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

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

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

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation or disability or other status, that aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

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

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

6. Mohamed Adel Fahmi (hereinafter Mr. Adel) is a 25-year-old Egyptian citizen and usually resides in Aga, Daqahlia. He is a political activist and a co-founder of the “April 6 Youth Movement”.

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

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

8. On 27 November 2013, campaigners of the “No Military Trials for Civilians” group gathered in front of Egypt’s Shura Council, the upper house of Parliament, in order to denounce the inclusion of military trials in the draft Constitution, which was finally approved on 18 January, 2014. Among those protestors were Messrs. Douma, Maher and Adel.

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

10. This protest was the first to be held after the proclamation of the restrictive “Law on the Right to Public Meetings, Processions and Peaceful Demonstrations” n° 107-2013. The law, issued on 25 November 2013 by the Interim President Adly Mansour, places draconian restrictions on the right to freedom of assembly and of expression.

11. Adopted only ten days after the lifting of the state of emergency, the assembly law constitutes a tool to further the crackdown on peaceful demonstrators and any voice of dissent against the military takeover.

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

13. Moreover, sit-ins are prohibited (article 14), which demonstrates that the law does not take into account the notion of peacefulness of assemblies and the security forces can resort to the use of force (article 13), “by means proportional to the extent of the danger posed to the lives, capital or property”, thus legalizing the use of violence against demonstrators.

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

Arrest and detention

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

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

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

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

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

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

21. On 22 December 2013, Messrs. Maher, Douma and Adel were sentenced by the Abdeen Misdemeanor Court to three years of imprisonment and hard labour, with a three-year probation period after serving their terms, and a fine of 50,000 EGP (approximately 7,000 USD) for “taking part in an unauthorised protest”, “attacking the security forces” and “disturbing the public order”, in contravention of the Law No. 107-2013 on the “Right to Public Meetings, Processions and Peaceful Demonstrations”.

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

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

24. On 7 April 2014, the Court upheld the judgment in the first instance and condemned the three men to three years of imprisonment with hard labour and a fine of 50,000 EGP (approximately 7,000 USD). They remain in detention at the Tora prison to date.

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

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

27. The source further submits that the detention of the three men is arbitrary, as it results from judicial processes that failed to meet the international norms and standards guaranteeing the right to a fair trial. The three men were not shown an arrest warrant or informed of the reasons for their arrest, in contravention of article 9, paragraph 2 of the International Covenant on Civil and Political Rights ("ICCPR"). They were also not given access to their lawyers prior to their trial to prepare their defence, contrary to article 14, paragraph 3, sub-paragraph (d) of the ICCPR. In this regard, the source notes that Mr. Adel in particular was held in incommunicado detention for four days following his apprehension until the sentencing date. Furthermore, the source questions whether the aforementioned persons have been afforded "a fair and public hearing by a competent, independent and impartial tribunal established by law" in accordance with article 14, paragraph 1 of the ICCPR, as both the Abdeen Misdemeanor Court and the Abdeen Misdemeanour Appeals Court are premised within the Tora Police Academy under the authority of the Ministry of Interior. The source takes the view that this violates the principle of separation of powers, as it may lead to the executive interference with the judicial process. The source also argues that the trial lacked impartiality, as the court only heard the witnesses for the prosecution and refused to investigate the defendants' claims that they have been mistreated.

Response from the Government

28. On 25 July 2014, the Government considers the arrests of Messrs. Maher, Douma and Adel lawful, since the authorities prosecuted them for breaching the law on demonstrations by "organising unauthorised gatherings, disrupting traffic and public order, injuring policemen, stealing items property of the Ministry of Interior, attempting to commit crimes and attacking public and private buildings."

29. The Government of Egypt emphasises its respect for the rights of peaceful assembly and demonstration by citing its Constitution and the law n°107-2013 on the “Organisation of the Right to Public Assembly, Processions and Peaceful Demonstrations in Public Places”.

30. Moreover, the Government’s response stresses that the new Constitution, approved in 2014, guarantees that no civilians can be tried before military courts.

Further comments from the source

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

32. The Government’s answer fails to give convincing precisions on their subsequent prosecutions, trials and detentions that the source believes arbitrary. It also abstains from commenting the decision of the Cairo Court for Urgent Matters to ban the April 6 Youth Movement on 28 April 2014, under law n°84 of 2002 on non-governmental organisations.

33. Finally, the source highlights that the Government’s response has been written by the Prosecution’s services themselves, in charge of prosecuting the aforementioned individuals, and not the Government per se. Consequently, the facts describe in the comments are also the ones that were used by the Prosecution’s services to arrest and detain them. The source also notes that the Government’s answer emphasises that the peaceful demonstration on 26 November was against the new protest law and the possibility for military courts to try civilians, and not for other purposes.

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

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

Discussion

36. The Working Group, upon assessing and analysing the information provided to it, notes with deep concern that the arrest and detention of the aforementioned persons, and the other acts of harassment faced by human rights defenders and journalists, are related to their legitimate human rights activities. Further concern is expressed for the physical and psychological integrity of the detainees from considering the situation at that time.

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

38. During the course of the demonstrations in question, if any unruly behaviour on the part of the participants ensues that would incur proportionate measures in accordance with domestic law, including arrest and detention, the individuals arrested or detained should be

informed of the charges against them and brought promptly before a judicial authority, as well as afforded the right to a fair trial within a reasonable time.

39. The Working Group further notes that the three individuals were arrested and sentenced to three years of imprisonment on the basis of the restrictive “Law on the Right to Public Meetings, Processions and Peaceful Demonstrations” n°107-2013. This law appears to be used as a tool for cracking down on peaceful demonstrations. This law places extremely broad restrictions to the right to freedom of expression and peaceful assembly. The UN High Commissioner for Human Rights has called upon the authorities to amend or repeal what he characterised as a “seriously flawed new law”¹.

40. This law constitutes a clear violation of article 21 of the ICCPR as it imposes restrictions, which are outside the scope of what is “necessary in a democratic society in the interests of national security, public safety, or public order”. Legal provisions incompatible with the fundamental rights and freedoms guaranteed under international human rights law would give rise to a qualification of detention as arbitrary.² In this regard, national courts have drawn upon the notions of arbitrariness as defined by the Human Rights Committee.³

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

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

43. The Working Group also notes, that none of the aforementioned individuals were authorised to access their lawyers during the pre-trial period of their deprivation of liberty, which violates their right to have access and be assisted by a counsel from the very start of their criminal investigation as guaranteed by article 11 (1) of the UDHR and article 14 (3) (d) of the ICCPR.

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

¹ Office of the High Commissioner for Human Rights, *New law on demonstrations in Egypt seriously flawed and must be amended* – Pillay, 26 November 2013.

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

³ Submission from the Government of Australia: in *Blundell v. Sentence Administration Board of the Australian Capital Territory*, Judge Refshauge drew upon notions of arbitrariness as applied by the Human Rights Committee in *A. v. Australia*. Judge Refshauge identified disproportionality, capriciousness and lack of comprehensive reasons as the hallmarks of arbitrariness.

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

45. Furthermore, article 14 of the ICCPR states in its paragraph 1 that “in the determination of any criminal charge against him, [...] everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” However, the appeals’ hearings of the three defendants were held in the premises of the Tora Police Academy, which operates under the Ministry of Interior. A Court sitting in a building attached to a non- judicial authority violates the principle of separation of powers as it is clearly liable to interfere with the executive.

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

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

48. The prohibition of arbitrary detention in articles 9 of the UDHR and ICCPR, together with the right to an effective remedy in article 8 of the UDHR and article 9, paragraph 5 of the ICCPR extends to all forms of detention. Due process rights are stated in article 10 of the UDHR and article 14 of the ICCPR. The proportionality review which determines whether a restriction on liberty can be justified is strict and takes into account the high value attached to personal liberty. The measures taken to restrict someone’s liberty must satisfy the criteria of legality, necessity and proportionality.

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

Disposition

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

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

51. Consequent upon the opinion rendered, the Working Group requests the Government to take all necessary measures to guarantee that the rights and freedoms of the above-mentioned persons are respected.

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

53. In light of the allegations of torture and other ill-treatment inflicted upon the detainees, Working Group considers it appropriate, in accordance with article 33(a) of its Methods of Work, to refer these allegations to the Special Rapporteur on torture and the Committee against Torture for appropriate action.

[Adopted on 3 December 2015]