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# Advance Edited Version

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**Human Rights Council**  
**Working Group on Arbitrary Detention**

## **Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018**

### **Opinion No. 47/2018 concerning Hisham Ahmed Awad Jaafar (Egypt)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 4 May 2018 the Working Group transmitted to the Government of Egypt a communication concerning Hisham Ahmed Awad Jaafar. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
  - (d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
  - (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. Mr. Jaafar is a 53-year-old journalist, researcher, the head of the Mada Foundation for Media Development and editor-in-chief of the website IslamOnline. His foundation served as a hub for research projects on social issues, such as women's rights, interreligious dialogue and de-radicalization. He is married and has three children.

### Arrest and detention

5. According to the information received, on 21 October 2015 several State Security agents, along with officers from the investigations department of 6th of October City, raided the building where the Mada Foundation for Media Development had its offices. The officers, in civilian clothes, did not show any arrest or search warrant and prevented everyone from entering the building as soon as the raid started.

6. Allegedly, the State Security agents searched all the offices of the building and confiscated all files and staff identification cards, while other officers inspected the Mada Foundation's computers. At the end of the raid, staff members were interrogated by the State Security agents. The entire building has reportedly been closed and sealed since then.

7. The source reports that, after the search and interrogations, Mr. Jaafar was arrested without a warrant and was not provided with any reasons for his arrest. He was allegedly taken to an undisclosed location.

8. On 21 October 2015, a State prosecutor, together with police officers, reportedly visited Mr. Jaafar's home. While his relatives were present and willing to open the door, the police officers allegedly broke through the entrance door and thoroughly searched his home, breaking objects and acting violently towards Mr. Jaafar's relatives. The source states that they confiscated all the computers, USB drives, tablets, cameras, money, car keys and car licences, and all other administrative papers without providing any reason. Despite requests before judicial authorities, these items have still not been returned.

9. Following the raid, Mr. Jaafar's family reportedly filed complaints to the President of the Republic, the Ministry of the Interior, the General Prosecutor of Egypt and the Prime Minister's Cabinet, inquiring about Mr. Jaafar's fate and whereabouts. They also asked officers at the police station in 6th of October City; the officers took a statement concerning Mr. Jaafar's disappearance but refused to provide any answers.

10. According to the source, it later emerged that, after the raid, Mr. Jaafar was brought blindfolded and handcuffed to State Security compound five in Sheikh Zayed City, where he was secretly detained until 25 October 2015. It is alleged that, during that time, he was brutally interrogated, without the assistance of a lawyer, about his activities as a journalist and the president of the Mada Foundation.

### Charges and pretrial detention

11. The source reports that, although documents from the State Security Prosecution date the charges to 22 October 2015, Mr. Jaafar was only notified of the charges on 25 October 2015, upon his transfer to Tora Maximum Security Prison, also known as Al Aqrab (Scorpion) Prison. It was also then that Mr. Jaafar was able to speak briefly to his lawyers for the first time. Mr. Jaafar was charged under Law No. 94 of 2015 on anti-terrorism with "joining a group established contrary to the provisions of the law intended to disrupt the provisions of the Constitution and laws" and that "terrorism was one of its means to achieve its purposes".

12. The source notes that, during his interrogation and hearings before the State Security Prosecution, Mr. Jaafar denied being part of any terrorist organization and denounced the political nature of the accusations. He stated that he was being targeted for his work as a journalist.

#### Incommunicado and continuous pretrial detention

13. After his appearance before the State Security Prosecution, on 25 October 2015, Mr. Jaafar's lawyers were reportedly not able to assist him during subsequent hearings, as they either were not informed, or were given incorrect information, about the day and subject of the hearings.

14. For instance, the source reports that, on 30 November 2015, Mr. Jaafar's lawyers went to State Security Prosecution headquarters and were waiting for him to be brought from the prison. However, the officers told them that the hearing would take place near Tora prison, which is located dozens of kilometres away. The lawyers went to Tora prison, only to be told that the hearing was in fact taking place at the State Security Prosecution's office. In the meantime, the hearing had started and, by the time they had come back to the Prosecution's office, his pretrial detention had been renewed and he had been brought back to Tora prison.

15. Mr. Jaafar has reportedly been detained in this manner for more than two years, without trial, with his detention being continuously extended every 45 days, without any effective means of challenging the legality of his deprivation of liberty.

16. On 8 February 2016, a joint urgent appeal (A/HRC/32/53, p. 60) was sent to the Government by several special procedures of the Human Rights Council, expressing serious concern over the allegations of the violation of Mr. Jaafar's fundamental rights. The Government did not respond.

17. The source reports that, in October 2017, a memorandum was filed by Mr. Jaafar's lawyers to claim that his pretrial detention exceeded the two-year maximum set out in article 143 of the Code of Criminal Procedure. However, the judicial authorities reportedly ignored the request and have so far failed to indicate a date for his trial.

18. According to the source, from the onset of his detention, Mr. Jaafar's relatives and counsel were denied the right to visit him regularly at Tora prison. After several weeks, the prison authorities decided to allow very short visits; in practice, visits were, however, arbitrarily denied on a regular basis. The source argues that Mr. Jaafar was held in incommunicado detention from March 2017 to August 2017. After that, the family was allowed to visit him only three times, for approximately seven minutes, once in August, once in September and once in November 2017. After a short visit in December 2017, all requests for visits from and communication with his relatives and his lawyers have been denied.

19. According to the information received, Mr. Jaafar appeared before the State Security Prosecution on 14 April 2018, with his lawyers present. The Prosecutor again decided to renew his pretrial detention under article 143 of the Code of Criminal Procedure. Mr. Jaafar's lawyers challenged the decision and again argued that article 143 limited the period of pretrial detention to a maximum of two years, while his client had been held two years and six months in pretrial detention.

#### Inclusion on a list of "terrorist" individuals

20. The source reports that, on 12 January 2017, the Official Gazette published a decision of the Cairo Criminal Court in which the names of 1,538 individuals appeared on a "terrorist list". The list included the name of Mr. Jaafar, as well as those of other journalists and activists, all of whom were accused of "belonging to" or "supporting" the Muslim Brotherhood, or having provided "assistance" to a political party.

21. This listing was based on Law No. 8 of 2015 on lists of terrorist entities and terrorists, issued by presidential decree in February 2015, which reportedly does not provide for any effective right to information about or to challenge the decision to list an individual.

22. Allegedly, Mr. Jaafar has not been personally notified of the listing, informed of the listing process, or given an opportunity to challenge the elements on which the decision to list him had been taken or to provide any exculpatory evidence before the Criminal Court. The consequences of the listing include travel bans, the withdrawal and cancellation of

passports, a prohibition of engagement in public affairs and the freezing of the individual's assets.

#### Conditions of detention and denial of medical care

23. Mr. Jaafar is detained at Tora prison under conditions that the source describes as particularly inhumane. In addition, he is allegedly subjected to prolonged solitary confinement. It is also claimed that he is regularly deprived of food and drinkable water, his confinement cell is deprived of light and infested with insects, and he sleeps on the ground without a mattress or bedding.

24. In addition, the source states that Mr. Jaafar, who suffers from an enlarged prostate and optic nerve atrophy, is denied adequate medical care. His sight is reportedly deteriorating and his health has considerably worsened since his detention.

25. According to the source, Mr. Jaafar receives minimal health care and his many requests to be transferred to an appropriate facility have been systematically denied. His lawyers' repeated requests for his release on medical grounds have all been denied.

26. In February 2016, Mr. Jaafar was transferred to the Tora prison hospital, after he began suffering from urinary retention and showed signs of kidney failure. On 4 March 2016, he was transferred to Al-Manial University Hospital of Cairo University. Subsequently, on 10 March 2016, the doctors requested that he be kept hospitalized for further tests. While he was kept at the Al-Manial Hospital for five months, he allegedly received minimal and insufficient medical care. State Security authorities reportedly forbade the medical doctors from performing all the tests necessary to assess the deterioration of Mr. Jaafar's kidney and his medical needs. He was transferred back to Tora prison in August 2016 without all the necessary tests having been done. Shortly after his return to the prison, Mr. Jaafar found blood in his urine and was transferred again to Tora prison hospital, where he was not permitted to consult with a urologist.

27. The source reports that, despite several complaints filed by both Mr. Jaafar's family and his lawyers, requesting his release or transfer to a medical facility for appropriate treatment, the authorities have continuously ignored the demands. Mr. Jaafar's relatives reported that, during their visit in March 2017, he appeared extremely weak and had lost significant weight. Furthermore, his body had numerous marks from insect bites. Reportedly, medicine sent to him by his family was seized.

#### Category I

28. The source submits that the arrest and pretrial detention of Mr. Jaafar should be considered as falling under category I, from the onset of the arrest to his current and continuous pretrial detention.

29. Mr. Jaafar was arrested without a mandate or warrant and without having the reason for his arrest explained to him. He was held in secret detention for four days (from 21 to 25 October 2015). In addition, the authorities questioned by his family refused to acknowledge his detention or to provide information about his fate and whereabouts. It is also stressed that Mr. Jaafar was deprived of his right to habeas corpus.

30. The source also contends that Mr. Jaafar's arrest was not based on any legal provision, contrary to article 9 of the International Covenant on Civil and Political Rights, according to which an individual may only be lawfully deprived of his or her liberty on specified grounds and according to procedures established by law. The source argues that State Security agents act under the command and control of the Ministry of the Interior and are provided with discretionary powers to arrest, interrogate and detain persons in non-official places of detention, without any judicial oversight.

31. The source submits that article 143 of the Code of Criminal Procedure, which allows for pretrial detention for up to two years, per se violates the right of an accused to be tried without undue delay enshrined in article 14 (3) (c) of the Covenant. The source notes that the two-year maximum set out in article 143 of the Code for cases in which the alleged acts are punishable with life imprisonment or the death penalty is systematically applied even in cases which cannot be considered as falling under the category of the most serious crimes.

32. The source further maintains that the sole reason behind Mr. Jaafar's arrest was his work as a journalist and his social activism, as president of the Mada Foundation, falling under the exercise of his freedom of expression and association. The continuous renewal of Mr. Jaafar's pretrial detention fails to meet the criteria required to prove a reasonable cause justifying pretrial detention. The source submits that article 9 (3) of the Covenant requires that pretrial detention be the exception, and also submits that bail should generally be granted. For the source, reasonable cause to maintain an accused in pretrial detention must be assessed in the light of all the circumstances of the case. Given that Mr. Jaafar's arrest and detention are a direct consequence of his profession as a journalist and his peaceful social activism, no reasonable cause can allegedly be derived from these circumstances, since no criminal act was carried out.

33. The source states that the prolonged pretrial detention for a period exceeding the two-year maximum for the most serious crimes renders, in any case, the pretrial detention of Mr. Jaafar void of legal basis. It highlights that the many attempts and memoranda submitted by the defence in order to challenge the legality of the pretrial detention and its extensions, both before and after the two-year period, have been ignored by the judicial authorities.

#### Category II

34. According to the source, there is a clear, direct and causal link between Mr. Jaafar's activities as a journalist, which fall under articles 19 and 21 of the Covenant, and his arrest and charges, which would render his deprivation of liberty arbitrary under category II.

35. The source recalls that, upon his arrest, Mr. Jaafar's office at the Mada Foundation was searched and several files were taken and computers were inspected. In addition, Mr. Jaafar's home was raided the same day by the State Security Prosecution and police officers, who confiscated all the computers, USB drives, tablets, cameras, money, car keys and car licences, and other administrative papers.

36. Moreover, the charges against Mr. Jaafar allegedly constitute a retaliation against his work as a journalist and activist. His activities included providing training and supporting local journalists and reporting violations committed against political opponents. His foundation served as a hub for research projects on various social issues. As a conflict-resolution specialist, he also highlighted the danger of the polarization of the national political landscape. Through his articles, he called for the opening of a political dialogue between national stakeholders, including the military and the opposition, and for the respect of civil and democratic liberties.

37. It was reported that State Security agents were mainly opposed to the fact that Mr. Jaafar had written about social, political and legal issues and denounced a crackdown on government opponents. According to reports of interrogations and hearings, his critical stance towards the authorities was considered proof of his support for terrorist organizations, which can be prosecuted under the broad and vague definition of the crimes included in article 1 of Law No. 8 of 2015 on lists of terrorist entities and terrorists.

38. Lastly, the source maintains that the case of Mr. Jaafar falls within a broader pattern of arbitrary arrests and detentions of journalists, human rights defenders and other peaceful activists, particularly under terrorism charges.

#### Category III

39. The source further claims that the procedure to maintain Mr. Jaafar in detention violates the basic international norms of a fair trial and should therefore be considered as arbitrary under category III.

40. The source contends that Mr. Jaafar was neither provided with an arrest warrant nor informed of the reasons for his arrest, and that he was placed in a state of enforced disappearance in violation of article 9 (1) and (2) of the Covenant.

41. Mr. Jaafar was allegedly informed of the charges against him through his lawyers, when he was allowed to talk to him on 25 October 2015. Therefore, he was denied his right

to be informed promptly of the reasons for the arrest and of the charges against him, which is in violation of articles 9 (2) and (3) and 14 (3) of the Covenant.

42. In addition, since 25 October 2015, he has been brought before the State Security Prosecution every 45 days to renew his pretrial detention, allegedly without his lawyers being present, as they were either uninformed or misinformed of the day and place of their client's hearings. Also, Mr. Jaafar was interrogated during the investigation without the assistance of his lawyers and he was further denied prison visits from his defence team. The source alleges that these constitute violations of article 14 (3) (b) and (d) of the Covenant.

43. Similarly, access to prosecution files, either directly by his family or through lawyers, was reportedly denied. As a result, it is impossible for Mr. Jaafar's lawyers to prepare his defence in the event of a trial, which is in violation of article 14 (3) (b) of the Covenant.

44. Moreover, Mr. Jaafar was reportedly held incommunicado for four days, kept outside of the protection of the law, denied contact with his relatives for extended periods of time and placed in prolonged solitary confinement. As to the right to have access to a medical doctor, all requests made to see a specialist capable of examining him appropriately were denied.

45. The source highlights that Mr. Jaafar was denied the right to challenge his detention before an independent authority, which is in violation of article 14 (1) of the Covenant. The prosecution has made it impossible for Mr. Jaafar's lawyers to question his pretrial detention effectively. The source emphasizes that Mr. Jaafar is being prosecuted by the State Security Prosecution, which acts under the control of the Ministry of the Interior and cannot be considered as an independent and impartial body.

46. Mr. Jaafar has allegedly been held in pretrial detention for more than two years and six months, while his trial date remains unknown. The source argues that the delay violates the right to be tried within a reasonable time and without unjustified delays, as enshrined in articles 9 (3) and 14 (3) (c) of the Covenant.

47. The source claims that the Government has refused to provide Mr. Jaafar with the appropriate and necessary medical attention and treatment, thereby violating his right to health under article 25 of the Universal Declaration of Human Rights. Furthermore, the failure to provide appropriate medical care violates the State's obligation to respect the right to life of all detainees, as enshrined in article 6 of the Covenant. The denial of medical care has been systematically denounced by families of individuals detained on political charges.

48. Furthermore, the source concludes that the alleged poor conditions in which Mr. Jaafar is being detained, including his continued solitary confinement, as well as the denial of appropriate medical care, amount to a form of torture and cruel, inhuman and degrading treatment under articles 1, 4 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

#### *Response from the Government*

49. On 4 May 2018, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 15 June 2018, detailed information about the situation of Mr. Jaafar and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Mr. Jaafar's physical and mental integrity.

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

#### **Discussion**

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

52. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

53. 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 the 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.<sup>1</sup> Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant rules and standards of international human rights law.<sup>2</sup>

54. The Working Group also wishes to reiterate that it applies a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, are restricted or where human rights defenders are involved.<sup>3</sup> Mr. Jaafar's role as a prominent human rights defender requires the Working Group to undertake this kind of intense and strict scrutiny.<sup>4</sup>

#### Category I

55. The Working Group will first determine whether it is possible to invoke any legal basis to justify Mr. Jaafar's deprivation of liberty from 21 October 2015, the absence of which would render the detention arbitrary in terms of category I.

56. According to the information provided by the source, which the Government has neither refuted nor addressed, Mr. Jaafar was arrested without the presentation of a warrant. In principle, and except for cases where a person is arrested in flagrante delicto, it may be presumed that an arrest without a valid warrant can amount to a violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant due to the lack of legal basis.

57. The legal basis alleged for the arrest and detention of Mr. Jaafar suffers from serious flaws. In order to ascertain such a legal basis, the authorities should have informed Mr. Jaafar of the reasons for his arrest or the charges against him at the time of his arrest; their

<sup>1</sup> See General Assembly resolution 72/180, fifth preambular paragraph; 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, para. 4 (b); opinions No. 38/2018, para. 60; No. 94/2017, para. 59; No. 88/2017, para. 32; No. 83/2017, paras. 51 and 70; No. 76/2017, para. 62; No. 28/2015, para. 41; and No. 41/2014, para. 24.

<sup>2</sup> See opinions No. 38/2018, para. 60; No. 94/2017, paras. 47 and 48; No. 33/2015, para. 80; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

<sup>3</sup> See opinions No. 13/2018, para. 22; No. 3/2018, para. 40; No. 94/2017, para. 49; No. 57/2017, para. 46; No. 41/2017, para. 95; No. 67/2012, paras. 56 and 57; No. 65/2012, paras. 39 and 40; No. 64/2011, para. 20; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 21/2011, para. 29. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (opinion No. 39/2012, para. 45). See also Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, art. 9 (3).

<sup>4</sup> Human rights defenders, in particular, have the right to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through those and other appropriate means, to draw public attention to such matters (see Declaration on Human Rights Defenders, art. 6 (c)). See also opinion No. 8/2009, para. 18.

failure to do so, together with the absence of a warrant, violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant. As stated in 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 deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law.<sup>5</sup>

58. The Working Group also notes that Mr. Jaafar was 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 his detention, in accordance with article 9 (3) and (4) of the Covenant. This also deprived him of an effective judicial remedy for the violation of his rights and freedoms, as provided for in articles 8 and 10 of the Universal Declaration of Human Rights and articles 2 (3) and 14 (1) of the Covenant.<sup>6</sup>

59. In the Working Group's view, article 143 of the Code of Criminal Procedure, which permits up to a maximum of two years of pretrial detention for crimes punishable by life imprisonment or the death penalty, cannot serve as the valid legal basis for prolonged pretrial custody in the present case. According to the fundamental guarantees of personal liberty, pretrial detention is the exception, not the rule, and a detainee is entitled to periodic judicial review of his or her detention. The Working Group notes that the assessment of the length of any given period of pretrial detention must be done on a case-by-case basis, while taking special consideration of the particular circumstances of each case. In the present matter, the Government has chosen not to challenge the allegations from the source. While article 143 provides for the extension of pretrial detention every 45 days, the Working Group considers that, in the present case, the automatic renewal for more than two years of the pretrial detention, without effective judicial review, cannot be considered to be compatible with article 9 (3) and (4) of the Covenant.

60. According to the Human Rights Committee, detention pending trial must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.<sup>7</sup> Pretrial detention should not be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity; courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.<sup>8</sup> The Working Group is of the view that these standards were not met by the Egyptian authorities in Mr. Jaafar's case.

61. In any case, the Working Group is appalled that Mr. Jaafar's pretrial detention exceeded even the problematic two-year maximum under article 143 of the Code of Criminal Procedure. This further renders the legal basis for Mr. Jaafar's pretrial detention void.

62. The Working Group expresses its grave concern that Mr. Jaafar has been held in incommunicado detention, without access to or communication with his family and lawyers and denied medical care and medication. 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.<sup>9</sup> Articles 8, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant also confirm the impermissibility of incommunicado detention.

63. It is particularly egregious that Mr. Jaafar was placed in incommunicado detention for four days, from 21 to 25 October 2015, during the initial stages of his deprivation of liberty. The Working Group notes that this also lacks a legal basis.

<sup>5</sup> See A/HRC/30/37, para. 12.

<sup>6</sup> See also articles 12 and 23 of the Arab Charter on Human Rights.

<sup>7</sup> General comment No. 35 (2014) on liberty and security of person, para. 38. See also opinion No. 24/2015, para. 37.

<sup>8</sup> General comment No. 35, para. 38. See also A/HRC/19/57, paras. 48–58.

<sup>9</sup> See opinion No. 93/2017, para. 49.



64. The Working Group therefore considers that Mr. Jaafar's arrest and pretrial detention lack a legal basis and are thus arbitrary, contrary to article 9 of the Covenant and falling under category I.

#### Category II

65. The Working Group recalls that the freedom of opinion and expression and the freedom of thought and conscience are fundamental human rights consecrated in articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.<sup>10</sup>

66. The Working Group notes that the Human Rights Committee, in paragraph 34 of its general comment No. 34 (2011) on the freedoms of opinion and expression, stated that restrictions on the freedom of expression must not be overbroad and recalled that such restrictions must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those which might achieve their protective function and be proportionate to the interest to be protected.<sup>11</sup> Moreover, the Working Group concurs with the Committee with regard to its emphasis, in paragraphs 38 and 42 of the same general comment that States parties should not prohibit criticism of institutions, such as the army or the administration, and that the penalization of a media outlet, publisher or journalist solely for being critical of the Government or the political social system can never be considered to be a necessary restriction of freedom of expression.

67. In the same vein, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that the right to freedom of expression includes the expression of views and opinions that offend, shock or disturb.<sup>12</sup> In addition, the Human Rights Council, in its resolution No. 12/16, paragraph 5 (p) (i), stated that restrictions on discussion of government policies and political debate are not consistent with article 19 (3) of the Covenant.

68. The Working Group is aware of the activities in which Mr. Jaafar engaged in the exercise of his fundamental liberties, such as reporting abuses against political activists, calling for a national dialogue between political forces, including the military and the opposition, and appealing for the respect of civil liberties and democratic freedoms. The Working Group is also mindful of the role of the Mada Foundation led by Mr. Jaafar, namely providing training and supporting journalism, and researching and advocating for various social issues, such as women's rights, interreligious dialogue and de-radicalization. In this connection, the Working Group notes that, concurrent with Mr. Jaafar's arrest, the authorities, also without a warrant, searched the Mada Foundation and Mr. Jaafar's house, seizing materials from both. In addition, as the source stated, security agents criticized Mr. Jaafar's writings on social, political and legal issues and denouncing a crackdown on government opponents. Moreover, his critical stance towards the authorities was considered to be proof of his support for terrorist organizations, according to reports from the hearings. His interrogation concerned his activities as a journalist. This information, which is not disputed by the Government, leads the Working Group to consider that the Government was targeting Mr. Jaafar and his organization, in view of the work that they did, for exercising his right to freedom of thought, expression and association.

69. The Working Group therefore considers Mr. Jaafar's deprivation of liberty to be arbitrary under category II, as it resulted from his exercise of the rights or freedoms guaranteed under articles 18, 19 and 20 of the Universal Declaration of Human Rights and articles 18, 19 and 22 of the Covenant.<sup>13</sup>

<sup>10</sup> See also *Kang v. Korea* (CCPR/C/78/D/878/1999), para. 7.2.

<sup>11</sup> See opinion No. 3/2018, para. 49.

<sup>12</sup> See A/HRC/17/27, para. 37.

<sup>13</sup> See also articles 24 (5) and (6), 30 and 32 of the Arab Charter on Human Rights.

## Category III

70. Given its finding that Mr. Jaafar's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that no trial should take place. However, with a trial taking place, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give the deprivation of liberty an arbitrary character, and thereby fall under category III.

71. As noted above, Mr. Jaafar was arrested without a warrant and was not promptly informed either of the reasons for his arrest or of any charges against him, which is in violation of articles 9 (2) and 14 (3) (a) of the Covenant.<sup>14</sup> He was also denied the right to notify and communicate with his family and lawyers, in disregard of principles 15–19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, as well as the right to be brought promptly before a judge, who is to decide without delay upon the lawfulness and necessity of detention, as stipulated in article 9 (3) and (4) of the Covenant and principle 37 of the Body of Principles.<sup>15</sup> In the view of the Working Group, such procedural defects severely compromised Mr. Jaafar's due process and fair trial rights from the beginning of the detention.

72. The Working Group also considers that the denial of access to a lawyer during the investigation, as well as during the determination of 45-day extensions of pretrial detention by the State Security Prosecution, violated Mr. Jaafar's rights to legal counsel under article 14 (3) (b) and (d) of the Covenant. The denial of access to prosecution files also made it impossible for his lawyers to prepare his defence in the event of a trial, which is in violation of article 14 (3) (b) of the Covenant.<sup>16</sup>

73. In the view of the Working Group, the determination of the extension of pretrial detention by the State Security Prosecution, which is under the Ministry of the Interior (an organ of the judicial branch and therefore dependent upon the executive and political power), does not qualify as a fair and public hearing by a competent, independent and impartial tribunal, as stipulated in article 10 of the Universal Declaration of Human Rights and in article 14 (1) of the Covenant.<sup>17</sup>

74. The Working Group further determines that Mr. Jaafar's pretrial detention, which began on 21 October 2015 and has continued for almost three years, clearly violates his right to be tried within a reasonable time, without undue delays, or to be released, as stipulated in articles 9 (3) and 14 (3) (c) of the Covenant.<sup>18</sup>

75. The Working Group is of the view that the periods of incommunicado detention and solitary confinement were incompatible with the obligation to guarantee the possibility to effectively prepare a legal defence for trial under article 14 (1) and (3) (b) of the Covenant. In addition, the Working Group also expresses its serious concern about the conditions of detention and the denial of medical care, which are in violation of articles 5 and 25 of the Universal Declaration of Human Rights, articles 7 and 10 of the Covenant and the provisions of the Convention against Torture.<sup>19</sup>

76. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process against Mr. Jaafar are of such gravity as to give to his deprivation of liberty an arbitrary character. Such deprivation of liberty is in violation of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant, therefore falling under category III.

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<sup>14</sup> See also article 14 (3) and 16 (1) of the Arab Charter on Human Rights.

<sup>15</sup> See also articles 14 (5) and (6) and 16 (2) of the Arab Charter on Human Rights.

<sup>16</sup> See also article 16 (2), (3) and (4) of the Arab Charter on Human Rights.

<sup>17</sup> See also article 13 of the Arab Charter on Human Rights.

<sup>18</sup> See also article 14 (5) of the Arab Charter on Human Rights.

<sup>19</sup> See also articles 8, 14 (4) and 20 (1) of the Arab Charter on Human Rights.

## Category V

77. The Working Group will now examine whether Mr. Jaafar's deprivation of liberty constitutes illegal discrimination under international law for the purpose of category V.

78. First and foremost, the Working Group notes that Mr. Jaafar is a journalist, researcher, the head of the Mada Foundation for Media Development and editor-in-chief of the website IslamOnline. The Mada Foundation, raided by officials simultaneously with his arrest, served as a hub for research projects on social issues, such as women's rights, interreligious dialogue and de-radicalization. The Working Group notes that he is entitled to protection as a human rights defender.<sup>20</sup>

79. In the above discussion on the application of category II to the present case, the Working Group established that Mr. Jaafar's deprivation of liberty resulted from his exercise of the rights or freedoms guaranteed under articles 18, 19 and 20 of the Universal Declaration of Human Rights and articles 18, 19 and 22 of the Covenant. After establishing that the deprivation of liberty resulted from the active exercise of civil and political rights, there is a presumption in this case that the deprivation of liberty may constitute a violation of international law on the grounds of discrimination based on political views and activities.

80. The Working Group cannot help but notice that Mr. Jaafar's political views and activities are clearly at the centre of the present case and that the authorities have displayed an attitude towards him that can only be characterized as targeted and discriminatory. In fact, Mr. Jaafar, along with his foundation, has been the target of official persecution and there is no explanation for this other than his exercise of the right to express such views and convictions as a human rights defender. The Government did not refute any of these allegations.

81. For these reasons, the Working Group considers that Mr. Jaafar's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant<sup>21</sup> on the grounds of discrimination based on political or other opinion and his status as a human rights defender. His deprivation of liberty therefore falls under category V.

82. The Working Group reiterates the dictum of 1980 of the International Court of Justice that states: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."<sup>22</sup> The conventional and customary prohibition of arbitrary detention was authoritatively recognized as a peremptory norm (*jus cogens*) of international law by the Human Rights Committee in paragraph 11 of its general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, and in paragraphs 51 and 75 of the Working Group's Deliberation No. 9 (2012) concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44, paras. 37–75).<sup>23</sup>

<sup>20</sup> See Declaration on Human Rights Defenders, articles 9 and 12.

<sup>21</sup> See also article 3 (1) of the Arab Charter on Human Rights.

<sup>22</sup> See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, para. 91, cited in opinions No. 30/2018, para. 40, footnote 9; No. 94/2017, para. 52, footnote 9; No. 76/2017, para. 56, footnote 19; No. 63/2017, para. 51, footnote 14; No. 37/2014, para. 32; No. 22/2014, para. 18, footnote 1; and No. 10/2013, para. 23, footnote 1. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, paras. 75–85, and the separate opinion thereto of Judge Cançado Trindade, pp. 763–777, paras. 107–142.

<sup>23</sup> See opinions No. 63/2017, para. 51; No. 10/2013, para. 32; No. 16/2011, para. 12; No. 15/2011, para. 20; and No. 24/2010, para. 28. See also *Restatement, Third, of the Foreign Relations Law of the United States*, sect. 702, comment (n), sect. 102, comment (k) (1987), listing (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, and (f) systematic racial discrimination as definitive peremptory norms.

83. The Working Group recalls that the corollary obligations *erga omnes* of protection “bind all the States which compose the organized international community” in a horizontal dimension and “bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations)” in a vertical dimension.<sup>24</sup> Hence, the duty to comply with international human rights standards that are peremptory and *erga omnes* norms, such as the prohibition of arbitrary detention, rests with all bodies and representatives of the State, all officials, including judges, prosecutors, police and security officers, and prison officers with relevant responsibilities, and all other natural and legal persons.<sup>25</sup> No person can contribute to human rights violations.

84. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, 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 the independence of judges and lawyers.

85. The Working Group notes that the present opinion is only one of several opinions in which the Working Group finds the Government to be in violation of its international human rights obligations.<sup>26</sup> The Working Group is concerned that this indicates a systemic problem with arbitrary detention in Egypt, which, if it continues, may amount to a serious violation of international law. The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.<sup>27</sup>

### Disposition

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

The deprivation of liberty of Hisham Ahmed Awad Jaafar, being in contravention of articles 3, 5, 9, 10, 18, 19, 20 and 25 of the Universal Declaration of Human Rights and of articles 7, 9, 10, 14, 18, 19 and 22 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

87. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Mr. Jaafar 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.

88. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Jaafar immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

<sup>24</sup> See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, requested by the United Mexican States, Concurring Opinion of Judge A.A. Cançado Trindade, paras. 74–85. Available at [www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf).

<sup>25</sup> See opinions No. 40/2018, para. 49; No. 94/2017, para. 73; No. 91/2017, para. 102; No. 83/2017, para. 90; No. 76/2017, para. 85; No. 1/2016, para. 43; No. 37/2014, para. 42; No. 36/2014, para. 21; No. 35/2014, para. 19; No. 34/2014, para. 34; No. 27/2014, para. 32; No. 22/2014, para. 25; No. 48/2013, para. 14; No. 36/2013, paras. 34 and 36; No. 35/2013, paras. 35 and 37; No. 34/2013, paras. 33 and 35; No. 9/2013, para. 40; No. 60/2012, paras. 20 and 21; No. 54/2012, para. 38; No. 50/2012, para. 27; No. 47/2012, paras. 19 and 22; No. 38/2012, para. 33; No. 64/2011, para. 25; No. 49/2011, para. 12; No. 39/2011, para. 17; No. 38/2011, para. 16; No. 37/2011, para. 15; 21/2011, para. 39; No. 20/2011, para. 25; No. 16/2011, para. 5; No. 15/2011, para. 5; No. 13/2011, para. 12; and No. 5/2011, para. 6.

<sup>26</sup> See opinion Nos. 27/2018, 26/2018, 83/2017, 78/2017, 30/2017, 60/2016, 54/2016, 42/2016, 41/2016, 7/2016 and 6/2016.

<sup>27</sup> See article 7 (1) (e) of the Rome Statute of the International Criminal Court. See also opinions No. 56/2017, para. 72; No. 51/2017, para. 57; No. 36/2017, para. 110; No. 33/2017, para. 102; No. 32/2017, para. 40; and No. 44/2016, para. 37.

89. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Jaafar and to take appropriate measures against those responsible for the violation of his rights.

90. 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 rights to freedom of peaceful assembly and of association, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 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 the independence of judges and lawyers, for appropriate action.

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

#### **Follow-up procedure**

92. 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. Jaafar has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Jaafar;
- (c) Whether an investigation has been conducted into the violation of Mr. Jaafar's 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.

93. 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.

94. 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.

95. 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.<sup>28</sup>

*[Adopted on 21 August 2018]*

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<sup>28</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.