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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 26/2018 concerning Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf (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. 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 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 16 January 2018 the Working Group transmitted to the Government of Egypt a communication concerning Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf. The Government replied to the communication on 27 March 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

4. Ola Yusuf al-Qaradawi, age 56, is a Qatari citizen of Egyptian origin and Hosam al-Din Khalaf, age 58, is an Egyptian citizen. They are also legal permanent residents of the United States of America and have several immediate family members who are citizens of the United States. They are a married couple and have three children. Ms. al-Qaradawi is the daughter of well-known Islamic scholar, Sheikh Yusuf al-Qaradawi, and previously was an administrative employee at the Embassy of Qatar in Egypt. Mr. Khalaf is an engineer who worked in the construction business and was previously a volunteer administrator for the Al-Wasat party, an Islamic political party that remains legal in Egypt. Reportedly, Mr. Khalaf had been previously detained in Egypt from 2014 to 2016 on the unofficial accusation of being part of the Muslim Brotherhood, which he had strongly denied. He was later released without charge or trial.

Arrest and detention

5. According to the source, Ms. al-Qaradawi and Mr. Khalaf were arrested on 30 June 2017, by agents from the Burg al-Arab Division of the State security agency, a branch of the Ministry of the Interior, at the family's vacation home in Ramses Village, Alexandria, on the north coast of Egypt. The source states that no arrest warrant was presented and no search warrant for the home was provided. The couple later learned that the agents had detained them for questioning in relation to a violation of an asset freeze, because they were moving furniture out of their vacation home. According to the source, the agents claimed that the home belonged to Ms. al-Qaradawi's father, Sheikh Yusuf al-Qaradawi, but in fact he did not own the home.

6. On 2 July 2017, Ms. al-Qaradawi and Mr. Khalaf were brought to the prosecutor's office of the State security agency, where they were informally told that they were under investigation. They were also told that they had been added to Case No. 316, a pre-existing mass investigation that appears to include over 250 people and involves vague allegations related to terrorism. However, they were not informed of any specific allegations against them.

7. After that meeting, Ms. al-Qaradawi and Mr. Khalaf were reportedly transported to prisons near Cairo that are under the control of the Ministry of the Interior. Ms. al-Qaradawi was taken to Al-Qanater prison and Mr. Khalaf was taken to Tora prison. The source informs the Working Group that, as they have not been charged with any crime, Ms. al-Qaradawi and Mr. Khalaf are currently being detained pursuant to temporary orders, which purport to authorize their detention.

8. On 3 July 2017, State-run media in Egypt reported that Ms. Al-Qaradawi and Mr. Khalaf had been arrested on the basis of allegations of being members of the Muslim Brotherhood and harming national unity and peace. The source emphasizes that both deny those unofficial allegations and that if Mr. Khalaf had any connection to the Muslim Brotherhood he would likely have faced charges during his prior detention, which was based on a similar accusation.

9. On 17 August 2017, the media reported that the couple's assets, along with those of five of Ms. al-Qaradawi's siblings, had been frozen, on the basis of allegations of affiliation with the Muslim Brotherhood and terrorist activities. The source emphasizes that the tactic of freezing assets has been used regularly by the Government against thousands of Egyptians over the past several years. The source asserts that, in the present case, this has led to Ms. al-Qaradawi and Mr. Khalaf being viewed as guilty by association without any evidence having been presented or any opportunity given to them to refute the allegations.

10. Despite various reports published by State-run media about charges allegedly having been filed against the couple, no copy of any arrest warrant, search warrant or indictment has been provided to Ms. al-Qaradawi, Mr. Khalaf or their lawyers.

11. According to the source, under Egyptian law, State security prosecutors may order 15 days of preventative detention for individuals suspected of committing felonies. This period

of detention can be renewed by the prosecutor for up to five months, in 15-day increments. To hold the individual past the five months, the prosecutor must submit the case to a relevant judge, who can either release the accused or renew the detention period for up to 45 days at a time.

12. The source informs the Working Group that Ms. al-Qaradawi and Mr. Khalaf had their temporary detention orders renewed nine times before being brought before a judge. During each of the brief renewal meetings, they were both able to speak with their lawyers, but not in private, for two to three minutes, which is how the conditions of their detention are known.

13. On 26 November 2017, Ms. al-Qaradawi and Mr. Khalaf were presented to a judge in Cairo Criminal Court who, under Egyptian law, will now see them every 45 days to renew their detention. They were reportedly held in glass cages during their brief appearances before the court and denied the ability to consult counsel.

14. On 4 January 2018, the judge renewed Ms. al-Qaradawi's detention order for a second 45-day period. On 8 January 2018, he renewed Mr. Khalaf's detention order for a second 45-day period. The source notes that a United States consular official who sought to observe both of these sessions was denied access to the courtroom.

Conditions of detention

15. The source alleges that, while they have been held in detention for more than six months, Ms. al-Qaradawi and Mr. Khalaf, in violation of Egyptian laws and regulations and international law, have consistently been denied their right to have contact with their family and access to counsel, and have been subjected to cruel, inhuman or degrading treatment that may amount to torture. Both have been held in incommunicado solitary confinement 24 hours per day, and allowed only five minutes per day to go to the bathroom. Their cells are dark, small, lack natural light and ventilation and have no beds or toilets. Unlike other prisoners, they are not permitted to regularly purchase food and water from the canteen or receive food and clothing from their family.

16. According to the source, Ms. al-Qaradawi, in particular, seems to have been singled out for disparate treatment. While her family has tried to visit her several times, they were, every time, the only ones to be turned away and were told that she was not eligible for family visits. Ms. al-Qaradawi was also denied consular visits from Qatari officials. According to her lawyers, who have seen her only briefly during the detention renewal sessions, Ms. al-Qaradawi has lost a significant amount of weight and appears very weak. She became very ill and was brought to the prison clinic but it is unclear whether she received any medication or treatment. In addition, during the renewal of her detention on 4 January 2018, Ms. al-Qaradawi had only about two minutes to speak with her counsel. The source alleges that she has suffered serious physical abuse in the prison. The source notes that, apparently, the guards sometimes use prisoners to cover their shifts watching the cells. On several occasions, one prisoner, who has been detained for four years and appears mentally unstable, has hit Ms. al-Qaradawi, pushed her to the ground and handled her aggressively. Ms. al-Qaradawi's repeated complaints to prison authorities have reportedly been ignored.

17. Mr. Khalaf, who is being held in Tora prison, one of the most notorious prisons in Egypt, has been denied access to see a doctor for reported pain in his eyes. A second request for a medical check-up was submitted to the prosecution but, reportedly, no action has been taken thus far.

18. The source reports that, as a result of these conditions, Ms. al-Qaradawi and Mr. Khalaf are suffering severe mental and emotional stress. The extent of their suffering is, however, unknown as they are not permitted any contact with the outside world. Their respective ages, 56 and 58 years old, make Ms. al-Qaradawi and Mr. Khalaf particularly vulnerable to cruel, inhuman and degrading treatment and torture. The source notes that, without intervention, it is unclear how much longer they will be able to withstand the physical and psychological distress imposed by prison authorities.

19. The source emphasizes that the general situation for human rights in Egypt is dire, noting independent reports that in the country there may be tens of thousands of arbitrarily detained people, who are often subjected to years of pretrial detention with no charges or trial

and under harsh prison conditions. The source claims that the Government has a well-documented practice of arresting real or purported political opponents and refusing them access to lawyers and family and to evidence that could be challenged in a court.

Analysis of violations

20. In the light of the foregoing, the source submits that Ms. al-Qaradawi and Mr. Khalaf have been denied fair trial guarantees and that their deprivation of liberty is arbitrary under category III of the categories applied by the Working Group.

Arrest without a warrant

21. According to the source, under the Egyptian Constitution, citizens can be arrested only on the basis of a judicial warrant, except in extreme cases. However, according to the source, Ms. al-Qaradawi and Mr. Khalaf were not arrested pursuant to an arrest warrant. When the State security agents arrived at the vacation home on 30 June 2017, they did not show any type of warrant, nor did they inform the couple that they were under arrest. Similarly, the search of the vacation home was illegal, as Egyptian law requires that authorities have a valid and specific search warrant to enter private property. The agents did not show any search warrant before they searched the vacation home or the couple's permanent residence in Cairo and seized personal property.

No reason given for arrest and no formal charges laid

22. The source reports that, since their arrest on 30 June 2017, Ms. al-Qaradawi and Mr. Khalaf have not been formally charged with any crime. At the time of the arrest, no reason for the arrest was given to Ms. al-Qaradawi, Mr. Khalaf, their family or their lawyers. To date they have not received any official explanation for their arrest and continued detention.

23. Ms. al-Qaradawi and Mr. Khalaf's lawyers have been told informally that the couple were suspected of "terrorist" activities. However, the source asserts that this claim is patently false and runs counter to the original reason given for their detention, which was the removal of furniture that Egyptian authorities believed was a violation of the asset freeze that had been imposed on the father of Ms. al-Qaradawi.

24. The source emphasizes that, though public media reports state that Ms. al-Qaradawi and Mr. Khalaf have been charged, neither they nor their lawyers have ever been presented with even a single paper in writing asserting what they are suspected of doing, let alone that they have been charged with a crime.

Extended pretrial detention

25. The source submits that for almost five months Ms. al-Qaradawi and Mr. Khalaf have been held in pretrial detention pursuant to multiple 15-day temporary detention orders, which were issued by the prosecutor and not by a judge. They have not been given any reason justifying their ongoing pretrial detention, or any opportunity to meaningfully contest the detention. While their lawyers have attempted to challenge their detention, all requests have been summarily denied. As such, Ms. al-Qaradawi and Mr. Khalaf have not been afforded any opportunity for conditional release, and are therefore being detained in violation of the international law, which bars preventative detention except in exceptional circumstances.

Incommunicado detention

26. The source submits that Ms. al-Qaradawi and Mr. Khalaf have been detained incommunicado since 30 June 2017. There are brief moments every 15 days, when their detention orders have been renewed, when they see their counsel, but otherwise they are totally cut off from the outside world.

27. For the first two days of their detention, their whereabouts were reportedly completely unknown to their family and lawyers. Since their detention in Al-Qanater and Tora prisons — as of 2 July 2017 — they have been held in ongoing solitary confinement and thus prohibited from communicating with their family. No visits or phone calls have been permitted.

Lack of access to legal counsel

28. When Ms. al-Qaradawi and Mr. Khalaf were arrested and initially questioned by the State security agents, their lawyers were not informed and were therefore not present, which is in direct violation of the Egyptian Constitution. As their detention continues, they have been denied all visits with their lawyers outside of the brief contact during the detention renewal sessions. At the sessions, Ms. al-Qaradawi and Mr. Khalaf cannot discuss any details of their case. Any conversations they have are in the presence of the State security prosecutor and are therefore not confidential.

Denial of access to all information

29. Ms. al-Qaradawi, Mr. Khalaf and their counsel have seen no official documents or evidence from the Government of Egypt explaining the reasons for the couple's arrest and detention, or any formal charges against them. As such, Ms. al-Qaradawi and Mr. Khalaf are completely unable to meaningfully challenge their ongoing temporary detention, and are unable to even contemplate preparing a defence to any potential charges that may be levelled against them.

Denial of the presumption of innocence

30. The source notes that the right to the presumption of innocence is protected in the Constitution of 2014, which explicitly states in article 96 that an accused person is innocent until proven guilty in a fair court of law that provides guarantees for the person to defend himself.

31. Since the arrests, fabricated statements about the couple's case, inter alia, those labelling them as members of the Muslim Brotherhood and as terrorists, have been made public through the State-run media. Ms. al-Qaradawi and Mr. Khalaf have not been provided with any opportunity to refute the informal claims. As such, they have effectively been tried in the court of public opinion without being charged with any crime.

Joint communications by special procedures mandate holders

32. Ms. al-Qaradawi and Mr. Khalaf have previously been the subject of a joint urgent appeal (EGY 15/2017) issued on 12 October 2017 by the Working Group on Arbitrary Detention, 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. The Working Group acknowledges the reply from the Government of Egypt, received on 21 December 2017.

Response from the Government

33. On 16 January 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 18 March 2018 concerning the current situation of Ms. al-Qaradawi and Mr. Khalaf 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 Ms. al-Qaradawi and Mr. Khalaf's physical and mental integrity.

34. On 8 March 2018, the Government sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension for the Government to submit its response by 2 April 2018. The Government submitted its response to the regular communication on 27 March 2018.

35. First, the Government notes that it is a party to several international treaties on human rights, including:

- (a) The International Covenant on Civil and Political Rights, ratified by Egypt in 1982;

(b) The Convention on the Elimination of All Forms of Discrimination against Women, ratified by Egypt in 1982;

(c) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, acceded to by Egypt in 1986;

(d) The Convention on the Rights of the Child, ratified by Egypt in 1990.

36. According to the Government, the Constitution affirms a number of rights and responsibilities, including those set out in human rights frameworks at the local and international levels, that must be respected, including: the rights to dignity, to personal liberty and to physical integrity, the independence of the judiciary, freedom of opinion and the right to fair and impartial trials, as detailed in articles 52, 65, 86 and 94 to 100 of the Constitution. The Government states that these rights represent a symbol of democracy and are essential to ensuring full respect for human rights. They are also directly linked to the response to the incorrectness of the allegations contained in the complaint.

37. The Government alleges that Ms. al-Qaradawi and Mr. Khalaf's case was based on an investigation undertaken by the Homeland Security Agency as recorded in the minutes of meetings, held on 19 and 26 February 2017, 4 April 2017, 13 and 25 May 2017 and 29 June 2017, on the plot by the senior leaders of the Muslim Brotherhood, including Mahmoud Ezzat Ibrahim Eissa (Supreme Guide) and Ahmed Ibrahim Munir Mustafa (Deputy Supreme Guide), to create an armed wing to conduct hostile operations aimed at the overthrow of the Government and to coordinate with Ansar Bait al-Maqdis (Supporters of the Holy House) to target Christians.

38. The Government further alleges that Qatar has backed the conspiracy, providing monthly payments of more than \$30 million, with the accused Yusuf Abdullah Ali al-Qaradawi acting as the go-between. It alleges that Turkey also provided financial support, with the accused Hussein Mahmoud al-Qazzaz in charge of coordination. The Government states that Mohamed Kamal, a senior leader killed by the security forces in October 2016, was responsible for the creation of armed groups whose members would receive military training abroad.

39. According to the Government, Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf were tasked with delivering instructions from exiled Muslim Brotherhood leaders in Qatar to their colleagues in Egypt, taking advantage of their position in the Qatari embassy in Egypt. The Government states that Ms. al-Qaradawi used the vacation home in Ramses Village to hold organizational meetings with Muslim Brotherhood leaders to deliver assignments and hand over money, and that the couple kept documents and money in the vacation home and used a car registered by Mr. Khalaf for the works of the Muslim Brotherhood.

40. The Government states that Ms. al-Qaradawi and Mr. Khalaf were arrested and their residence searched on 1 July 2017 in accordance with the seizure and inspection order issued by the public prosecution on 30 June 2017, as detailed in case No. 316 of 2017. They were charged with being members of an illegal terrorist group aimed at disrupting the Constitution and the law; preventing the State organs and public authorities from executing their tasks; attacking public and private rights and freedoms; harming national unity and social peace by means of terrorism; and knowingly providing material aid to a terrorist group through financial support. The public prosecution initially issued a decision to imprison them for 15 days pending investigation, and as at the time of writing they remained in custody.

41. The Government maintains that the health rights of persons deprived of their liberty are protected by articles 33 to 37 of Law No. 396 of 1956 concerning the organization of prisons. All prisons are required to have at least one resident physician for the care of the inmates. The prisoners who cannot be treated in the prison or who are in critical condition may be transferred to an outside hospital.

42. According to the Government, Ms. al-Qaradawi, who is being held in the women's section of Al-Qanater prison, was examined by the prison's doctor, who reported that she did not have any health issues, and she regularly visits the prison cafeteria, where she spent 600 Egyptian pounds in October. Mr. Khalaf, who is being held in maximum-security prison No. 2 in Tora, also received a medical examination, which revealed that he was suffering from early symptoms of cataracts and posterior vitreous detachment. He received appropriate

treatment from the prison medical staff and regularly visits the prison cafeteria, where he spent 2,000 Egyptian pounds in October. The prison records indicate that neither have received any visits from their family members since the beginning of their custody.

43. It is the Government's view that Ms. al-Qaradawi and Mr. Khalaf have received due care under the Law concerning the organization of prisons and the prison regulations, in compliance with article 12 of the International Covenant on Economic, Social and Cultural Rights. The Government submits that the allegations made by the source are groundless.

44. Furthermore, the Government contends that the Egyptian legal system affords sufficient safeguards to those deprived of their liberty in conformity with international standards, including article 9 of the International Covenant on Civil and Political Rights. Articles 54 to 56 of the Constitution provide for appropriate guarantees; articles 85 and 86 of the Law concerning the organization of prisons allow judicial supervision of prisons. It is impossible to state that the conditions of the detainees are poor and that proper living and health conditions are not provided since the law empowers the judicial authority to take the steps it deems appropriate to maintain all forms of legal detention.

45. The Government concludes that all actions taken with regard to Ms. al-Qaradawi and Mr. Khalaf were in accordance with international standards, the Constitution and domestic laws. The source's allegations are without legal or factual grounds.

Further comments from the source

46. The response from the Government was transmitted to the source on 27 March 2018 for further comment. In its response of 9 April 2018, the source maintains that Ms. al-Qaradawi and Mr. Khalaf's arrest and ongoing detention are arbitrary and in violation of international law, notwithstanding the Government's claims to the contrary. The source observes that almost half of the Government's response discusses unrelated accusations against senior members of the Muslim Brotherhood, including Ms. al-Qaradawi's father, Sheikh Yusuf al-Qaradawi, ascribing guilt by association to Ms. al-Qaradawi and Mr. Khalaf, and that the Government repeatedly tries to counter specific allegations in the initial communication with general denials by merely quoting articles of international and domestic human rights law.

47. The source provides further information to support its allegations that Ms. al-Qaradawi and Mr. Khalaf's detention falls under category III for violating their due process rights by reason of: (a) arrest without a warrant; (b) failure to provide a reason for arrest and holding without charge; (c) subjection to extended pretrial detention; (d) incommunicado detention; (e) denial of access to legal counsel; (f) denial of all access to information; and (g) violation of the right to the presumption of innocence. The source states that, while Qatar does not currently have an embassy operating in Egypt, the rights and interests of its citizens are represented by the embassy of Oman, which has made numerous requests for visits, transfers, improvement of detention conditions, release and more information only to face categorical denial.

48. The source also reinforces its claims that the conditions of detention amount to cruel, inhuman and degrading treatment on the basis of: (a) abuse and mistreatment with impunity; (b) denial of appropriate medical care; and (c) prolonged solitary confinement.

Discussion

49. The Working Group thanks the source and the Government for their extensive engagement and for their submissions in relation to Ms. al-Qaradawi and Mr. Khalaf's detention.

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.¹

¹ See A/HRC/19/57, para. 68.

51. 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.²

52. 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.³ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.⁴ The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.⁵

Category I

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

54. According to the information provided by the source, which the Government has failed to rebut with credible evidence, Ms. al-Qaradawi and Mr. Khalaf were arrested without the presentation of warrant. In principle, arrest without a valid warrant must be considered ipso facto a violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the International Covenant on Civil and Political Rights due to the lack of legal basis.

55. The alleged legal basis for Ms. al-Qaradawi and Mr. Khalaf's arrest and detention further suffers from other serious defects. As stated in the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law.⁶ In order to ascertain such a legal basis, the authorities should have informed Ms. al-Qaradawi and Mr. Khalaf of the reasons for their arrest or the charges against them at the time of their arrest; their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant.

56. The Working Group notes that the Government has failed to specify when Ms. al-Qaradawi and Mr. Khalaf were allowed to contact or receive their family, lawyers or consular officials or to provide documentary evidence, such as a copy of the arrest warrants and visitation logs or phone registries to prove any contact that has been made with either of them since their arrest on 30 June 2017. It also notes that Ms. al-Qaradawi and Mr. Khalaf 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 and articles 2 (3) and 14 (1) of the Covenant.

² See *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. 41/2013, para. 27; and No. 59/2016, para. 61.

³ See General Assembly resolution 72/180, preambular para. 5; Commission on Human Rights resolutions 1991/42, para. 2 and 1997/50, para. 15 and Human Rights Council resolutions 6/4, para. 1 (a) and 10/9.

⁴ See opinions No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

⁵ See opinions No. 94/2017, para. 48; No. 88/2017, para. 24; No. 83/2017, para. 60; No. 76/2017, para. 50; and No. 33/2015, para. 80.

⁶ See A/HRC/30/37, para. 12.

57. The Working Group expresses its grave concern that Ms. al-Qaradawi and Mr. Khalaf have been held in incommunicado detention, have been denied access to a lawyer, to medical care and to medication and have been subjected to forced sleep deprivation. The Working Group, in its jurisprudence, has consistently argued that holding a person incommunicado breaches the right to challenge the lawfulness of detention before a judge.⁷ Articles 8, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights also confirm the impermissibility of incommunicado detention.

58. The Working Group notes, in this regard, that the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁸ The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also consistently urged States to declare incommunicado detention illegal.⁹ The beatings and denial of access to medical care and medication endured by Ms. al-Qaradawi and Mr. Khalaf appear to confirm the worst fears about incommunicado detention. Arrestees or detainees who have been beaten and are not provided the minimum conditions to maintain their health, in violation of articles 5 and 25 (1) of the Universal Declaration of Human Rights and articles 7 and 10 of the International Covenant on Civil and Political Rights, will find it difficult to take proper judicial proceedings to challenge the lawfulness of their detention.

59. The Working Group therefore considers that Ms. al-Qaradawi and Mr. Khalaf's arrest, detention and imprisonment lack a legal basis and are thus arbitrary, falling under category I.

Category III

60. The Working Group will now consider whether the violations of the right to a fair trial and due process suffered by Ms. al-Qaradawi and Mr. Khalaf were of such gravity as to give their deprivation of liberty an arbitrary character with respect to category III.

61. According to the information provided by the source, which the Government has failed to rebut with credible evidence, Ms. al-Qaradawi and Mr. Khalaf were arrested without the presentation of warrant and were not promptly informed of the reasons for their arrest or of any charges against them. While the Government states that Ms. al-Qaradawi and Mr. Khalaf were arrested in accordance with the law and due process and that its laws provide for legal guarantees and judicial supervision in accordance with international standards, it has failed to specify when Ms. al-Qaradawi and Mr. Khalaf were allowed to contact or receive their family, lawyers or consular officials or to provide documentary evidence such as a copy of the arrest warrant and visitation logs or phone registries to prove any contact that has been made with either of them since their arrest on 30 June 2017.

62. 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 Ms. al-Qaradawi and Mr. Khalaf's pretrial detention, which has already lasted almost 10 months with no sign that their criminal trial will take place soon. In the present case, the Working Group finds that the Government neither tried Ms. al-Qaradawi and Mr. Khalaf within a reasonable time nor released them, in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 (3) and 14 (3) (c) of the International Covenant on Civil and Political Rights.

63. Furthermore, the Government did not respect Ms. al-Qaradawi and Mr. Khalaf's right to legal assistance at all times — which is inherent in the right to liberty and security of person — or their right to a fair and public hearing by a competent, independent and impartial

⁷ See opinion No. 93/2017, para. 49.

⁸ See A/54/44, para. 182 (a).

⁹ See A/54/426, para. 42 and A/HRC/13/39/Add.5, para. 156.

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. Ms. al-Qaradawi and Mr. Khalaf were able to speak with their lawyer for two to three minutes each time, but not in private, when they were brought before a judge for the renewal of their temporary detention orders.

64. The Government further failed to respect Ms. al-Qaradawi and Mr. Khalaf's presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights, articles 10 (1) and 14 (2) of the Covenant, and principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In broadcasting in the State media statements labelling them as members of the Muslim Brotherhood and as terrorists before they had even been formally charged or tried, when they had no chance to refute such informal claims, the Government violated Ms. al-Qaradawi and Mr. Khalaf's right to be presumed innocent. The Working Group recalls that all public officials have a duty to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused.¹⁰ While the presumption of innocence needs to be balanced with the public's right to know in a democratic society, the latter must be proportionate to the former. Furthermore, the near-automatic extension of Ms. al-Qaradawi and Mr. Khalaf's pretrial detention by courts with no regard for their due process and fair trial rights are also indicative of the violation of the presumption of innocence.

65. Ms. al-Qaradawi and Mr. Khalaf's ordeals in prison amounted to cruel, inhuman and degrading treatment, in violation of article 5 of the Universal Declaration of Human Rights, articles 7 and 10 of the Covenant and principle 6 of the Body of Principles, in addition to the relevant provisions of the Convention against Torture.¹¹ Such a situation would seriously undermine their ability to defend themselves and hinder their exercise of the right to a fair trial.

66. Furthermore, 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 describes prolonged solitary confinement as solitary confinement for a time period in excess of 15 consecutive days. The Human Rights Committee has noted that prolonged solitary confinement of a detained or imprisoned person may amount to acts prohibited by article 7.¹²

Right to consular assistance

67. The Working Group notes that, vis-à-vis Ms. al-Qaradawi, the Government failed to take the formal procedures necessary to establish the legal basis for the arrest and detention of a foreign national under the provisions of article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 36 of the Vienna Convention on Consular Relations, to which Egypt is a party.

68. According to article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, when a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner: (a) the consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State is to, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor; (b) the person concerned is to have the right to communicate with the said authorities and any communication by the person to the said authorities is to be forwarded without delay, and he

¹⁰ See opinions No. 83/2017, para. 79; and No. 33/2017, para. 86 (e). See also Human Rights Committee general comment No. 35 (2014) on liberty and security of person, para. 30 and *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997), paras. 3.5 and 8.3.

¹¹ See also article 13 of the Arab Charter on Human Rights and article 5 of the African Charter on Human and Peoples' Rights.

¹² See the Committee's general comment No. 20 (1992) on prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 6.

or she is to also have the right to receive communications sent by the said authorities without delay; (c) the person concerned is to be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

69. Article 36 (1) (b) of the Vienna Convention on Consular Relations provides that a foreign national arrested or committed to prison or to custody pending trial or is detained in any other manner should be informed without delay of his or her rights to inform consular officers about his or her detention and to have any communication addressed to them forwarded without delay. This is in addition to the consular officers' right to be informed of the detention and to maintain communication (art. 36 (1) (b)) and their right to arrange for legal representation and to visit in person (art. 36 (1) (c)).

70. The Working Group notes that the General Assembly has reaffirmed emphatically the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention.¹³

71. Furthermore, the Body of Principles recognizes in principle 16 (2) the importance of consular assistance for a detained or imprisoned foreign national by specifically mentioning his or her right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he or she is a national.

72. The Nelson Mandela Rules provide, in rule 62, paragraph 1, that prisoners who are foreign nationals are to be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.¹⁴

73. Given the limited availability of remedies for individuals in the international sphere, consular protection is invaluable for foreign nationals who are disadvantaged by the lack of familiarity with the local law, customs and even language. Furthermore, it should be noted that the institution of consular protection not only serves the interests of the detained foreign individual and of the State that espouses such interests, but also furthers the interests of the international community as a whole by facilitating international exchange and reducing the potential for friction between States over the treatment of their nationals.¹⁵

74. In the light of the factual and legal considerations above, the Working Group considers that the Government has failed to respect Ms. al-Qaradawi's right to consular protection under customary international law, as codified in article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 36 of the Vienna Convention on Consular Relations, during her initial arrest and detention, in violation of article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights and principle 16 (2) of the Body of Principles.

75. In the light of the foregoing, the Working Group concludes that the non-observance of the international norms relating to the right to a fair trial is of such gravity as to give Ms. al-Qaradawi and Mr. Khalaf's deprivation of liberty an arbitrary character, falling under category III.

¹³ See General Assembly resolution 72/179, para. 32. See also General Assembly resolutions 72/149, para. 4 (k) and 72/188, para. 15 (g) and Human Rights Council resolution 37/28, para. 2 (j).

¹⁴ See also A/HRC/30/37, annex, guideline 21, stipulating the monitoring of all places of immigration detention and public reporting by consular officials (conditional upon request by persons in immigration detention).

¹⁵ See opinion No. 58/2017, para. 64.

Category V

76. The Working Group will now examine whether Ms. al-Qaradawi and Mr. Khalaf's deprivation of liberty constitutes discrimination under international law with respect to category V.

77. The source maintains that Ms. al-Qaradawi and Mr. Khalaf have been targeted by the Government for guilt by association as the daughter and son-in-law of Sheikh Yusuf al-Qaradawi, a prominent figure of the Muslim Brotherhood based in Qatar. The Government initially claimed that Ms. al-Qaradawi and Mr. Khalaf had been arrested for violating the asset freeze imposed on Sheikh Yusuf al-Qaradawi before levelling more substantial allegations against them that the asset in question, the vacation home in Ramses Village, served as the meeting place for their father's compatriots.

78. While the Government claims that Ms. al-Qaradawi and Mr. Khalaf were arrested and charged for membership of an illegal terrorist group, it has offered few details other than making vague assertions that their home served as the hideout for the Muslim Brotherhood. Nor have the two been formally charged or tried for their alleged crime.

79. The Working Group cannot but conclude that Ms. al-Qaradawi and Mr. Khalaf have been arrested and detained for their family ties with Sheikh Yusuf al-Qaradawi. This is the only plausible explanation for the subversion of the equal protection of the law they experienced, as observed above. No one should be deprived of liberty for the crimes, real or not, committed by their family member by birth or marriage in a free, democratic society.

80. For these reasons, the Working Group considers that Ms. al-Qaradawi and Mr. Khalaf's deprivation of liberty constitutes a violation of article 2 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the International Covenant on Civil and Political Rights on the grounds of discrimination based on birth and family relations aimed at and resulting in ignoring the equality of human beings and that it therefore falls under category V.

81. This case is one of several cases brought before the Working Group in the past five years concerning the arbitrary deprivation of liberty of persons in Egypt.¹⁶ 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.¹⁷

Disposition

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

The deprivation of liberty of Ola Yusuf al-Qaradawi and Hosam al-Din Khalaf, being in contravention of articles 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 25 of the Universal Declaration of Human Rights, of articles 2, 7, 9, 10, 12, 14, 16, 17 and 26 of the International Covenant on Civil and Political Rights, and of article 16 (7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, is arbitrary and falls within categories I, III and V.

83. Consequent upon the opinion rendered, the Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Ms. al-Qaradawi and Mr. Khalaf without delay and bring it into conformity with the standards and principles set out in international norms on detention, including those set out in the Universal Declaration of Human Rights.

84. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to immediately release Ms. al-Qaradawi and Mr.

¹⁶ See, for example, opinions No. 83/2017, No. 78/2017, 30/2017, No. 60/2016, No. 54/2016, No. 42/2016, No. 41/2016, No. 7/2016 and No. 6/2016.

¹⁷ See, for example, opinions No. 32/2017, para. 40; No. 33/2017, para. 102; No. 51/2017, para. 57; No. 56/2017, para. 72; No. 78/2017, para. 86; and No. 83/2017, para. 89.

Khalaf and accord them an enforceable right to compensation and other reparations, in accordance with international law.

85. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. al-Qaradawi and Mr. Khalaf, and to take appropriate measures against those responsible for the violation of their rights.

86. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, for appropriate action.

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 Ms. al-Qaradawi and Mr. Khalaf have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. al-Qaradawi and Mr. Khalaf;

(c) Whether an investigation has been conducted into the violation of the rights of Ms. al-Qaradawi and Mr. Khalaf 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.

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 information within six months of the date of the 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 requests the Government to disseminate through all available means the present opinion among all stakeholders.

91. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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 April 2018]

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