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Human Rights Council
Working Group on Arbitrary Detention

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Opinion No. 20/2023 concerning Islam Atef Omar Jaballah and Abdelsamad Mahmoud Mohamed al-Fiqi (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 51/8.

2. In accordance with its methods of work,¹ on 11 August 2022 the Working Group transmitted to the Government of Egypt a communication concerning Islam Atef Omar Jaballah and Abdelsamad Mahmoud Mohamed al-Fiqi. 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).

¹ [A/HRC/36/38](#).

Submissions

Communication from the source

4. Islam Atef Omar Jaballah is an Egyptian national born on 26 May 1984. He is a pharmacist and is married with four children.

5. Abdelsamad Mahmoud Mohamed al-Fiqi is an Egyptian national born on 7 December 1964. He usually resides in Disūq, Kafr el-Sheikh Governorate, Egypt. Prior to his arrest, Mr. al-Fiqi worked in the educational field. He is married and has three children.

a. Context

6. According to the source, Mr. Jaballah and Mr. al-Fiqi were arrested and arbitrarily deprived of their liberty through a practice termed “rotation”, whereby individuals are repeatedly detained on the grounds of new criminal charges levied against them that prevent them from being effectively released from pretrial detention. The source explains that, under Egyptian law, the maximum limit for pretrial detention is two years. However, the source reports that, through the practice of rotation, once individuals reach this limit or have served their sentence, an entirely new case is brought against them, creating a new basis to hold them in pretrial detention. The new case effectively restarts the detention period, creating a scenario in which someone who has never been tried for a crime could be kept indefinitely in pretrial detention. The source adds that, oftentimes, the detention renewal session occurs, or new charges are brought, while the person is still detained, without being brought before the prosecution or being allowed to access counsel. The source also reports that detainees’ families often suffer financially, as the person detained is often their primary financial provider and families are forced to pay high fees for legal representation in proceedings that can be drawn out for years.

7. The source explains that repeated detention through the practice of rotation is systematic in Egypt. Reportedly, subjects of rotation, having been granted release orders from the prosecution or having already served their prison sentence, are transferred to the police station for their place of residence, where they are detained for days, on the basis of waiting for the national security decision. Allegedly, individuals wait for approval from the National Security Agency to be released, upon which they are either released or taken from the police station and transferred to one of the Agency’s premises and subjected to enforced disappearance for a period ranging from days to months. The individuals are then brought before the prosecution again and charged in a new case. The source submits that this practice is contrary to international norms relating to the rights to a fair trial.

b. Conditions of arrest and detention

Islam Atef Omar Jaballah

8. According to the source, Mr. Jaballah was arrested on 4 May 2018, at around 1 p.m., by State security officers in plain clothes while he was walking home with a friend from the mosque in Kawm Ḥamādah city. Reportedly, Mr. Jaballah was physically forced inside a white State security van without being presented with a warrant or informed of the reason for his arrest. The source reports that a witness told Mr. Jaballah’s family of the incident.

9. The source explains that, upon his initial arrest, Mr. Jaballah was taken to an unknown location and subjected to enforced disappearance for almost four months, from 4 May to 28 August 2018. Reportedly, he was taken to the National Security Agency headquarters in Damanhur, and subjected to physical and psychological torture by State security officers, including beatings, electrocution and being hung by an iron chain for several hours. The source notes that Mr. Jaballah suffered chronic back pain as a result of this treatment.

10. Reportedly, Mr. Jaballah’s lawyer submitted a request to the prosecution to present a complaint regarding the allegations of torture, but the request was rejected. As a result, the information regarding Mr. Jaballah’s treatment remains unheard by any judicial authority. The source notes that Mr. Jaballah’s family did not file any additional complaints concerning his treatment because they believed that such complaints would not be considered.

11. The source explains that State security officers denied that Mr. Jaballah had been subjected to enforced disappearance and indicated in the police report that he had been arrested the day he was first brought before the prosecution, namely, 28 August 2018.

12. On 28 August 2018, Mr. Jaballah was reportedly brought for the first time before the Supreme State Security Prosecution and charged with joining an unidentified banned group, which was not named, and participating in its activities. Mr. Jaballah was then allegedly held in pretrial detention in the National State Security headquarters of Damanhur until 5 September 2018, when he was transferred to the Tora Maximum Security Prison, known as the “Scorpion Prison”. He reportedly remained incommunicado in pretrial detention there for almost two years, banned from receiving visitors and in poor detention conditions in inadequately ventilated, overcrowded and unhygienic cells. The source notes that his lawyer filed a request for a medical examination for his back pain, which was denied by the prison administration.

13. On 30 August 2020, Mr. Jaballah reportedly reached the maximum two-year limit for pretrial detention and his family learned, through Mr. Jaballah’s lawyer, that his release had been ordered by the Supreme State Security Prosecution. The source explains that Mr. Jaballah remained detained in Kawm Ḥamādah police station for 30 days in preparation for his release but, instead of being released, he was referred to the Supreme State Security Prosecution on 10 October 2020.

14. On 10 October 2020, the Supreme State Security Prosecution reportedly charged Mr. Jaballah, in another case, with joining a banned group. The same day, a new pretrial detention order was reportedly issued and Mr. Jaballah was transferred to Damanhur Prison, where he has been detained to date.

15. According to the source, Mr. Jaballah was subsequently charged, in a third case, with joining a terrorist group. Mr. Jaballah’s family was informed of the new charge on 17 March 2021.

16. The source notes that Mr. Jaballah has never been tried for charges under any of the above-mentioned cases. The source explains that, every time that Mr. Jaballah’s pretrial detention period reached the two-year maximum limit, the Supreme State Security Prosecution issued a release order and Mr. Jaballah was charged under a new case, restarting the detention period.

17. According to the source, Mr. Jaballah’s lawyer was present during the initial interrogation, detention renewal sessions and court proceedings. However, Mr. Jaballah’s lawyer was reportedly never allowed to visit his client in the detention facilities. The source reports that, as of May or June 2022, Mr. Jaballah no longer has access to legal counsel as his family cannot afford to pay for it.

18. The source claims that Mr. Jaballah’s family was first able to visit him on 10 August 2018, while he was detained in the National State Security headquarters in Damanhur. Once Mr. Jaballah was transferred to Tora Maximum Security Prison, his family had the right to visit him once a month, separated by wired glass. According to the source, Mr. Jaballah’s family visited him on 23 July 2022.

19. Reportedly, Mr. Jaballah’s family sent a complaint to the Ministry of Interior and the Attorney General on 2 June 2018 and a report to the Damanhur Police Department; both remain unanswered.

Abdelsamad Mahmoud Mohamed al-Fiqi

20. According to the information received, Mr. al-Fiqi was first arrested on 21 June 2018, at his residence. Reportedly, State security officers wearing plain clothes broke into his house and arrested him, without providing him with an arrest warrant or a legal justification for his arrest. The State security agents allegedly damaged items in the house and took hundreds of thousands of Egyptian pounds and Mr. al-Fiqi’s passport.

21. The source explains that, prior to this, on 10 June 2018, two of Mr. al-Fiqi’s relatives had been arrested by the State security authorities at their place of residence. They were reportedly tortured to find out where Mr. al-Fiqi had moved to for fear of being arrested, and

eventually informed the authorities of Mr. al-Fiqi's new address. According to the source, after the address was confirmed, Mr. al-Fiqi's relatives were both released.

22. Mr. al-Fiqi was reportedly subjected to enforced disappearance from 21 June to 14 July 2018. Reportedly, it was later discovered that he had been held at the National Security Agency headquarters in the Kafr el-Sheikh Police Directorate. During this period, he was allegedly subjected to physical and psychological torture and inhumane and degrading treatment by State security officers, including being beaten, stripped naked and electrocuted on different body parts.

23. According to the source, on 14 July 2018, Mr. al-Fiqi's case was brought before the Supreme State Security Prosecution and he was charged with joining a banned group, participating in its work and financing it. That same day, Mr. al-Fiqi was reportedly transferred to the Kafr el-Sheikh Prison. On 3 August 2018, he was transferred again to Tanta Prison in Al-Gharbi Province, where he was detained until 15 August 2018. He was then reportedly transferred to the Tora Maximum Security Prison, where he was banned from receiving visitors. The source notes that Mr. al-Fiqi's family did not know anything about his whereabouts until 25 May 2019.

24. On 25 May 2019, Mr. al-Fiqi was reportedly ordered to be released and was transferred to the Disūq police station to wait for his release. According to the source, he remained there for two weeks before being taken to an undisclosed location and subjected to enforced disappearance for six months. During this period, he was allegedly subjected to severe torture and ill-treatment again and he went on a hunger strike to protest such treatment. The source reports that, as Mr. al-Fiqi was banned from receiving visitors, he could not disclose information to his family or lawyer about the treatment he was subjected to. Furthermore, the source explains that Mr. al-Fiqi was not physically present during his detention renewal sessions and was therefore unable to file a complaint about the violations he had been subjected to. Reportedly, he was finally able to inform his lawyer of his treatment after a hearing before the Supreme State Security Prosecution on 23 November 2019.

25. The source explains that, on 23 November 2019, Mr. al-Fiqi's case was heard before the Supreme State Security Prosecution. He was reportedly charged, in another case, with joining a terrorist group. According to the source, Mr. al-Fiqi was first detained in Tora Investigation Prison, where he was banned from receiving visits from family members. Allegedly, on 19 November 2021, Mr. al-Fiqi was transferred to Abu Zaabal Prison, where he has also been banned from receiving visits and where he remains detained to date. Upon his arrival at Abu Zaabal Prison, Mr. al-Fiqi was reportedly subjected to beatings by prison guards.

26. The source reports that Mr. al-Fiqi's lawyer was not present during his initial interrogation before the State Security Prosecution and was only present for the second detention hearing. Moreover, Mr. al-Fiqi's lawyer was reportedly banned from visiting him in the detention facilities.

27. Lastly, the source reports that Mr. al-Fiqi's family sent complaints to the Attorney General and the Minister of the Interior on 23 June 2018, but the complaints remain unanswered.

c. Legal analysis

28. The source argues that the arrests and detentions of Mr. Jaballah and Mr. al-Fiqi are arbitrary under categories I and III of the working methods of the Working Group.

i. Category I

29. The source argues that the arrests and detentions of Mr. Jaballah and Mr. al-Fiqi are arbitrary under category I as they lack legal basis or justification.

Legality of the arrest

30. The source recalls that article 9 of the Universal Declaration of Human Rights prohibits arbitrary arrest, as a safeguard to the right to liberty guaranteed under article 3. This was reiterated by the Human Rights Committee in its general comment No. 35 (2014).

According to the source, the right of individuals to be informed, at the time of their arrest, of the reason for their arrest, and to be promptly informed of any charges brought against them is also protected under principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and article 14 (3) of the Arab Charter on Human Rights, which has been ratified by Egypt.

31. The source concludes that the arrests of Mr. Jaballah and Mr. al-Fiqi were arbitrary as, at the time of the arrest, neither was shown an arrest warrant or provided with an explanation of the reasons for the arrest.

Enforced disappearance

32. The source recalls that the prohibition of enforced disappearance is non-derogable, even in a state of emergency.² The source claims that Mr. Jaballah was subjected to enforced disappearance for four months. Mr. Al-Fiqi was reportedly subjected to enforced disappearance twice, the first time for 24 days and the second time for six months.

33. According to the source, the enforced disappearances of Mr. Jaballah and Mr. al-Fiqi violate articles 17 and 18 of the International Convention for the Protection of All Persons from Enforced Disappearance, which state that detention should only be carried out in officially recognized locations and that States must ensure that no one is detained secretly and that the detainee's family and lawyer are provided with accurate information about the detention.

Prolonged arbitrary detention

34. The source argues that the current prolonged detention of Mr. Jaballah and Mr. al-Fiqi is arbitrary in nature, without legal justification and politically motivated. It is alleged that their prolonged detention is part of a systematic practice whereby Egyptian authorities detain political prisoners as part of multiple separate cases, usually on similar charges, to ensure that they remain in pretrial detention. Once a detainee is ordered to be released under one case, or completes the two-year maximum term for pretrial detention as specified under the Criminal Procedure Code of Egypt, they reportedly remain in pretrial detention pending investigation into another case.

35. The source contends that Mr. Jaballah and Mr. al-Fiqi both remained detained pending investigation in a second case under similar charges, despite having completed the two-year maximum pretrial detention period, in violation of their right to liberty under article 9 of the Universal Declaration of Human Rights and article 9 (1) and (2) of the Covenant.

Review by an independent, objective and impartial authority, right to habeas corpus, and implementation of release orders

36. The source recalls that, under article 9 (3) of the Covenant, persons held on criminal charges must be brought promptly before a judge or another officer authorized by law to exercise judicial power for judicial control of the detention. Once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial.

37. The source recalls Human Rights Committee general comment No. 35 (2014), in which the Committee reiterated that the reviewing authority is required to be independent, objective and impartial in relation to the issues dealt with. This therefore excludes public prosecutors. The source contends that, if a person already detained on one criminal charge is ordered into detention under another charge, that person must be brought before such a reviewing authority to verify the second detention. The source recalls that, as a general rule, persons awaiting trial are not to be detained and that pretrial detention is permissible as an exception only, when it is necessary to prevent flight, interference with evidence or the recurrence of crime.³ The source contends that the necessity of pretrial detention must be determined on the basis of an individual assessment and that alternatives to pretrial detention must be considered. According to the Committee in its general comment No. 35 (2014), the

² International Convention for the Protection of All Persons from Enforced Disappearance, art. 1 (2); and A/HRC/13/42, para. 50.

³ General comment No. 35 (2014), para. 38.

necessity and reasonableness of pretrial detention must be reassessed through periodic re-examinations and, where there is no lawful basis for continuing the detention, the judge must order the individual's release.

38. The source explains that, under articles 142 and 143 of the Code of Criminal Procedure, pretrial detention for felonies can be renewed for 15-day periods by an investigating judge or a prosecutor, for a maximum of 150 days. After this, pretrial detention can be renewed in 45-day increments, but must be reviewed by a judge. Furthermore, article 143 of the same Code stipulates that pretrial detention can be extended only if it is in the interest of the investigation, specifically when the investigation is not yet concluded, and must be based on credible evidence.

39. According to the source, the Supreme State Security Prosecution is the authority in charge of persons charged with terrorism-related offences, such as the two defendants. The Supreme State Security Prosecution is empowered to initiate an investigation and issue pretrial detention decisions after questioning the individuals. It can reportedly renew the pretrial detention in 15-day intervals for a maximum of 150 days. Once this maximum term is reached, the Terrorism Judicial Circuit (or trial court) reviews the pretrial detention.

40. The source argues that the existing domestic framework, which permits Supreme State Security prosecutors to assume the powers of judges to issue pretrial detention decisions, is flawed in itself, as the Working Group has deemed the Supreme State Security Prosecution insufficiently independent, objective and impartial.⁴ The source reports that, in practice, the Supreme State Security Prosecution systematically orders the accused to be detained after questioning and repeatedly renews pretrial detention in 15-day intervals up to the maximum period of 150 days. The Supreme State Security Prosecution then reportedly keeps defendants detained by requesting judges to renew their pretrial detention. The source argues that the Supreme State Security Prosecution has undue power and influence and can release those detained at any time, but regularly chooses not to do so.

41. The source submits that the Supreme State Security Prosecution regularly fails to implement release orders. Even when courts order a release, the Supreme State Security Prosecution reportedly appeals the order or keeps defendants in detention without a legal basis. The source alleges that State security authorities subject defendants to enforced disappearance and arbitrary detention to obstruct release orders until they create a new case with similar charges, keeping the defendant in pretrial detention without a trial almost indefinitely. Moreover, the source contends that the Supreme State Security Prosecution is complicit in ignoring and failing to investigate complaints regarding the obstruction of release orders and other grave practices such as enforced disappearance and torture, thereby contributing to the sustainability of the violations.

42. In the case at hand, the source submits that the Supreme State Security Prosecution failed to implement the release orders of Mr. Jaballah and Mr. al-Fiqi and kept the two men in pretrial detention until they were charged with another case, in violation of their rights under the Covenant and the Criminal Procedure Code of Egypt.

43. For the above-mentioned reasons, the source concludes that the detention of Mr. Jaballah and Mr. al-Fiqi is arbitrary under category I.

ii. Category III

44. The source argues that the detention of Mr. Jaballah and Mr. al-Fiqi is arbitrary under category III as they have been denied their rights to due process.

Right to access an effective legal counsel

45. The source recalls that, according to principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, detainees should not be denied the right to communicate with the outside world, in particular with their family or counsel, for more than a matter of days. According to the source, in its general comment No. 32 (2007), the Human Rights Committee specified that the right to promptly access legal

⁴ Opinion No. 14/2020, para. 52.

representation includes the right for lawyers to privately communicate with their clients and to be present at interrogation sessions without interference or restrictions.

46. Furthermore, it is noted that, under the Basic Principles on the Role of Lawyers, the competent authorities have the duty to ensure detainees' access to effective counsel, which includes ensuring that lawyers have access to appropriate information, files and documents in their possession or control at the earliest appropriate time and for sufficient time so as to enable them to provide effective legal assistance to their clients. The source argues that the right to effective counsel is fundamentally related to the principle of equality of arms, enshrined in article 11 of the Universal Declaration of Human Rights, which includes the right to be given the time and facilities necessary to prepare and present a defence with counsel prior to trial.

47. The source has documented that, in most cases of detention containing terrorism-related charges, lawyers are not authorized to argue the case during the trial, and only receive from the court a copy of the documentation setting out the charges and sentence.

48. Accordingly, the source argues that the complete denial of the right of Mr. Jaballah and Mr. al-Fiqi to promptly seek legal representation and communicate with their lawyers while in detention violates their right to effective legal assistance.

Right to family visits

49. The source recalls that the right to communicate with the outside world and be visited by family members is a fundamental safeguard against human rights violations, including torture, ill-treatment and enforced disappearance.

50. The source recalls that, under article 17 (2) (d) of the International Convention for the Protection of All Persons from Enforced Disappearance, individuals detained and imprisoned have the right to communicate and be visited by their families. The source argues that this right applies regardless of the offence of which someone is suspected or accused.

51. The source also refers to the Egyptian prison regulations, under which all persons in pretrial detention have the right to receive one family visit per week and sentenced persons have the right to receive two visits per month. In March 2020, the Government of Egypt reportedly announced a state of emergency owing to the coronavirus disease (COVID-19) pandemic and halted all prison visits and communication with prisoners. On 15 August 2020, the Ministry of Interior announced that prison visits would be reinstated. Prison visits reportedly resumed on 22 August, although with severe limitations. According to the source, although the state of emergency was officially lifted in October 2021, restrictions on family visits are still imposed by the authorities to circumvent fundamental human rights. The source argues that the denial of family visits to detainees predates the COVID-19 crisis and that, for years, the authorities have been preventing detainees, including political opponents, critics and human rights lawyers, from contacting their family members or lawyers. The source expresses particular concern for individuals, such as Mr. al-Fiqi, held in politically motivated cases who have been denied this right.

52. The source recalls that, while Mr. Jaballah currently receives only one family visit per month, he has been subjected to incommunicado detention as the prison administration prevents some individuals held in connection to political cases from exchanging letters with their family members.

53. The source explains that Mr. al-Fiqi was entirely denied the right to be visited by his family during his detention in Tora Maximum Security Prison. In this regard, the source explains that many detainees held in that prison are banned from receiving visitors. Mr. al-Fiqi has reportedly also been banned from receiving visitors at Abu Zaabal Prison, where he is currently detained.

54. The source also explains that the Ministry of Interior has published the telephone numbers of 44 prisons across Egypt. However, it reportedly left out both maximum security prisons within the Tora Prison complex, where Mr. Jaballah is held along with other human rights defenders and political activists, thereby further limiting detainees' contact with their families.

55. The source alleges that such restrictions on and prevention of family visits were not implemented to pursue a legitimate aim and thereby violate the detainees' right to communicate with the outside world.

Right to be free from torture and ill-treatment

56. The source submits that Mr. Jaballah and Mr. al-Fiqi were subjected to severe torture and ill-treatment, especially during the period that they were disappeared. The source alleges that such ill-treatment and torture were carried out to coerce the defendants into making a confession and incriminating themselves. According to the source, Mr. Jaballah's lawyer attempted to file a complaint with the prosecution regarding the allegations of torture, but the complaint was rejected. The source contends that Mr. al-Fiqi was also subjected to physical and psychological torture during the two periods that he was subjected to enforced disappearance. However, since he was banned from receiving visits from his lawyer and family and was not physically present during detention renewal sessions, Mr. al-Fiqi was unable to report his treatment until he met with his lawyer after a hearing before the Supreme State Security Prosecution on 23 November 2019.

57. The source argues that these practices violate the right of Mr. Jaballah and Mr. al-Fiqi to be free from torture, ill-treatment and degrading punishment, guaranteed by article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, the source adds that the Committee against Torture has specified the absolute nature of this right, which applies irrespective of the offence alleged and cannot be restricted, including in times of war or states of emergency, and cannot be justified, including by threats of terrorism or other violent crime.⁵

Right to health

58. The source recalls that, under article 16 of the African Charter on Human and Peoples' Rights, article 12 of the International Covenant on Economic, Social and Cultural Rights and rules 25 and 27 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), every detainee has the right to attain the highest standard of physical and mental health, which includes access to timely and appropriate health care, but also to underlying determinants of health, such as adequate food, water and sanitation.⁶ The source cites the Standard Minimum Rules for the Treatment of Prisoners in observing that sick prisoners whose health requires special treatment must be transferred to specialized institutions or civil hospitals and the failure to provide access to adequate health care violates the right to health.⁷

59. In the light of the alleged ailing health of Mr. Jaballah and Mr. al-Fiqi, the source concludes that the authorities' refusal to allow them access to proper medical examinations and treatment, thereby putting them at serious risk of irreparable damage to their health and even death, violates their right to access adequate health care.

60. For the above-mentioned reasons, the source concludes that the detention of Mr. Jaballah and Mr. al-Fiqi is arbitrary under category III.

Response from the Government

61. On 11 August 2022, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 10 October 2022 about the situation of Mr. Jaballah and Mr. al-Fiqi. The Working Group also requested the Government

⁵ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 44 (A/57/44)*, para. 53 (i). See also Human Rights Committee, general comment No. 20 (1992), para. 3.

⁶ See also the third general report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, document CPT/Inf (93) 12, para. 53.

⁷ African Commission on Human and People's Rights, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communications No. 105/93, No. 128/94, No. 130/94 and No. 152/96, Decision, 31 October 1998; and African Commission on Human and People's Rights, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, Communications No. 137/94, No. 139/94, No. 154/96 and No. 161/97, Decision, 31 October 1998.

to clarify the legal provisions justifying their continued detention, as well as the compatibility of their detention with the State's obligations under international human rights law, and in particular with regard to the treaties ratified by Egypt. Moreover, the Working Group called upon the Government to ensure Mr. Jaballah's and Mr. al-Fiqi's physical and mental integrity.

62. The Working Group regrets that the Government did not submit a reply to the communication, nor did it request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

Discussion

63. 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.

64. In determining whether Mr. Jaballah's and Mr. al-Fiqi's detention is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.⁸ In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

65. The source has argued that Mr. Jaballah's and Mr. al-Fiqi's detention is arbitrary and falls under categories I and III. The Working Group shall examine these in turn.

Category I

66. The source argues that Mr. Jaballah was arrested on 4 May 2018 and Mr. al-Fiqi on 21 June 2018 by State security officers in plain clothes, without being presented with any type of warrant or informed of the charges against them. Furthermore, it is suggested that they were both subjected to enforced disappearance: Mr. Jaballah for almost four months, from 4 May to 28 August 2018; and Mr. al-Fiqi, firstly, from 21 June to 14 July 2018, and, subsequently, from May to November 2019. The Government has chosen not to address these allegations even though it was provided an opportunity to do so.

67. Article 9 (2) of the Covenant provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges against him or her. The Working Group has previously stated that, for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case.⁹ This is typically¹⁰ done through an arrest warrant or arrest order (or equivalent document).¹¹ The reasons for arrest must be provided immediately upon arrest and must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.¹² It is also required that the decision on whether the arrest is warranted be taken by an outside authority that is a competent, independent and impartial judicial body. This is procedurally inherent in the right to personal liberty and security and the prohibition of arbitrary deprivation of liberty under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 of the Covenant and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁸ A/HRC/19/57, para. 68.

⁹ Except for arrests in flagrante delicto, where the opportunity to obtain a warrant will not be typically available.

¹⁰ Human Rights Committee, general comment No. 35 (2014), para. 23. See also opinions No. 88/2017, para. 27; No. 3/2018, para. 43; and No. 30/2018, para. 39. See further Arab Charter on Human Rights, art. 14 (1).

¹¹ Human Rights Committee, general comment No. 35 (2014), para. 27; and opinion No. 30/2017, paras. 58 and 59.

¹² Opinion No. 85/2021, para. 69.

68. The Working Group finds that the authorities' failure to present a warrant to Mr. Jaballah and Mr. al-Fiqi and to provide them with an explanation of the reasons for their arrest at the time of their arrest violates the above provisions and renders their arrest devoid of any legal basis. Therefore, as Mr. Jaballah and Mr. al-Fiqi were arrested in violation of the above provisions, their detention is arbitrary.

69. The Working Group further cannot but find that Mr. Jaballah and Mr. al-Fiqi were subjected to enforced disappearance for significant periods of time (four months for Mr. Jaballah and almost seven months cumulatively for Mr. al-Fiqi), in violation of article 9 (1) of the Covenant. Enforced disappearances are prohibited by international law and constitute a particularly aggravated form of arbitrary detention.¹³ Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention, lacks any valid legal basis under any circumstance and is inherently arbitrary as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.¹⁴ The Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances.

70. Moreover, the Working Group notes that these enforced disappearances resulted in the incommunicado detention of Mr. Jaballah and Mr. al-Fiqi and thus precluded them from being brought promptly before a judge or other officer authorized by law to exercise judicial power as required under article 9 (3) of the Covenant. Noting that both Mr. Jaballah and Mr. al-Fiqi were subsequently brought before the Supreme State Security Prosecution, which charged them with criminal offences and ordered their pretrial detention, the Working Group recalls that the prosecutorial body cannot be considered a judicial authority for the purposes of article 9 (3) of the Covenant.¹⁵

71. In addition, in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged in article 9 (4) of the Covenant. The Working Group recalls that the right to challenge the lawfulness of detention before a court is a self-standing human right that is essential to preserve legality in a democratic society.¹⁶ This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty and to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention and detention under counter-terrorism measures.¹⁷ Moreover, it applies irrespective of the place of detention, or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.¹⁸

72. The right to take proceedings before a court in order that that court may decide upon the lawfulness of detention must also be afforded without delay, as specified in article 9 (4) of the Covenant. As the Human Rights Committee specified in its general comment No. 35 (2014) (para. 47), the adjudication of the case should take place as expeditiously as possible.

¹³ Human Rights Committee, general comment No. 35 (2014), para. 17. See also opinions No. 5/2020, No. 6/2020, No. 11/2020, No. 13/2020, No. 77/2020, No. 38/2021 and No. 25/2022.

¹⁴ See article 1 of the Declaration on the Protection of All Persons from Enforced Disappearance, in which any act of enforced disappearance is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in that field; and opinions No. 82/2018, para. 28; No. 18/2019, para. 33; No. 22/2019, para. 67; No. 26/2019, para. 88; No. 28/2019, para. 61; No. 29/2019, para. 54; No. 36/2019, para. 35; No. 41/2019, para. 32; No. 42/2019, para. 48; No. 51/2019, para. 58; No. 56/2019, para. 79; No. 6/2020, para. 43; No. 11/2020, para. 41; and No. 34/2020, para. 49. See also article 22 of the Arab Charter on Human Rights.

¹⁵ Human Rights Committee, general comment No. 35 (2014), para. 32. See also opinions No. 14/2015, para. 28; No. 5/2020, para. 72; No. 6/2020, para. 47; and No. 41/2020, para. 60. See further [A/HRC/45/16/Add.1](#), para. 35.

¹⁶ [A/HRC/30/37](#), paras. 2 and 3.

¹⁷ *Ibid.*, para. 11, and annex, para. 47 (a).

¹⁸ *Ibid.*, annex, para. 47 (b).

In the present case, while Mr. Jaballah and Mr. al-Fiqi appeared before the prosecution after long periods of enforced disappearance – which in itself is a violation of article 9 (4) of the Covenant – it remains unclear when and if they appeared before a judge. The Working Group therefore finds a breach of article 9 (4) of the Covenant. Given that they were not able to challenge their detention, their right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

73. Lastly, the Working Group recalls that it is a well-established norm of international law that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible.¹⁹ Article 9 (3) of the Covenant provides that it is not to be the general rule that persons awaiting trial are to be detained, but release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings. In order to give effect to this principle, pretrial detention must be based on an individualized determination that it is reasonable and necessary, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary in the particular case.

74. It follows from the source's submissions, which the Government has chosen not to contest, that Mr. Jaballah's and Mr. al-Fiqi's continued periods of pretrial detention were never substantiated.

75. The Working Group has already had a chance to express its concern over the so-called rotation practice, whereby release is ordered but never effected and new charges are brought against the person concerned.²⁰ This practice of recycling of charges and the consequent repetition of pretrial detention on charges that are very similar to previous ones is akin to "revolving door" pretrial detention and is entirely incompatible with article 9 (3) of the Covenant. Given that this practice materialized in both cases, the Working Group considers that not only were the rights of Mr. Jaballah and Mr. al-Fiqi further violated under article 9 (3) of the Covenant, but the authorities' failure to comply with the release orders also violated article 9 (1) of the Covenant.

76. In view of the above, the Working Group concludes that the arrests and detentions of Mr. Jaballah and Mr. al-Fiqi are arbitrary under category I.

Category III

77. The source has submitted, and the Government has chosen not to contest, that Mr. Jaballah and Mr. al-Fiqi were denied the right to promptly seek legal representation and communicate with their lawyers while in detention.

78. The Working Group recalls principle 9 and guideline 8 of 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, according to which persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after the moment of apprehension, and that such access is to be provided without delay. The Working Group finds that the enforced disappearances and incommunicado detentions to which both Mr. Jaballah and Mr. al-Fiqi were subjected to by definition deprived them of their right to legal counsel at a critical stage of criminal proceedings and exposed them to a risk of coercion, which according to the source indeed took place.

79. The Working Group considers that, in order for a trial to be fair, an accused should be able to obtain the whole range of legal services from the outset of the proceedings, including a possibility to discuss the case, to organize the defence, to collect evidence favourable to the accused, to get legal support to prevent ill-treatment and, if it took place, to effectively complain about it, and to ensure that the privilege against self-incrimination is duly respected.

¹⁹ Opinions No. 28/2014, para. 43; No. 49/2014, para. 23; No. 57/2014, para. 26; No. 1/2020, para. 53; and No. 8/2020, para. 54. See also Human Rights Committee, general comment No. 35 (2014), para. 38; and [A/HRC/19/57](#), paras. 48–58.

²⁰ Opinions No. 53/2022, para. 73; and No. 60/2022, para. 74.

80. Holding an accused incommunicado at the crucial initial period of detention, as was the case with both Mr. Jaballah and Mr. al-Fiqi, violates the essence of the right to legal assistance and to prepare a defence and the principle of equality of arms, guaranteed under articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) of the Covenant. The Working Group considers that these violations substantially undermined and compromised Mr. Jaballah's and Mr. al-Fiqi's capacity to defend themselves in any court proceedings that could arise.

81. The Working Group stresses that, under international human rights law, all detained and imprisoned individuals have the right to communicate with and be visited by their families. The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused. According to principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, this right may only be subject to conditions and restrictions as specified by law or lawful regulations. However, both petitioners were held incommunicado during the initial period of their detention, and Mr. al-Fiqi was apparently denied the right to be visited by his family during his detention in the Tora Maximum Security Prison and at Abu Zaabal Prison, where he is currently detained.

82. The Working Group also expresses its gravest concern at the allegations of torture and ill-treatment, unrebutted by the Government, including allegations of beatings, electrocution, being hung by an iron chain for several hours, in the case of Mr. Jaballah, and being beaten, stripped naked and electrocuted on different body parts, in the case of Mr. al-Fiqi. In the Working Group's view, not only is torture a grave violation of human rights per se, but it seriously undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in the light of the right, under article 14 (3) (g) of the Covenant, not to be compelled to testify against oneself or to confess guilt. As the Working Group has stated before, confessions made in the absence of legal representation are not admissible as evidence in criminal proceedings.²¹ Furthermore, the use of a confession extracted through ill-treatment in any proceedings remains prohibited under article 15 of the Convention against Torture and principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and automatically renders the entire proceedings unfair, regardless of whether other evidence was available to support the verdict.²² The treatment described above reveals a prima facie breach of the absolute prohibition of torture, which is a peremptory norm of international law, and of the Convention against Torture, principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 1 of the Nelson Mandela Rules. The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

83. Lastly, the Working Group notes that both Mr. Jaballah and Mr. al-Fiqi spent about five years in pretrial detention. The Working Group recalls that the right of the accused to be tried without undue delay, set out in article 14 (3) (c) of the Covenant, is designed not only to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.²³ However, what is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused and the manner in which the matter was dealt with by the administrative and judicial authorities. In the present cases, the Working Group has been presented with no reasons to justify such delays. It therefore finds a violation of article 14 (3) (c) of the Covenant.

84. In view of the above, the Working Group concludes that the arrest and detention of Mr. Jaballah and Mr. al-Fiqi are arbitrary under category III.

²¹ A/HRC/45/16, para 53. See also opinions No. 1/2014, para. 22; No. 14/2019, para. 71; No. 59/2019, para. 70; and No. 73/2019, para. 91. See further E/CN.4/2003/68, para. 26 (e).

²² Opinions No. 43/2012, para. 51; No. 34/2015, para. 28; No. 52/2018, para. 79 (i); No. 32/2019, para. 43; No. 59/2019, para. 70; and No. 73/2019, para. 91. See also opinions No. 48/2016, No. 3/2017, No. 6/2017, No. 29/2017 and No. 39/2018.

²³ Human Rights Committee, general comment No. 32 (2007), para. 35.

Concluding remarks

85. The Working Group notes that the present opinion is only one of many opinions in recent years in which it has found the Government to be in violation of its international human rights obligations.²⁴ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in Egypt, including through the unlawful practice of rotation, whereby release is ordered but never effected and new charges are brought against the person concerned, which, if it continues, may amount to a serious violation of international law. The duty to comply with international human rights standards rests with all State organs, officers and agents as well as with all other natural and legal persons. 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.

86. The Working Group also notes that both individuals were tortured and the source's uncontested allegations that both individuals' health is deteriorating and that neither individual has been allowed access to proper medical examinations and treatment. It thus feels obliged to remind the Government that, in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person and that denial of medical assistance constitutes a violation of the Nelson Mandela Rules, rules 18, 22, 24, 25, 27, 30 and 42 in particular, as well as principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Disposition

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

The deprivation of liberty of Islam Atef Omar Jaballah and Abdelsamad Mahmoud Mohamed al-Fiqi, being in contravention of articles 3, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 6, 9, 14 and 16 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

88. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situations of Mr. Jaballah and Mr. al-Fiqi without delay and bring them 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.

89. The Working Group considers that, taking into account all the circumstances of the cases, the appropriate remedy would be to release Mr. Jaballah and Mr. al-Fiqi immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

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

91. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Working Group on Enforced or Involuntary Disappearances and to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

²⁴ See, for example, opinions No. 6/2016, No. 7/2016, No. 41/2016, No. 42/2016, No. 54/2016, No. 60/2016, No. 30/2017, No. 78/2017, No. 83/2017, No. 26/2018, No. 27/2018, No. 47/2018, No. 63/2018, No. 82/2018, No. 87/2018, No. 21/2019, No. 29/2019, No. 41/2019, No. 42/2019, No. 65/2019, No. 77/2019, No. 6/2020, No. 80/2020, No. 45/2021, No. 79/2021, No. 83/2021, No. 23/2022, No. 34/2022, No. 53/2022 and No. 60/2022.

Follow-up procedure

93. 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. Jaballah and Mr. al-Fiqi have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Jaballah and Mr. al-Fiqi;

(c) Whether an investigation has been conducted into the violations of Mr. Jaballah's and Mr. al-Fiqi'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.

94. 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.

95. 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 cases 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.

96. 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.²⁵

[Adopted on 30 March 2023]

²⁵ Human Rights Council resolution 51/8, paras. 6 and 9.