

**OPINION No. 7/2002 (EGYPT)**

Communication addressed to the Government on 3 September 2001

Concerning: Yasser Mohamed Salah, Kamal Hakim Yacob, Mohamed Mahmoud Mourad, Ashraf Mohamed El-Zanaty, Nabil Fouad Bekhit, Adel Abdelnaby Amin, Ahmad Fahmy Azziz, Alaa El-Sayed El-Sawy, Hatem Ibrahim Mohamed, Amir Aly Kollaly, Mohamed Fath Allah Ibrahim, Agmed Mostafa Mohamed, Gamal Salam Saied, Mohamed Abdel Azeim Abdel Wahab, Atef Abdel Azeim, Waael Osman Serag, Farhan Mansour Metwalli, Walid Ismail Hasanein, Magdi Mohamed Ahmed, Ashraf Salah Shahin, Abdel Salam Mohamed Taha, Hani Said Azoug, Sayed Mohamed Abdel Mottalib, Mohamed Elsayed Ibrahim, Sayed Ahmed Kamal Hussein, Hamada Said Ahmed, Sherif Said Hilmi, Fouad Mohamed Abdel Rahman, Mohamed Fathi Ibrahim, Nagi Abdalla Abdelhafeez, Hani Fathi Elshahat, Osame Mohamed Eid, Mohamed Kamal Abdelrazek, Moawwad Ismail Ibrahim, Abdallah Gamal Soleiman, Amr Ramadan Khattab, Mohamed Fathi Mohamed, Walid Elmohammadi Mustafa, Mohamed Reda Ahmed, Wael Abdelrahman Mohamed, Yehya Abbas Mayhoub, Ayman Anwar Mousa, Mohamed Ali Osman, Sherif Hosni Mousa, Sherif Farahat and Mahmoud Ahmed Allam (55 persons in all, 52 according to the Government)

**The State is a party to the International Covenant on Civil and Political Rights**

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by Commission resolution 1997/50, and reconfirmed by resolution 2000/36. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. The Working Group conveys its appreciation to the Government for having provided the requisite information in good time.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (i) When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (category I);
  - (ii) When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, in articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
  - (iii) When the complete or partial non-observance of the international standards relating to a fair trial set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (category III).

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government.
5. According to the source of the communication, at least 55 persons were arrested in Cairo on the grounds of their sexual orientation in the early hours of 11 May 2001, during a raid by police of the discotheque on the Queen Boat moored on the Nile in Zamalek District. Ten undercover officers from both State Security and the Cairo Vice Squad are said to have entered the bar around 2 a.m. After watching and filming the dancing in the bar for some time, they reportedly began rounding up Egyptian customers.
6. According to the information received, the police targeted men who appeared to them to be homosexuals or who were not accompanied by women. One of the men was slapped on the face several times by a police officer and was called a derogatory word for homosexual when he allegedly refused to leave the boat.
7. The detained men were reportedly driven to the Vice Squad headquarters at Abdin police station, where they are said to be held in incommunicado detention. They were interrogated by high-ranking officers of the State Security Prosecution. A lawyer went to the police station, but was reportedly denied access to the detainees because he could not produce a power of attorney. State Security officers are believed to have stated that the arrested persons must appoint a lawyer by signing a power of attorney in person. The whereabouts of the detainees were said not to have been revealed to their families or friends. Some relatives who went to the Vice Squad headquarters were reportedly refused access to the detainees.
8. It was reported that on 12 May 2001, the detainees were brought before the public prosecution service where they were served with a detention order and transferred to Tora Prison where they continue to be held. On 6 and 7 June 2001, they were brought before the public prosecution service in Cairo on charges of immoral behaviour and contempt of religion.
9. In its reply, dated 19 September 2001, the Government explained that there was no article in Egypt's national legislation that provides for the prosecution of a person on account of his or her sexual orientation. The Government gave the following explanations.
10. The incident of 11 May 2001 involving the arrest of the 52 accused persons was registered as Qasr al-Nil State Security (Emergency) Misdemeanour case No. 182/2001. The first and second accused persons were charged with contempt of religion, and all the other accused persons were charged with habitually engaging in immoral acts with men. Such acts are punishable as criminal offences under article 98 (f) of the Penal Code and articles 9 (c) and 15 of the Prevention of Prostitution Act No. 10 of 1961. The case was referred to the courts on 18 July 2001 and is still pending.
11. Article 2 (1) of the International Covenant on Civil and Political Rights provides that: "Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other

opinion, national or social origin, property, birth or other status.” The obligations set forth in the aforementioned article, therefore, place the States parties to the Covenant, including Egypt, under a positive obligation to respect and to ensure to all individuals within their territory and subject to their jurisdiction all the rights recognized in the Covenant, without distinction of any kind or on any ground.

12. Article 98 (f) of the Penal Code provides that: “Any person who exploits religion in order to promote or advocate extremist ideologies by word of mouth, in writing or in any other manner with a view to stirring up sedition, disparaging or belittling any divinely-revealed religion or its adherents, or prejudicing national unity or social harmony shall be liable to a penalty of imprisonment for a period of not less than six months and not more than five years or a fine of not less than LE 500 and not more than LE 1,000.”

13. This article designates the act in question as a criminal offence, regardless of the perpetrators, and does not establish any criteria for making a distinction between offenders that could constitute discrimination. Thus, the same procedures and penalties are applied under the law to any person proved to have committed such an offence.

14. Article 9 (c) of the Prevention of Prostitution Act No. 10 of 1961 states that: “Anyone who habitually engages in debauchery or prostitution is liable to a penalty of three months to three years’ imprisonment and/or a fine of LE 25-300.” This article characterizes prostitution, meaning the perpetration of immoral acts and of offences against public decency, as a criminal offence, regardless of whether the offender is a woman (prostitution) or a man (debauchery).

15. Thus, it is the personal conduct of each of the defendants, meaning their perpetration of immoral acts and offences against public decency, which is regarded as a criminal offence under this particular article. The Government reported that the gender or sexual orientation of the perpetrator is irrelevant. This offence need only display a certain type of conduct. According to the evidence gathered by the Department of Public Prosecutions, the accused persons in this case had displayed just such conduct. Therefore, the Department of Public Prosecutions referred the case, together with the contempt of religion charges brought against the defendants, to the courts.

16. There is no truth to the allegation that the accused were arrested on account of their sexual orientation (sodomy), since the offences to which the case refers are not defined by the sexual orientation of the perpetrator.

17. In addition to the above, the Government affirmed that all of the measures taken against those accused were in conformity with the procedures for remand in custody, and were carried out in accordance with the law and in the presence of defence counsels.

18. The source, to whom the Government’s reply was communicated, stated that the persons arrested were brought before the High Court of State Security, established under emergency law. The court sentenced 23 of them to imprisonment for periods ranging from one to five years for “debauchery” and “offence against religion” and ordered the release of the other 29 persons. The sentence is not subject to appeal.

19. In its reply, the source enclosed a document entitled “Forensic Report Case No. 655/2001 - High Court of State Security”, confirming the allegations made.
20. The report provides an account of the examination by an expert of the two persons mentioned in the initial communication. The subject is an anal examination required by the Procurator’s Office, as part of the prosecution procedure, to establish whether or not the persons concerned are homosexuals.
21. In the light of the above information, the Working Group considered the case in two stages. First, it had to determine whether the alleged prosecution or conviction of the persons accused on grounds of sexual orientation was justified and, if so, whether those grounds did constitute discrimination under article 2, paragraph 1, of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which would confer an arbitrary character on their detention.
22. Concerning the allegation that the accused were prosecuted on grounds of sexual orientation, the Government argues, on the one hand, that there is no truth in the allegations that the accused were arrested on account of their sexual orientation (sodomy) since the offences to which the case refers are not determined by the sexual orientation of the offender, and, on the other, that all the persons accused were charged with “habitually engaging in immoral acts with men”.
23. The Working Group notes, however, that article 98, paragraph 1, of the Penal Code, which provided the basis for the prosecution, penalizes any person who exploits religion in order to promote or advocate extremist ideologies with a view to:
- (a) Stirring up sedition;
  - (b) Disparaging or belittling any divinely-revealed religion or its adherents;
  - (c) Prejudicing national unity or social harmony.
24. According to the source, who had commissioned someone to oversee the trial proceedings a fact not contested by the Government in its reply - two of the defendants (Sherif Farahat and Mahmoud Ahmed Allam) were prosecuted and/or convicted for offence against religion, while the others were charged with “making homosexual practices a fundamental principle of their group in order to create social dissensions, and engaging in debauchery with men”.
25. The Working Group considers that, setting aside the case of the first two persons mentioned above, about whom it is insufficiently informed regarding the acts with which they are charged, the other persons were in fact prosecuted on charges of homosexuality, as is attested by the legal examination ordered by the Procurator’s Office on the grounds that homosexuality, as a sexual orientation, is a source of “social dissensions” under article 98, paragraph 1, of the Egyptian Penal Code.

26. With regard to the discriminatory character of the measure of deprivation of liberty which would confer on such deprivation an arbitrary character, the Working Group notes that, in its reply, the Government (which is a party to the International Covenant on Civil and Political Rights) refers to article 26 of the Covenant in the following terms:

“The obligations set forth in article 2 (1) place the States parties to the International Covenant, including Egypt, under a positive obligation to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, without distinction of any kind or on any ground. However, article 26 cited above, which establishes the right of all persons not to be subjected to discrimination has, as its corollary, the responsibility imposed on States parties (article 2, paragraph 1 of the Covenant) to undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as ... sex ... or other status.”

27. The question, therefore, is whether the reference to “sex” may be regarded as covering “sexual orientation or affiliation”, and whether it follows that the detention of the defendants can be considered arbitrary on the grounds that it was ordered on the basis of a domestic legislation provision (namely article 98, paragraph 1 of the Egyptian Penal Code) not in accordance with the international standards set forth in article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the Covenant to which the Government refers. The approach adopted by United Nations human rights bodies with regard to this question would argue in favour of an affirmative answer. Of particular relevance in this regard are the following:

(a) The Human Rights Committee. In the *Nicholas Toonen v. Australia* case, the Committee notes, in paragraph 8.7 of its Views, that “The State Party has sought the Committee’s guidance as to whether sexual orientation may be considered an ‘other status’ for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view the reference to ‘sex’ in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation” (CCPR/C/50/D/488/1992). Confirming this approach, the Committee subsequently called on States not only to repeal laws criminalizing homosexuality, but also to include in their constitutions the prohibition of any discrimination based on sexual preferences (see concluding observations of the Human Rights Committee (Poland), 29 July 1999 (CCPR/C/79/Add.110, para. 23));

(b) The Committee on Economic, Social and Cultural Rights. Its General Comment No. 14 (2000), referring in paragraph 18 (under the heading “Non-discrimination and equal treatment”), to article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the wording of which is similar to that of the above-cited article 2 of the International Covenant on Civil and Political Rights) considers that that article proscribes any discrimination, including that based on “sexual orientation”;

(c) The Committee on the Elimination of Discrimination against Women. In paragraphs 127 and 128 of its concluding observations on Kyrgyzstan (A/5438), the Committee states: “The Committee is concerned that lesbianism is classified as a sexual offence in the Penal Code, and accordingly, recommends that lesbianism be reconceptualized as a sexual orientation and that penalties for its practice be abolished”;

(d) The Office of the United Nations High Commissioner for Refugees (UNHCR). In a recent document (7 May 2002) entitled “Guidelines on International Protection: gender-related persecution within the context of article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees” (HCR/GIP/02/01) it is stated in paragraph 17 under the heading “Persecution on account of one’s sexual orientation” that: “Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.”

28. In the light of the foregoing and of the approach adopted by United Nations human rights bodies in this regard, the Working Group renders the following opinion:

The detention of the above-mentioned persons prosecuted on the grounds that, by their sexual orientation, they incited “social dissention” constitutes an arbitrary deprivation of liberty, being in contravention of the provisions of article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights to which the Government is a party.

29. Consequently, the Working Group requests the Government:

(a) To take the necessary steps to remedy the situation by bringing it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights;

(b) To consider the possibility of amending its legislation so as to bring it into line with the Universal Declaration of Human Rights and other relevant international instruments to which it is a party.

Adopted on 21 June 2002