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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. 63/2018 concerning Reem Qutb Bassiouni Qutb Jabbara (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 16 April 2018 the Working Group transmitted to the Government of Egypt a communication concerning Reem Qutb Bassiouni Qutb Jabbara. 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. Reem Qutb Bassiouni Qutb Jabbara is an Egyptian citizen, born in 1976. Ms. Jabbara works as a documentary films director.

Arrest and detention

5. According to the source, in 2016, Ms. Jabbara enrolled in a filming workshop in Turkey with a famous reporter who used to work with Al-Jazeera network news. She presented some of her short films and broadcasted them on YouTube, free from any political affiliations. Afterwards, she enrolled in a course in the United States of America to obtain a certified degree relating to filming and directing. On 26 December 2016, as Ms. Jabbara was returning to Egypt, she was arrested at an airport in Egypt for possessing a quadcopter with a high-definition camera, part of her filming equipment.

6. The source explains that Ms. Jabbara showed her receipts for and the certificate from the filming course to the State security officer at the airport. The State security officer did not believe her, and accused her of being "up to something". Shortly thereafter, security officers escorted Ms. Jabbara to Thany Al-Qatamih police station. According to the source, Ms. Jabbara was subjected to enforced disappearance for one week, from 26 December 2016 to 2 January 2017. On 29 December 2016 and during her enforced disappearance, she was presented to the Supreme State Security Prosecution and, the first time, without her lawyer. The lawyer was not allowed inside the Prosecution office during the first six questionings. Ms. Jabbara was therefore alone during many of her appearances before the Supreme State Security Prosecution.

7. The source also alleges that, on 1 April 2017, Ms. Jabbara was transferred to El Qanater El Khayreya Women's Prison while under investigation and awaiting her trial under case No. 1153/2017. While in detention in both a police station and the prison, she suffered from the lack of sanitation services and ventilation, which led her to develop skin rashes. Sleeping on the ground in a small and crowded cell caused her fatigue and pain in her lower back. She also developed severe pain in her colon from eating and drinking unclean water and food. Ms. Jabbara's family requested several times for her to be examined, diagnosed and treated, but their requests were ignored owing to medical negligence and the lack of resources at the police station and the prison. The source notes that, more recently, Ms. Jabbara's sister has been able to bring medications during the prison visits.

8. The source also reports that, ever since her investigation started, her lawyer has not been allowed to attend the interrogations with her. Moreover, he cannot talk to Ms. Jabbara for more than a few minutes before the interrogation. Ms. Jabbara is now facing charges of belonging to a banned group as part of Al-Jazeera staff, possessing filming equipment, espionage and spreading rumours and chaos before the counter-terrorism department of the North Cairo Criminal Court, established under a Ministry of Justice decree in 2013. Ms. Jabbara's family denied any connections that would link her to Al-Jazeera, arguing that she had been to Turkey only for studies.

9. According to the source, Ms. Jabbara's detention was renewed by the Supreme State Security Prosecution every 45 days until the investigating judge issued a release order in July 2017. It was, however, appealed by the Prosecution, and her detention therefore continued.

Legal analysis

10. The source argues that, in Ms. Jabbara's case, several international norms have been violated, specifically regarding pretrial rights. The source argues that the main rights violated are the right to liberty, the right to information for persons in custody, the right to recourse to legal counsel, the right to be brought promptly before a judge, and the right to be tried within a reasonable time and to safeguards during questioning. In addition, the source challenges the legality of Ms. Jabbara's arrest and detention conditions under the rights of fair trial during a state of emergency and when countering terrorism.

11. With regard to the right to liberty, the source alleges that the facts of the case show that Ms. Jabbara faced enforced disappearance by the authorities when she was detained for one week, and the fact that the authorities prevented her family from knowing her whereabouts and did not provide any legal basis for her arrest.

12. The source alleges therefore that Ms. Jabbara's arrest and detention violate her rights enshrined in article 9 (1) of the International Covenant on Civil and Political Rights as clarified by the Human Rights Committee with regard to elements of inappropriateness, injustice and lack of predictability.

13. Indeed, the source explains that Ms. Jabbara was singled out when she arrived at the airport for possessing a quadcopter. Although she showed the security officer her filming course certificate and the receipts for the quadcopter, she was arrested. The arrest carried out by the authorities against Ms. Jabbara was therefore unnecessary and not reasonable in such a situation. The source also notes that the authorities arrested Ms. Jabbara on suspicion of espionage as she had a quadcopter with her, which led the authorities to think that she might be "up to something". The authorities did not, however, provide any facts or information which could satisfy an objective observer that such a suspicion was "reasonable" at the time of the arrest.

14. With regard to the right to information for persons in custody, the source argues that article 9 (2) of the Covenant was breached when the security officers arrested Ms. Jabbara without stating the grounds for her arrest. The authorities therefore violated the essential right of being informed, at the time of the arrest, about a specific and clear legal basis under which Ms. Jabbara was held accountable. Before the process of investigation, Ms. Jabbara did not know the charges against her. Furthermore, Ms. Jabbara was not allowed to notify any third person, family member or anyone else of her arrest during her enforced disappearance while undergoing investigation.

15. In addition, the source recalls that the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment clearly provides that individuals, upon arrest, have the right to inform third parties, and to be notified of this essential right. To be taken into consideration with this right are also the rights to remain silent and to be notified of the right to legal counsel. However, the source reports that no such notification was given in this case as Ms. Jabbara was taken directly to Thany Al-Qatamih police station, where she was held while she was being presented to the Supreme State Security Prosecution without her lawyer or her family knowing her whereabouts.

16. With regard to the right to a legal counsel, the source recalls Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, according to which a person, upon arrest, has the right to have "prompt access" to legal counsel. In this case, however, the source argues that Ms. Jabbara was deprived of this right as she attended six of her interrogations alone, without any legal counsel. Furthermore, given that her family did not know her whereabouts and appointed her a lawyer, the lawyer was unable to attend the investigations and was denied entry to the Prosecution office. The source notes that this is also a violation of article 154 of the Code of Criminal Procedure, which prohibits the absence of a lawyer appointed to a detainee while the detainee is under interrogation. Article 154 also provides for the authorities to appoint a lawyer to a detainee if the detainee cannot afford one.

17. Moreover, the source claims that the authorities perpetuated the above violation by not facilitating meetings between Ms. Jabbara and her lawyer by denying the latter access to the Supreme Prosecution office and by preventing him from attending interrogations and communicating with Ms. Jabbara.

18. With regard to the right to be brought promptly before a judge, the source states that international standards require a detainee to be brought before a judge after the arrest within a few days; while the "promptness" is left to each State, the Human Rights Committee asserted in its general comment No. 8 that it must not take more than a few days. The source reports, however, that this is a case of prolonged detention awaiting trial. Indeed, Ms. Jabbara was granted a conditional release in July 2017 owing to her deteriorating conditions of health, and awarded bail by an investigating judge, a decision that was later appealed by

the Supreme State Security Prosecution. According to the source, this violates article 14 (3) (c) of the Covenant.

19. The source moreover claims that, after Ms. Jabbara's release was rejected in July 2017, she should have been brought expeditiously to trial to avoid her having to endure a lengthy period of detention, given her poor health; this was not, however, the case, as her detention was extended without reasonable grounds for it being issued.

20. Lastly, with regard to Ms. Jabbara's right to a fair trial during time of emergency, the source recalls article 4 of the Covenant, which grants States the right to take measures derogating from certain rights enshrined in the Covenant. The source points out, however, that customary international law does not provide for any derogation from international peremptory norms, even in times of emergency. One of these norms is the right to a fair trial. The source also notes that the Covenant does not prohibit the establishment of special tribunals for countering terrorism; such tribunals must, however, address cases in conformity with international human rights standards regarding the right to a fair trial. The source nonetheless claims that the Supreme State Security Court did not grant Ms. Jabbara her right to a fair trial given that it failed to apply the proportionality test when it extended her period of detention despite her poor health without applying reasonable grounds. In addition, the source claims that the court did not ensure Ms. Jabbara a trial within a reasonable time, which violated her right to be tried expeditiously. According to the source, most importantly, the Government denied her right to legal counsel and disregarded the fact that she had been subjected to enforced disappearance for a week by State security agents. The source concludes, therefore, that Ms. Jabbara's right to a fair trial were breached by the Supreme State Security Court when it disregarded the proportionality requirement.

Response from the Government

21. On 16 April 2018, the Working Group transmitted the allegations made by the source to the Government of Egypt through its regular communication procedure. The Working Group requested the Government to provide, by 3 July 2018, detailed information about the current situation of Ms. Jabbara and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Ms. Jabbara's physical and mental integrity.

22. 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

23. 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.

24. 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.

Category I

25. The Working Group will first determine whether it is clearly impossible to invoke any legal basis to justify Ms. Jabbara's detention from 26 December 2016 that would render it arbitrary in terms of category I.

26. The Working Group is particularly concerned that Ms. Jabbara has been placed in a state of secret detention for one week from 26 December 2016 to 2 January 2017. The Working Group recalls that the Human Rights Council, in its resolution 37/3, stressed that no one should be held in secret detention and urged States to ensure that all persons held in detention under their authority were provided with access to the courts and to investigate all

alleged cases of secret detention. The Working Group considers that such a detention lacks legal basis.

27. According to the information provided by the source, which the Government has not disputed, Ms. Jabbara was arrested without the presentation of a warrant. In principle, arrest without a valid warrant must be considered a violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant.

28. In addition, the source explained that the authorities did not inform Ms. Jabbara of the reasons for her arrest or the charges against her at the time of her arrest. The Working Group considers that the failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant.

29. Furthermore, the Working Group notes that Ms. Jabbara 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 her detention, in accordance with article 9 (3) and (4) of the Covenant. The Working Group recalls that 48 hours are usually sufficient to transport the individual and to prepare for the judicial hearing, and that any delay longer than 48 hours must remain absolutely exceptional and justified under the circumstances.[1] Ms. Jabbara was consequently also deprived of her right to challenge the legality of her detention, in violation of articles 8 and 10 of the Universal Declaration and articles 2 (3) and 14 (1) of the Covenant.

30. The Working Group wishes to stress that pretrial detention should be the exception, not the rule, and a detainee is entitled to periodic judicial review of his or her detention. The nearly automatic extension of pretrial detention every 45 days from 26 December 2016 to July 2017 by the Supreme State Security Prosecution cannot be considered to be compatible with article 9 (3) of the Covenant. The Working Group concurs with the Human Rights Committee, when it observed in its general comment No. 35 that detention pending trial must be based on an individualized determination that 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.[2] 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.[3] The Working Group reiterates its view that the consideration of alternative non-custodial measures allows ascertainment of whether the principles of necessity and proportionality have been met (A/HRC/19/57, para. 55).

31. The Working Group considers therefore that Ms. Jabbara's arrest and pretrial detention lack a legal basis and are thus arbitrary, falling under category I.

Category II

32. The Working Group recalls that the freedom of opinion and expression and the freedom of thought and conscience are fundamental human rights guaranteed in articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.[4]

33. The Working Group notes that the Human Rights Committee, in 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 (para. 34).[5] The Committee also

[1] Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 33.
[2] Ibid., para. 38, cited in opinion No. 24/2015, para. 37.
[3] Ibid. See also A/HRC/19/57, paras. 48–58.
[4] *Yong Joo-Kang v. Republic of Korea* (CCPR/C/78/D/878/1999), para. 7.2. See also the Arab Charter on Human Rights, arts. 30–31.
[5] See opinion No. 3/2018, para. 49.

emphasized that States parties should not prohibit criticism of institutions, such as the army or the administration (para. 38), and that the penalization of a media outlet, publishers or journalist solely for being critical of the Government or the political social system espoused by the Government can never be considered to be a necessary restriction of freedom of expression (para. 42).

34. 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 (A/HRC/17/27, para. 37). In addition, the Human Rights Council, in its resolution 12/16, paragraph 5 (p) (i), recalled that restrictions on discussion of government policies and political debate were not consistent with article 19 (3) of the Covenant. At the same time, the Working Group recalls that States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of article 19 (3) of the Covenant.

35. The Working Group wishes to stress that the right to freedom of expression should be guaranteed to every person, including Ms. Jabbara. Ms. Jabbara's detention for her alleged exercise of her right to freedom of expression, including her working on films, broadcasting them on YouTube and possessing filming devices, serves no legitimate aim in a democratic society, under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. In this case, the Working Group considers that Ms. Jabbara has been detained as much for her alleged employment by the banned Al-Jazeera network as for any specific act of reporting. Even if the allegations were true, it is unacceptable to deprive her of her liberty on the sole basis of her work for Al-Jazeera. In this regard, the Working Group finds that Ms. Jabbara should enjoy the right to freedom of association under article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant. The Government offers no legitimate ground for interfering with her rights. Moreover, the Working Group notes that the present case is one of those touching upon the Government's practice of detaining persons with real or alleged ties to Al-Jazeera, which has been considered as being in contravention of the freedom of opinion and expression, especially with regard to the media.[6]

36. The Working Group is therefore of the opinion that Ms. Jabbara's deprivation of liberty is arbitrary under category II, as it violated articles 19, 20 and 23 of the Universal Declaration of Human Rights and articles 19 and 22 of the Covenant.

Category III

37. Given its finding that Ms. Jabbara's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that no trial should be held. Given, however, that the trial is being held, 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 her deprivation of liberty an arbitrary character, thereby falling under category III.

38. The Working Group considers that the denial of access to a lawyer during the investigation, as well as the determination of 45-day extensions of pretrial detention by the Supreme State Security Prosecution, violated Ms. Jabbara's rights under article 14 (3) (b) and (d) of the Covenant.

39. In the view of the Working Group, the determination of the extension of pretrial detention by the Supreme State Security Prosecution, which comes under the Ministry of the Interior, does not qualify as a fair and public hearing by a competent, independent and impartial tribunal for the purposes of article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant. The Working Group recalls that a tribunal should be independent of the executive and legislative branches of government or enjoy in specific

[6] See opinion No. 83/2017, para. 86.

cases judicial independence in deciding legal matters in proceedings that are judicial in nature.[7]

40. The Working Group also expresses its concern at the harsh conditions of detention and the denial of medical care, in violation of articles 5 and 25 of the Universal Declaration of Human Rights and articles 7 and 10 of the Covenant. This makes it even more difficult for the detainee and accused to prepare and defend herself effectively, therefore jeopardizing her right to a fair trial in accordance with article 14 (3) (b) of the Covenant.

41. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give the deprivation of liberty of Ms. Jabbara an arbitrary character that falls within category III.

Category V

42. The Working Group will now examine whether Ms. Jabbara's deprivation of liberty constitutes unlawful discrimination under international law for the purposes of category V.

43. As noted above, it seems improbable that Ms. Jabbara had ever in fact been employed by Al-Jazeera. Rather, Ms. Jabbara's prolonged detention without trial appears to be part of a widespread crackdown by the Government on the independent media and bloggers for political opinion at odds with its own.[8]

44. Al-Jazeera in particular has been targeted by the Government for its alleged false news, as the arrest, detention and prosecution of some of its journalists in the past demonstrate. Having expelled Al-Jazeera from the country, the Government is currently contesting its arbitration claims for the alleged destruction of its media business in Egypt, with the arrest and detention of its employees, attacks on its facilities, interference with its transmissions and broadcasts, closure of its offices, cancellation of the claimant's broadcasting licence and compulsory liquidation of its local branch during and after the 2013 protests and coup d'état.[9]

45. The Working Group is thus of the view that discrimination by the Government on the basis of alleged journalistic affiliation to an international broadcaster blacklisted by the Government is the only plausible explanation for Ms. Jabbara's arrest and detention. The Working Group therefore concludes that Ms. Jabbara has been arbitrarily deprived of her liberty because of her alleged association with Al-Jazeera, as part of the Government's collective targeting of Al-Jazeera staff in Egypt, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and falls within category V.

Widespread or systematic imprisonment or other severe deprivation of liberty

46. The Working Group notes that the present opinion is only one of many other opinions adopted by the Working Group in the past five years in which it has found the Government of Egypt to be in violation of its international human rights obligations.[10] 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 a crime against humanity.

47. 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 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.

[7] Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 18.

[8] Opinion No. 83/2017, para. 85.

[9] See https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/1; and http://investmentpolicyhub.unctad.org/ISDS/Details/700.

[10] See, for example, opinions No. 27/2018, No. 26/2018, 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.

Disposition

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

> The deprivation of liberty of Reem Qutb Bassiouni Qutb Jabbara, being in contravention of articles 2, 5, 7, 8, 9, 10, 11, 19, 20, 23 and 25 of the Universal Declaration of Human Rights and of articles 2, 7, 9, 10, 14, 19, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

49. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Ms. Jabbara 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.

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

51. The Working Group urges the Government to ensure a full and independent investigation into the circumstances surrounding the arbitrary deprivation of liberty of Ms. Jabbara, and to take appropriate measures against those responsible for the violation of her rights.

52. In accordance with paragraph 33 (a) of its methods of work, 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 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.

53. The Working Group encourages the Government to ratify the Optional Protocols to the International Covenant on Civil and Political Rights.

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

Follow-up procedure

55. 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. Jabbara has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. Jabbara;

(c) Whether an investigation has been conducted into the violation of Ms. Jabbara'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.

56. 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.

57. 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.

58. 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.[11]

[*Adopted on 24 August 2018*]

[11] Human Rights Council resolution 33/30, paras. 3 and 7.