of equality of arms could be respected. This is an additional element leading the Working Group to consider that the right to a fair trial was not guaranteed by the authorities in respect of Mr. Gharib and Mr. Elsayed.

79. For these reasons, the Working Group finds that the fair trial rights of Mr. Gharib and Mr. Elsayed, under articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the Covenant, have been violated and that, as such, their detentions are arbitrary under category III.

Disposition

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

The deprivation of liberty of Hisham Abdelaziz Gharib and Bahaaeldin Ibrahim Nemaalla Elsayed, being in contravention of multiple provisions of international human rights instruments and standards, including articles 3, 9, 19, 20 and 21 of the Universal Declaration of Human Rights, principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and articles 2 (1) and (3), 9, 14, 16, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

81. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of the two individuals 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.

82. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be release Mr. Gharib and Mr. Elsayed immediately and to accord them an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global COVID-19 pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Gharib and Mr. Elsayed.

83. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detentions and treatment of Mr. Gharib and Mr. Elsayed and to take appropriate measures against those responsible for the violation of their rights.

84. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

Follow-up procedure

86. 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. Gharib and Mr. Elsayed have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Gharib and Mr. Elsayed;

(c) Whether an investigation has been conducted into the violation of their rights 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.

87. 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.

88. 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.

89. 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.⁸

[Adopted on 10 September 2021]

⁸ Human Rights Council resolution 42/22, paras. 3 and 7.