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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020

Opinion No. 14/2020 concerning Amal Fathy, Mohamed Lofty and a minor whose name is known to the Working Group (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 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 18 October 2019 the Working Group transmitted to the Government of Egypt a communication concerning Amal Fathy, Mohamed Lofty and a minor whose name is known to the Working Group. The Government submitted a late response on 21 January 2020. 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. Amal Fathy is a national of Egypt born in 1984. Ms. Fathy is a campaigner and advocate for the rights of women as well as a student of mass communications at Cairo University. She previously worked as an actress, an assistant film director and a fashion model and was active in the now-banned April 6 youth movement as well as in, and following, the 2011 Egyptian revolution. More recently, Ms. Fathy has not been affiliated with any particular movement or non-governmental organization, but she continues to engage actively in social media, especially Facebook, in particular on women's rights issues and discrimination against women in Egypt, while being the primary caretaker of her son.

5. Mohamed Lofty is a leading Egyptian human rights defender and Ms. Fathy's husband. He is a dual national of Egypt and Switzerland. He is a co-founder and the director of the Egyptian Commission for Rights and Freedoms, an Egyptian human rights organization. He has suffered persecution and harassment for his work in the past.

6. The minor, who was three years old at the time of the arrest, is the son of Ms. Fathy and Mr. Lofty, and is also a dual national of Egypt and Switzerland.

a. Arrest and detention

7. According to the source, Ms. Fathy was arrested at around 2.30 a.m. on 11 May 2018, along with Mr. Lofty and their son, by seven plain-clothes officers of the National Security Agency and two armed, masked and uniformed officers of the Egyptian special forces, accompanied by two plain-clothes operatives, who raided their home in Maadi, south of Cairo, with the stated intention of arresting Ms. Fathy. After searching the apartment, the officers brought the three to Maadi Police Station. One of the plain-clothes officers, who claimed to be a National Security Agency officer, said that he was in possession of an arrest warrant, but refused to produce it when challenged by Mr. Lofty.

8. The National Security Agency officer told Mr. Lofty that his wife's arrest was in relation to a 12-minute video she had posted on Facebook, in which she had complained about having been poorly treated at a bank, about having been sexually harassed by a security guard and about the difficulties of being a woman in Egypt and in which she had voiced criticism of Egypt in general. The pro-Government and State-owned media, citing the video, had accused Ms. Fathy of insulting the nation and its institutions while identifying her as an April 6 movement activist and as Mr. Lofty's wife, and a wave of online harassment and threats against her had followed. The officer had underlined that Ms. Fathy's video had "angered people high up".

9. The source indicates that Ms. Fathy's identity card was confiscated, the family's apartment was searched, and documents and a computer tablet were examined. Mr. Lofty tried to arrange for his son to be picked up by a family member to no avail, and the three were taken to Maadi Police Station and detained in a room. Ms. Fathy's and Mr. Lofty's mobile telephones were seized at the station.

10. The source reports that although Mr. Lofty's lawyer made several attempts to contact him during this time, they were not allowed to speak to each other. When the lawyer arrived at the police station, he was told that the family was not there. Similarly, Ms. Fathy was denied contact with a lawyer.

11. Mr. Lofty and his son were released on the same day, a few hours later, once a family member could finally be reached, while Ms. Fathy was remanded by the Maadi prosecutor, who interviewed her in the afternoon and ordered 15 days of preventive detention pending further investigation into charges of "advocating false news on Facebook" and "misusing social media".

12. Ms. Fathy was subsequently charged in two separate cases, first a misdemeanour case (case No. 7991/2018) and then a State-security case (case No. 621/2018), on the basis of her Facebook post.

i. Case No. 7991/2018

13. The source explains that in case No. 7991/2018, concerning her video on Facebook, Ms. Fathy was accused of broadcasting a video harming national security; posting a video inciting the overthrow of the regime and spreading false rumours; and misusing social media. She was remanded in detention for 15 days, and sent to the Al-Qanater women's prison, north of Cairo. Mr. Lofty was informed that his wife had been transferred on 13 May 2018.

14. The specific charges against her in the case were insulting a public official or civil servant, a law officer or any person charged with a public service, while, or because, the public servant was performing his duty (Penal Code, art. 133); disclosing State or defence secrets (Penal Code, art. 80 A); deliberately disclosing false or tendentious news, information or rumours about the country's internal situations that would weaken the country's financial credibility, dignity and prestige, or exercising any activity that is liable to damage the country's national interests (Penal Code, art. 80 D); promoting in Egypt, by any means, calls for changes to the basic principles of the Constitution or the basic systems of the social community, for the domination of one class over other classes, for the elimination of a social class, for the overthrow of the basic social or economic systems of the State, or for the destruction of any of the basic systems of the social community (Penal Code, art. 98 B); deliberately disseminating news, information, data, or false or tendentious rumours that could disturb public security, cause terror among the people, or cause harm and damage to the public interest (Penal Code, art. 102 bis); and premeditatedly disturbing or harassing a third party by misusing telecommunications equipment (Telecommunication Regulation Law (Law No. 10 of 2003), art. 76 (2)).

15. The source reports that the prosecutor in Maadi later referred her for trial on charges of: (a) disseminating false news for the purpose of disturbing public peace, punishable by a fine (Penal Code, art. 102 bis); (b) possession of indecent material, punishable by up to two years in prison and a fine (Penal Code, art. 178); and (c) use of insulting language, punishable by up to one year in prison and a fine (Penal Code, art. 306).

16. On 24 May 2018, the prosecutor in Maadi extended Ms. Fathy's preventive detention for 15 days pending further investigation, without providing reasons, and Ms. Fathy's appeal against the extension was rejected by court. On 7 June 2018, the prosecutor extended the preventive detention for a further 15 days pending further investigation, but that time the Helwan Misdemeanour Court of Appeal ordered Ms. Fathy's release on bail of 10,000 Egyptian pounds, on 19 June 2018. The prosecutor in Maadi appealed, but the Criminal Court of South Cairo approved the release on bail on 21 June 2018. Despite the bail decision for case No. 7991/2018, she remained in custody in relation to the State-security case (see below).

17. On 29 September 2018, Ms. Fathy was convicted of the first two of the three charges in case No. 7991/2018 and was sentenced to two years in prison and a fine of 10,000 Egyptian pounds, with a bail set at 20,000 Egyptian pounds for temporary suspension of the sentence, by Maadi Misdemeanour Court. Both the fine and the bail were paid the next day, but she was remanded again until 27 December 2018 because of the second State security case.

18. On 30 December 2018, the Maadi Misdemeanour Court of Appeals upheld Ms. Fathy's conviction in case No. 7991/2018. She has a final avenue of appeal, to the Court of Cassation, and was granted a stay of the sentence until the final appeal is exhausted. The source explains that it could take months or years for the appeal to be listed and heard, during which time Ms. Fathy remains at risk of being re-arrested and detained to serve the two-year prison term. Ms. Fathy's husband has also requested, through the National Council of Human Rights, a pardon from the President in relation to this offence.

ii. Case No. 621/2018

19. With regard to the State-security case (case No. 621/2018), the source explains that, on 13 May 2018, Mr. Lofty was informed that his wife's case had been transferred to the Supreme State Security Prosecution, a special branch of the Office of the Public Prosecutor responsible for investigating national security threats. She was then accused of the more serious charges of joining a terrorist group, publishing false news to disrupt public security

and harm national interests, and using the Internet to call for acts of terrorism (Penal Code, art. 86 bis, and the anti-terrorism law (Law No. 94 of 2015)).

20. On the same day, the Supreme State Security Prosecution ordered a separate 15-day preventive detention pending further investigation. The Prosecution extended her preventive detention by 15-day periods on 24 May, 7 June, 19/21 June, 2 July, 15 July, 30 July, 13 August, 28 August, 12 September, 26 September, 14 October and 28 October 2018 without providing reasons or a purported legal basis. On 12 November 2018, a Cairo court extended her preventive detention by 45 days. She was denied the opportunity to confer with her lawyers before appearing in court and her legal counsel was not present at the hearings.

21. On 18 December 2018, a court accepted the appeal lodged by Ms. Fathy's lawyers against the 45-day preventive detention order and ordered her release on probation. On 26 December 2018, a Cairo court extended her probation period for another 45 days. On 27 December 2018, she was finally released on conditional bail into stringent house arrest conditions, after 230 days in prison.

22. The source notes that international pressure, including by United Nations human rights experts and the Office of the United Nations High Commissioner for Human Rights,¹ may have contributed to the court exercising its discretion to release Ms. Fathy.

23. The source indicates that, during Ms. Fathy's detention, her lawyers faced difficulties in gaining access to her and communicating with her, first at the police station, then for the preparation of the appeals against her detention, and they have never been given access to her case file. Ms. Fathy was only able to meet with her lawyers briefly, for a few minutes, before each hearing. Moreover, the source indicates that Ms. Fathy suffered from deteriorating psychological conditions and that she had not obtained, while in detention, the required medical treatment.

24. The source states that, even though Ms. Fathy is currently not in prison, she was subjected to unduly stringent bail conditions that amounted to, or were at any rate commensurate with, detention in a conventional establishment until 9 February 2019. She remains at risk of arrest.

25. Allegedly, under the terms of her initial bail conditions, Ms. Fathy was under house arrest: she had to report to a nearby police station weekly and was otherwise confined to her home other than to obtain medication and to attend court. The source explains that Ms. Fathy suffers from panic attacks as a result of her detention. She requested authorization to see her psychologist for treatment; the fact that such appointments were not set out as permitted meant the terms of her bail were impeding her ability to obtain proper medical treatment and care. On 9 February 2019, the Court amended her bail conditions to lift the house arrest conditions, which meant she could finally seek the medical treatment she required. While the house arrest conditions were lifted, the Court increased her reporting requirements to twice a week. No date has been set for her trial in relation to case No. 621/2018.

26. The source reiterates that Ms. Fathy remains on probation pending appeal against the two-year sentence imposed in relation to the conviction in case No. 7991/2018. She is at risk of being arrested to serve this sentence at any time. The source reports that Ms. Fathy spent from 11 May to 27 December 2018, some 230 days, in prison, and she remains at grave risk of being further detained, either to serve the two-year sentence in relation to the Facebook post, or upon conviction for the subsequent charge of membership of a terrorist organization, or both.

¹ See Office of the United Nations High Commissioner for Human Rights, "UN experts condemn Egypt as clampdown 'tightens the noose' on women's rights movement", news release, 15 December 2016; and the press briefing note on Egypt, Ethiopia and the United States of America, 5 June 2018 (available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23174).

b. Legal analysis

i. Deprivation of liberty under category I

27. The source submits that Ms. Fathy's detention did not comply with the principle of legality as a matter of international law. As such, her deprivation of liberty was without legal basis for the purpose of category I.

28. The source notes that the Egyptian authorities did not provide any written explanation of the legal basis for the pretrial detention. The source suggests that the basis may be found in articles 134, 142 or 143 of the Code of Criminal Procedure.

29. Specifically, the source argues that the arresting officers refused to provide Ms. Fathy with an arrest warrant when she was first arrested. This, according to the source, is a breach of article 9 (2) of the International Covenant on Civil and Political Rights.

30. The source also argues that Ms. Fathy's pretrial detention did not comply with the domestic law of Egypt on the basis that the authorities failed to explain which provision of law provided the basis for her continued detention, or provide the reasons that justified her continued detention. The source recalls that pretrial detention is an exceptional legal measure available only in the following cases: for cases of in flagrante delicto offences; when the accused is a flight risk; when there is a fear that the legal process may be impeded or harmed; in cases implicating security and public order; and in cases involving felony or misdemeanour crimes punishable by a prison sentence, when the accused does not have a known residence in Egypt. In the present case, the source claims that Ms. Fathy's pretrial detention did not meet these standards. The source claims that no reasons were given for her continued detention in circumstances where she was not a flight risk and had a small child at home for which she was the primary caregiver. The authorities have thus failed to demonstrate that Ms. Fathy's detention was reasonable and necessary.

31. Moreover, the source alleges that, even if Ms. Fathy's detention was lawful pursuant to Egyptian law, the law and its application and enforcement in her case do not comply with international law. The provisions relating to pretrial detention are vague, subject to excessive discretion of prosecutors, facilitate pretrial detention for an egregiously lengthy period (of up to two years or longer) and leave little or no recourse for detainees who wish to challenge their continued detention, in violation of articles 9, 10 and 11 of the Covenant, article 6 of the African Charter on Human and Peoples' Rights, and article 54 of the Constitution of Egypt.

32. With this in mind, the source argues that Ms. Fathy's detention was repeatedly renewed for 15-day periods by a prosecutor without reasons being given. Thus, according to the source, these apparently automatic extensions of her detention period without adequate or proper argument failed to comply with article 9 (3) and (4) of the Covenant.

33. The source concludes that the authorities failed to provide Ms. Fathy with full and proper access to a court to meaningfully challenge her ongoing detention, namely, by failing to allow her unimpeded access to her lawyers, by failing to provide her with reasons for her detention, thus preventing her from properly considering and assessing her arguments about the necessity and reasonableness of the detention, and through the apparent automatic extension of her detention period, in breach of articles 9 and 14 of the Covenant. Her detention was, accordingly, arbitrary within the terms of category I of the categories applicable to cases before the Working Group.

ii. Deprivation of liberty under category II

34. According to the source, the actions taken by Egypt appear to be motivated by an intention to prevent Ms. Fathy from exercising her rights to freedom of expression in speaking out about women's rights in Egypt in her social media posts, which are critical of the current Government's failure to prevent sexual harassment in Egypt. She has been accused of a range of offences related to publication, including spreading false news and being a member of a banned group, for having expressed an opinion online. The source recalls that detention of journalists, human rights defenders and activists on this basis in Egypt has been found by the Working Group to constitute arbitrary detention under category II. To the extent that she was detained for that reason, the source argues that Ms. Fathy's detention was arbitrary under category II.

iii. Deprivation of liberty under category III

35. The source claims that Ms. Fathy had limited access to her lawyers and was not able to meaningfully challenge her detention in court because the detention was extended without a statement of the basis of the detention and the reasons for her continued detention, which would allow her to properly challenge the reasons, and because of the apparently perfunctory manner in which the detention period was being extended. This, according to the source, amounts to a violation under category III.

36. According to the source, the non-observance of the international norms relating to the right to a fair trial, set out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the State concerned, was of such gravity as to give the deprivation of liberty an arbitrary character. In this case, the apparently automatic and continued renewal of the 15-day period of Ms Fathy's detention by a prosecutor, in unreasonable and unnecessary circumstances, in which she did not have access to her case file, sufficient access to her lawyers or the ability to put arguments before a judge in order to meaningfully challenge her detention, rendered her temporary pretrial detention arbitrary, in violation of article 11 (1) of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

iv. Deprivation of liberty under category V

37. The source recalls that the Working Group has found on numerous occasions that the arrest and detention of journalists and activists in Egypt was, in practice, discrimination on the grounds of the political opinions they had expressed or on the basis of their affiliation with a banned journalist organization. Therefore, the source concludes that arrest and detention on the basis of a political opinion falls within category V. For the same reasons, the arrest and detention of Ms. Fathy falls within category V.

38. The source also underlines that the Working Group has made clear that measures of house arrest, when they are accompanied by serious restrictions on liberty of movement, can amount to detention. While Ms. Fathy was temporarily released on conditional bail, she was under house arrest until 9 February 2019, under conditions that were restrictive and prevented her from leaving the house except to report to the police station and to obtain medical assistance. While her bail conditions have since been relaxed, allowing her to leave the house freely, she remains under bail conditions with an obligation to report regularly to the police in relation to case No. 621/2018. She remains at risk of arrest and imprisonment in relation to the two-year sentence imposed in relation to case No. 7991/2018, which is being appealed. Furthermore, the restrictions on her liberty have been imposed in relation to criminal charges and a conviction related to internationally protected free speech activity. For the reasons set out above, the source insists that this amounts to arbitrary detention.

39. Considering all of the above, the source submits that Ms. Fathy's detention was arbitrary, as are the probation measures that followed.

40. The situation of Ms. Fathy has been raised in one urgent appeal and one allegation letter (EGY 9/2018 and EGY 14/2018). The Government replied to the allegation letter on 23 January 2019.

Response from the Government

41. On 18 October 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 17 December 2019, detailed information about the current situation of Ms. Fathy, Mr. Lofty and their son and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Ms. Fathy, Mr. Lofty and their son.

42. The Government submitted its response on 21 January 2020, that is, after the deadline given by the Working Group. The response is therefore considered late, and the Working Group cannot accept the response as if it had been presented within the time limit. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the methods of work of the Working Group. Under paragraph 16 of its methods of work, the Working Group may render an opinion on the basis of all the information it has obtained.

Discussion

43. At the outset, the Working Group welcomes the release of Mr. Lofty and his son several hours after their arrest on 11 May 2018, as well as Ms. Fathy's release on probation on 27 December 2018, after the court decision of 18 December 2018. Following her release, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. In this particular case, the Working Group has decided to render the present opinion, doing so despite the absence of a timely response from the Government, in conformity with paragraph 15 of its methods of work. In making this decision, the Working Group gives particular weight to the fact that, although Ms. Fathy has been released, the circumstances in which the three individuals were arrested and deprived of liberty were serious and warrant further attention; Ms. Fathy was deprived of liberty for more than eight months in prison; the authorities failed to release Ms. Fathy on probation until 27 December 2018, despite the court decision to release her on 18 December 2018; Ms. Fathy remained under house arrest under stringent bail conditions that the Working Group construes as deprivation of liberty² until the amendment by the court of her bail conditions to remove the house arrest requirement on 9 February 2019; Ms. Fathy remains at risk of being re-arrested and detained to serve the two-year prison term if the Court of Cassation rejects her appeal and upholds the sentence; the Government has failed to share information about the present case, including the release of the three individuals, in a timely manner, let alone provide the guarantee of non-repetition.³

44. 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, in a timely manner, the *prima facie* credible allegations made by the source.

45. The Working Group wishes to reaffirm that States have the obligation to respect, protect and fulfil the right to liberty and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international and regional standards set forth in the Universal Declaration of Human Rights, the Covenant and other applicable international and regional instruments.⁴ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.⁵

46. With respect to the detention of Mr. Lofty and his son for several hours on 11 May 2018, the Working Group notes that neither the duration nor location prevents it from amounting to deprivation of liberty for the purpose of investigating cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards in a quasi-judicial manner, the core mandate vested in the Working Group by the Commission on Human Rights, in its resolutions 1991/42 and 1997/50, and by the Human Rights Council, in its resolution 6/4.⁶

i. Category I

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

² See deliberation No. 1 on house arrest, deliberation No. 9 on the definition and scope of arbitrary deprivation of liberty under customary international law (para. 59) and opinion No. 54/2015, para. 88.

³ See opinions No. 88/2017, para. 21, and No. 94/2017, para. 44.

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

⁵ See, for example, opinions No. 1/1998, para. 13; No. 51/2019, para. 53; and No. 56/2019, para. 74.

⁶ See deliberation No. 9 (paras. 55 and 59). See also opinions No. 67/2017, para. 19, and No. 83/2017, para. 63; and European Court of Human Rights, *Belchev v. Bulgaria* (application No. 39270/98), judgment of 8 April 2004, para. 82.

48. The source submits, and the Government does not contest, that Ms. Fathy, Mr. Lofty and their son were not presented with an arrest warrant or informed of the reasons for their arrest at the time of arrest.

49. As the Working Group has stated, in order for deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.⁷

50. International human rights law includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁸ For the minor, who was three years old at the time of arrest with his parents, article 37 (b) of the Convention on the Rights of the Child provides an additional layer of international legal protection of his personal liberty. The Working Group has been presented with no other valid grounds to justify any exception to this principle in the present case. Furthermore, although the arresting officers claimed to have an arrest warrant, they refused to produce it when requested by Mr. Lofty. The search of the individuals' property without warrant also violated article 12 of the Universal Declaration of Human Rights, article 17 (1) and (2) of the Covenant and article 21 (1) and (2) of the Arab Charter on Human Rights.⁹

51. The source states that one of the National Security Agency officers said explicitly to Mr. Lofty that the arrest of Ms. Fathy was in relation to a 12-minute Facebook video she had posted. No reasons were given for the arrest of Mr. Lofty and his son. The Working Group recalls that, in accordance with general comment No. 35 (2014) on liberty and security of person (para. 25), the reasons for an arrest 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. The "reasons" concern the official basis for the arrest, not the subjective motivations of the arresting officer. The Working Group thus finds that, in order to invoke a legal basis for deprivation of liberty, the authorities should have informed Ms. Fathy, Mr. Lofty and their son of the reasons for their arrest, at the time of arrest. Their failure to do so violates article 9 of the Universal Declaration of Human Rights, article 9 (2) of the Covenant and principle 10 of the Body of Principles.¹⁰

52. The Working Group notes that Ms. Fathy was subjected to pretrial detention for 230 days (from 11 May to 27 December 2018) under preventive detention orders issued and extended in a series of hearings by the prosecutor in Maadi and the Supreme State Security Prosecution in relation to the misdemeanour case (No. 7991/2018) and the State-security case (No. 621/2018). In view of the Human Rights Committee's general comment No. 35 (para. 32), the Working Group considers that such prosecuting authorities cannot be considered as independent, objective and impartial officers ensuring the proper exercise of judicial power. The absence of such judicial authority violates article 9 (3) of the Covenant. Moreover, the Working Group observes, with grave concern, that the near-automatic extension of pretrial detention by prosecutors for a prolonged time period is a common practice,¹¹ and that it is not based on individualized determination or periodic judicial reviews. In particular, the Working Group is concerned by the practice of the Supreme

⁷ See, for example, opinions No. 93/2017, para. 44; No. 45/2019, para. 51; and No. 46/2019, para. 51.

⁸ The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, opinions No. 1/1993, paras. 6–7; No. 51/2019, para. 56, and No. 56/2019, para. 77. See also article 6 of the African Charter on Human and Peoples' Rights and article 14 (1) of the Arab Charter on Human Rights.

⁹ See opinions No. 36/2018, No. 78/2018, No. 83/2018, No. 31/2019 and No. 33/2019. See also Opinion No. 83/2019.

¹⁰ See also article 6 of the African Charter on Human and Peoples' Rights and article 14 (1) and (3) of the Arab Charter on Human Rights.

¹¹ See, for example, opinions No. 63/2018, No. 82/2018, No. 87/2018, No. 29/2019, No. 41/2019 and No. 65/2019.

State Security Prosecution of nominally ordering preventive detention pending further investigation but in practice enabling indefinite detention without prospect of trial.

53. The source explained that Ms. Fathy was arrested on 11 May 2018 and transferred to prison on 13 May 2018, with no mention of a judicial hearing. The Working Group recalls the right to be brought promptly before a judge, within 48 hours of the arrest, barring absolutely exceptional circumstances, in accordance with the international standard.¹² Moreover, the Working Group considers that her pretrial detention, which should be the exception rather than the rule, lacked a legal basis as it was not based on an individualized determination that it was reasonable and necessary taking into account all the circumstances, for such purposes specified in law as to prevent flight, interference with evidence or the recurrence of crime, and as there was no consideration of alternatives, such as bail, electronic bracelets or other conditions, which would render detention unnecessary in the particular case.¹³ Therefore, the Government has violated article 9 of the Universal Declaration of Human Rights, article 9 (1) and (3) of the Covenant, and principles 11, 37 and 38 of the Body of Principles.¹⁴

54. Moreover, in view of the fact that Ms. Fathy was not brought promptly before a judge, and that she was denied lawyers, the Working Group further observes that Ms. Fathy was not afforded the right to take proceedings before a court to challenge the legality of her detention so that it could decide without delay on the lawfulness of her detention, in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights, articles 2 (3) and 9 (1) and (4) of the Covenant, and principles 11, 32 and 37 of the Body of Principles.¹⁵ The Working Group has indicated that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society (A/HRC/30/37, paras. 2–3).

55. The Working Group also notes that the authorities delayed, until 27 December 2018, the implementation of the court order of 18 December 2018 to release Ms. Fathy on probation, in violation of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant.

56. The Working Group will elaborate further on the propriety of detention under articles 80 A, 80 D, 86 bis, 98 B, 102 bis, 133, 178 and 306 of the Penal Code, article 76 (2) of the Telecommunication Regulation Law and the anti-terrorism law in view of the principle of legality and its effect on the right to a fair trial and other freedoms in the present case.

57. The Working Group recalls that vaguely and broadly worded provisions, which cannot qualify as *lex certa*, violate the due process of law underpinned by the principle of legality in article 11 (2) of the Universal Declaration of Human Rights. Furthermore, the Working Group notes that the Human Rights Committee has found, in its case law, that detention pursuant to proceedings that were incompatible with article 15 (1) of the Covenant were necessarily arbitrary within the meaning of article 9 (1) of the Covenant.¹⁶

58. In this light, the Working Group considers that the vague provisions of the Penal Code, the Telecommunication Regulation Law and the anti-terrorism law cannot qualify as *lex certa*, and that they may be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law underpinned by the principle of legality that is stipulated in article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant. The Working Group considers that the relevant provisions of the anti-terrorism law, which prescribe various prison terms for harmless online postings, are neither necessary to protect the public or private interests against injury nor are they

¹² Human Rights Committee, general comment No. 35, para. 33. For the Working Group's jurisprudence, see opinions No. 57/2016, paras. 110–111; No. 2/2018, para. 49; and No. 83/2018, para. 47.

¹³ Human Rights Committee, general comment No. 35, para. 38. See also A/HRC/19/57, paras. 48–58.

¹⁴ See also article 6 of the African Charter on Human and Peoples' Rights and article 14 (1) and (5) of the Arab Charter on Human Rights.

¹⁵ See also article 6 of the African Charter on Human and Peoples' Rights and article 14 (1) and (6) of the Arab Charter on Human Rights.

¹⁶ Human Rights Committee, *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4.

proportionate to guilt. In addition, the requirements of *lex praevia*, *lex stricta*, *lex certa* and *lex scripta* must be construed more strictly in proportion to the severity of the prescribed punishment. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.¹⁷

59. The Working Group also highlights that laws that are vaguely and broadly worded may have a deterrent effect on the exercise of the rights and freedoms of individuals, as they have the potential to cause abuse, including the arbitrary deprivation of liberty.¹⁸ The Working Group therefore reiterates the concerns expressed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism about the recent amendments to the 2015 anti-terrorism law that could result in more, not less, abuse and a chilling effect.¹⁹ The Working Group refers the case to that Special Rapporteur.

60. For these reasons, the Working Group considers that the deprivation of liberty of Ms. Fathy, Mr. Lofty and their minor son lacked a legal basis and was thus arbitrary, falling under category I.

ii. Category II

61. The source alleges that Ms. Fathy was arrested, tried and convicted for her 12-minute Facebook video, in which she criticized the poor treatment and sexual harassment she experienced at a bank and spoke of the difficulties of being a woman in Egypt, which was the factual basis of the two criminal cases against her. The Government has not produced any evidence as to how this post amounted to criminal activity. According to the source, the Facebook video had generated a deluge of criticism from the pro-Government and State-owned media, which accused her of insulting the nation and identified her as an April 6 movement activist and as Mr. Lofty's wife, as well as a wave of online harassment and threats. Her case, *prima facie*, constitutes violations of freedom of thought, freedom of expression and the freedom to take part in the conduct of public affairs.

62. The Working Group considers that contributing to the debate on gender discrimination can be considered as taking part in the conduct of public affairs under article 25 (a) of the Covenant. The Working Group notes the observation by the Human Rights Committee, in paragraph 8 of its general comment No. 25 (1996) on participation in public affairs and the right to vote, that citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves and that this participation is supported by ensuring freedom of expression, assembly and association.

63. Pursuant to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights, and to draw public attention to the observance of human rights (arts. 1 and 6 (c)).²⁰ The source has demonstrated that Ms. Fathy was detained for the exercise of her rights under the Declaration. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.²¹

64. While the right to freedom of expression is subject to restrictions as are provided by law and are necessary for respect of the rights or reputations of others or for the protection of national security or public order (*ordre public*), or of public health or morals, in accordance with article 19 (3) of the Covenant, the Working Group cannot consider that

¹⁷ See, for example, opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59; and Human Rights Committee, general comment No. 35, para. 22.

¹⁸ Opinion No. 10/2018, para. 55.

¹⁹ OHCHR, "Egypt's updated terrorism law opens the door to more rights abuses, says UN expert", news release, 9 April 2020.

²⁰ See also General Assembly resolution 74/146, para. 12.

²¹ See, for example, opinions No. 75/2017, No. 44/2019 and No. 45/2019.

social media posts complaining about alleged sexual harassment or gender discrimination can be subjected to restriction on the grounds of national security or public order, as the criminal cases against Ms. Fathy would have one believe. The Working Group has not been presented with any evidence that the post was violent or incited others to violence and the Government has presented no explanation how the post would fall under the restrictions of article 19 (3) of the Covenant.

65. In the same vein, the Working Group recalls that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has indicated that the right to freedom of expression includes expression of views and opinions that offend, shock or disturb (A/HRC/17/27, para. 37). Even statements considered unacceptable, disrespectful and in very bad taste by the authorities are entitled to protection. In addition, the Human Rights Council, in its resolution 12/16, called upon States to refrain from imposing restrictions that were not consistent with article 19 (3) of the Covenant, including on discussion of government policies and political debate.

66. The Working Group therefore finds that Ms. Fathy's deprivation of liberty was arbitrary, falling within category II, as it resulted from her legitimate exercise of the rights and freedoms under articles 19 and 21 (1) of the Universal Declaration of Human Rights and articles 19 (1) and (2) and 25 (a) of the Covenant.²²

67. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

iii. Category III

68. Given its finding that Ms. Fathy's deprivation of liberty was arbitrary under category II, the Working Group wishes to emphasize that in such circumstances no trial should have taken place. However, as the two trials have taken place and are still ongoing, 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, so that it falls within category III.

69. The Working Group notes that, at all times, the authorities failed to respect Ms. Fathy's right to legal assistance, which is inherent in the right to liberty and security of person and in the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant. The Working Group considers that this violation substantially undermined and compromised Ms. Fathy's capacity to defend herself in any subsequent judicial proceedings. As the Working Group stated in 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, 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 such access is to be provided without delay. The Working Group therefore finds a serious violation of articles 10 and 11 (1) of the Universal Declaration of Human Rights, article 14 (1) and (3) (b) and (d) of the Covenant, and principles 17 and 18 of the Body of Principles.²³

70. The Working Group further observes that the authorities have denied Ms. Fathy access to her case file in violation of due process. As the Working Group has stated, in principle 12 and guidelines 11 and 13 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, every individual deprived of liberty has the right to have access to material related to his or her detention, including information that may assist the detainee in arguing that the detention is not lawful or that the reasons for the detention no longer apply. However, that right is not absolute, and the disclosure of information may be restricted if such a restriction is necessary and proportionate in pursuing a legitimate

²² See also articles 8, 9 (2) and 13 (1) of the African Charter on Human and Peoples' Rights and articles 24 (1) and (2), 30 (1) and 32 (1) of the Arab Charter on Human Rights.

²³ See also article 7 (1) (c) of the African Charter on Human and Peoples' Rights and articles 12, 13 (1) and 16 (2) and (3) of the Arab Charter on Human Rights.

aim, such as protecting national security, and if the State has demonstrated that less restrictive measures would be unable to achieve the same result, such as providing redacted summaries that clearly point to the factual basis for the detention.²⁴ However, the Government has provided no such justification in the present case. The Working Group therefore finds a serious violation of articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) and (d) of the Covenant.

71. The Working Group further concludes that Ms. Fathy's pretrial detention in prison for 230 days, from 11 May 2018, without individualized judicial determination undermined the presumption of innocence guaranteed under article 11 (1) of the Universal Declaration of Human Rights, article 14 (2) of the Covenant and principle 36 (1) of the Body of Principles.²⁵

72. The Working Group cannot fail to express its concern at the stringent bail conditions imposed during Ms. Fathy's house arrest, which prevented her from seeing her psychologist for treatment, undermined her ability to defend herself, hindered her right to a fair trial and violated article 10 (1) of the Covenant.²⁶ The Working Group therefore refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health for further consideration.

73. 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 Ms. Fathy's deprivation of liberty an arbitrary character that falls within category III.

74. The Working Group notes that the present opinion is only one of many opinions in recent years in which the Working Group has found the Government to be in violation of its international human rights obligations.²⁷ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in Egypt, which, if it continues, may amount to a serious violation of international law.²⁸ 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.²⁹ The Working Group has alluded to this possibility in its past cases concerning Egypt.

75. Lastly, the Working Group would welcome the opportunity to visit Egypt in order to engage with the Government in a constructive manner

Disposition

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

(a) The deprivation of liberty of Amal Fathy, being in contravention of articles 2, 3, 8, 9, 10, 11 (1) and (2), 12, 19, and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9 (1), (2), (3) and (4), 10 (1), 14 (1), (2), (3) (b) and (d), 15 (1), 17 (1) and (2), 19 (1) and (2), 25 (a) and 26 of the International Covenant on Civil and Political Rights, was arbitrary and falls within categories I, II and III;

²⁴ See also opinions No. 19/2005, para. 28 (b); No. 50/2014, para. 77; No. 89/2017, para. 56; No. 18/2018, para. 53; No. 78/2018, paras. 78–79; and No. 70/2019, para. 79.

²⁵ See also article 7 (b) of the African Charter on Human and Peoples' Rights and article 16 of the Arab Charter on Human Rights.

²⁶ See opinions No. 46/2014, para. 37; No. 47/2017, para. 28; No. 52/2018, para. 79 (j); No. 53/2018, para. 77 (c); No. 29/2017, para. 63; No. 32/2019, paras. 41–42; and No. 59/2019, para. 69. See also E/CN.4/2004/3/Add.3, para. 33, and articles 14 (4) and 20 (1) of the Arab Charter on Human Rights.

²⁷ 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 and No. 77/2019.

²⁸ Opinion No. 47/2018, para. 85.

²⁹ A/HRC/13/42, para. 30. See also, for example, opinions No. 1/2011, para. 21; No. 51/2017, para. 57; and No. 56/2017, para. 72.

(b) The deprivation of liberty of Mohamed Lofty, being in contravention of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the International Covenant on Civil and Political Rights, was arbitrary and falls within category I;

(c) The deprivation of liberty of the minor whose name is known to the Working Group, being in contravention of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the International Covenant on Civil and Political Rights, was arbitrary and falls within category I.

77. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Ms. Fathy, Mr. Lofty and their minor son 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.

78. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to overturn Ms. Fathy's conviction and drop all outstanding charges against her, and accord Ms. Fathy, Mr. Lofty and their minor son an enforceable right to compensation and other reparations, in accordance with international law.

79. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Fathy, Mr. Lofty and their minor son and to take appropriate measures against those responsible for the violation of their rights.

80. The Working Group requests the Government to bring its laws, in particular articles 80 A, 80 D, 86 bis, 98 B, 102 bis, 133, 178 and 306 of the Penal Code, article 76 (2) of the Telecommunication Regulation Law (Law No. 10 of 2003) and the anti-terrorism law (Law No. 94 of 2015), into conformity with the recommendations made in the present opinion and with the commitments made by Egypt under international human rights law.

81. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism for appropriate action.

82. The Working Group encourages the Government to ratify the Optional Protocol to the International Covenant on Civil and Political Rights, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the International Convention for the Protection of All Persons from Enforced Disappearance and the Rome Statute of the International Criminal Court.

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

84. The Working Group transmits the present opinion to the Government of Switzerland for its consideration.

Follow-up procedure

85. 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. Fathy has been unconditionally released; and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. Fathy, Mr. Lofty and their minor son;

(c) Whether an investigation has been conducted into the violation of the rights of Ms. Fathy, Mr. Lofty and their minor son 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.

86. 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.

87. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

88. 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.³⁰

[Adopted on 1 May 2020]

³⁰ Human Rights Council resolution 42/22, paras. 3 and 7.