

Opinion No. 27/2008 (Egypt)

Communication addressed to the Government on 11 October 2007

Concerning Mr. Mohamed Khirat Al-Shatar and 25 other persons

The State is a party in the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
5. The cases were reported to the Working Group as follows: Mohamed Khirat Saad Al-Shatar; born in Dakahleya on 4 May 1950, a businessman and a member of boards of administration of several banks and financial companies, was arrested on 14 December 2006 at 12 p.m. at his home, located in Madinat an Nasr, Cairo.
6. Ayman Abd El-Ghani Hassanin; born on 1 November 1964, an engineer, was arrested in the above-mentioned date, time and place.
7. Khaled Abdelkader Owda; born on 31 August 1944, a scientist and professor of geology at the University of Assiut; member of the People's Assembly between 2000 and 2005; militant of the National Democratic Party; was arrested on 14 January 2007 at 1.30 p.m. at the University compound, while he was meeting with several foreign university professors.

8. Ahmad Ahmad Nahhas, born on 12 February 1959, an engineer and treasurer of the Engineers' Trade Union of Alexandria, was arrested on 16 January 2007 at 4.30 p.m. at his place of work in Alexandria.
9. Ahmed Ashraf Mohamed Mostafa Abdul Warith, 50, manager of an editorial house, was arrested on 24 December 2007, during the afternoon at his place of work in Al-Sayeda Zeinab.
10. Ahmed Azzedin El-Ghoul, born on 8 October 1954, a journalist with home address in Giza, was arrested at his home on 14 December 2006 at 3 a.m.
11. Amir Mohamed Bassam Al-Naggar, born on 16 February 1964, a professor at the Faculty of Medicine of the University of Cairo, was arrested on 1 January 2007 at 2 a.m. at his home.
12. Esam Abdul Mohsen Afifi, born on 7 December 1956, a professor in Biochemical at the Faculty of Medicine of the University of Al-Azhar, with home address in Giza, was arrested at his home on 14 December 2006 at 2.30 a.m.
13. Essam Abdul Halim Hashish, born on 29 April 1950, a professor of engineering at the University of Cairo, was arrested on 14 January 2007 at 2 a.m. at his home.
14. Farid Aly Galbt, born on 23 March 1954, a law professor at the University of Al Azhar, was arrested on 14 December 2006 at 3 a.m. at his home.
15. Fathy Mohamed Baghdady, born on 27 June 1954, a school director with home address in Nasr-City, Cairo, was arrested at his home on 14 December 2006 at 3 a.m.
16. Gamal Mahmoud Shaaban, born on 6 June 1965, a financial manager with home address in Alexandria, was arrested at his place of work in Alexandria, the Salsapeal Company, on 14 December 2006 at 2 p.m.
17. Ahmad Mahmoud Shousha, born on 23 March 1954, an engineer with home address in Nasr-City, Cairo, was arrested on 24 December 2006 at 2.30 a.m. at his home.
18. Yasser Mohamed Ali, born on 22 March 1955, manager at the Credit United Bank, with home address in Giza, was arrested on 14 December 2006 at 2 a.m. at his home.
19. Mahmoud Abdul Latif Abdul Gawad, born on 28 December 1957, a lawyer with home address in Idku City Behera, was arrested at his home on 17 January 2007 at 1.30 a.m.
20. Hassan Ezzudine Malek; born on 20 August 1958; a Businessman; addressed in Nasr-City, Cairo, was arrested on 24 December 2006 at 2.00 a.m. at his home.
21. Mahmoud Morsi Koura, born on 25 October 1961, an engineer with home address in Ain Shams, Cairo, was arrested at his home on 14 December 2006 at 3 a.m.
22. Mamdouh Ahmed Al-Husseini, born in 1947, an engineer with home address in New Cairo, Al' Tagamue Al-Khamis, was arrested on 14 December 2006 at 1 a.m. at his home.
23. Medhat Ahmad El-Haddad, born on 25 December 1949, President of the Arabian Construction Company (ACC), with home address in Rami, Alexandria, was arrested at his home on 14 January 2007 at 2 a.m.
24. Mohamed Ali Bishr, born on 14 February 1951, an engineering professor at the University of Menoufia with home address in Shebin El-Kom, was arrested on 14 January 2007 at 5 a.m. at his home.

25. Mohamed Mahmoud Hafez, born on 24 August 1971, an ophthalmologist and Director of Hayat Pharmaceutical International Co. laboratories, with home address in Nasr-City, Cairo, was arrested at his home on 24 December 2006 at 2 a.m.
26. Mohamed Mehany Hassan, born on 27 October 1976, a qualified accountant with home address in Flower City, Ezpet Elnkhel, Cairo, was arrested on 14 December 2006 at 4 a.m. at his home.
27. Mohamed Ali Baligh, born on 8 October 1956, a professor of medicine at the Cairo Ophthalmologic Institute with home address in Heliopolis, Cairo, was arrested at his place of work on 23 December 2006 at 10 a.m.
28. Mostafa Salem, born on 2 August 1962, an accountant with home address at Heliopolis, Cairo, was arrested on 14 December 2006 at 3 a.m. at his home.
29. Osama Abdul Muhsin Shirby, born on 1 July 1944, the director of a travel agency with home address in Alexandria, was arrested at his home on 14 January 2007 at 2 a.m.
30. Murad Salah El-Desouky, born on 25 September 1957, a professor of anatomy at the Faculty of Medicine of the University of Cairo with home address in Mit Ghamr, Daqahliya, was arrested on 14 December 2006 at 6 a.m. at 20 Mohamed Hassan Street, Ain Shams, Cairo.
31. According to the information submitted by the source, these 26 persons, all leading members of the opposition organization the Muslim Brotherhood, were arrested at their homes and places of work in simultaneous predawn raids on 14, 23 and 24 December 2006 and on 14, 16 and 17 January 2007 by agents of the State Security forces (Amn Addawia) acting with the support of special units of the Army. Their houses and offices were searched and personal computers, cellular phones, books and documents pertaining to them and to members of their families were confiscated. No arrest or search warrants were shown to them or to their relatives and no reasons were given for their arrests.
32. These 26 persons, together with other 14 more persons, were taken to Al-Mahkoum Prison in Cairo, where they were held in cells of 3 by 8 metres in size. They were denied blankets and medicines, and 17 detainees were forced to sleep on the floor. Their relatives were denied the right to visit them.
33. On 21 January 2007, the detainees were taken to Torah Prison. The Public Prosecutor 'Abd al-Magid Mahmud charged them with membership in a banned organization and provision of arms and military training to university students. He prolonged their imprisonment on three occasions. On 28 January 2007, the Public Prosecutor ordered the assets of the detainees frozen on the grounds that they had financed a banned organization. Their wives' and children' assets were also frozen.
34. On 29 January 2007, a Judge of the Cairo Criminal Court, after having interrogated the accused, dismissed all charges against them and ordered their immediate release. He considered that there was no evidence against the detainees and that the extension of the detention period was not justified. The Court considered that the detention of these persons was unjustified, particularly considering their good standing and reputable position in the Egyptian society and the fact they did not have any criminal records. In his ruling, the Judge specifically called on the Executive authorities to respect his decision.
35. Despite the court ruling, the Ministry of the Interior issued warrants against these persons and they were all immediately re-arrested by the police. According to the source, these re-arrests showed contempt for the rule of law and disrespect for the court decision.
36. On 4 February 2007, the President of the Republic, acting in his capacity as Supreme Commander of the Armed Forces, ordered that the detainees be tried by the

Supreme Military Tribunal of Heikstep, Cairo, according to the Code of Military Justice of 1966 (Law No. 25), which authorizes the President to refer civilians to military trials. The Emergency Laws allows the Government to indefinitely detain people without charge, trial or legal recourse, sometimes for years.

37. The source further adds that military tribunals are known for their quick trials and for not giving the defense enough time to prepare for the case. Egyptian military judges are not obligated to possess a legal license. Military judges, appointed only for a two-year period by the Deputy Head of the Armed Forces, can be dismissed at any time. Among the fair trial guarantees that are being routinely violated when civilians are brought before Egyptian military courts, are the right to a public trial before an independent and impartial court; the right to prompt access to a defense lawyer; the right to prepare an adequate defense and the right to appeal.

38. On 24 April 2007, the Cairo Criminal Court acquitted for the second time 17 of the above-mentioned detainees, in response to an appeal filed by their relatives and overruled the State Prosecutor's decision to freeze the detainees' assets. The authorities did not carry out the acquittal decisions and ordered instead that the military trials begin on 26 April 2007.

39. The first session of the trial was held in absolute secrecy and security. Media access to the trial was severely restricted. Independent international observers were denied access to the court. Defense lawyers were not informed of the date of the beginning of the trial and decided to boycott the court session in protest, compelling the defendants to defend themselves. Defendants were not informed on the charges against them before the beginning of the trial. Later, they were charged by a panel of three military judges with terrorism, money laundering and possession of documents propagating the Muslim Brotherhood's ideas. The State Prosecutor acknowledged that he had not yet received the report on money laundering and that it had not yet been presented by the bank. The source considers that this shows that the defendants were charged, their accounts frozen and their companies shut down, without any valid legal evidence. Sessions of the trial were also held on 3 June, 15 July and 5 August 2007.

40. The source considers that these detentions were part of a crackdown the authorities began in March 2006 against the Muslim Brotherhood, which, although officially banned, constitutes the country's largest opposition group, with 88 out of 454 seats in Parliament. It considers that the crackdown began when the Muslim Brotherhood lent its support to judges campaigning for further independence of the judiciary. Egyptian military tribunals cannot assure that persons charged with criminal offenses have the right to a fair trial, as stipulated in article 14 of the International Covenant on Civil and Political Rights. Its judgments are final and cannot be appealed to a higher court, denying defendants due-process rights. Military courts should not have jurisdiction to try civilians, whatever the charges they face. They can no be considered as independent and impartial tribunals for civilians.

41. The source considers that the above-mentioned persons have been arrested and are being kept in detention solely for exercising their rights to freedoms of assembly, association, opinion and expression, rights enshrined by articles 18, 19 and 22 of the International Covenant on Civil and Political Rights.

42. As to the facts, the Government reported that on 13 December 2006, the Office of the Public Prosecutor received a police investigation report concerning a number of leaders of the Muslim Brotherhood Society—a proscribed organization—suspected of holding organizational meetings in order to draft a plan targeting students at various universities, in particular at Al-Azhar University. The purpose of the plan was to create havoc, to disrupt studies and incite students to stage demonstrations and sit-ins, damaging public and private

property and obstructing the law, with a view to achieving what the proscribed organization refers to as “the empowerment phase prior to the establishment of the Islamic Caliphate”.

43. The investigations yielded the following results:

(a) The leaders responsible for the organizational plan were identified, including Mohamed Khirat Al-Shatar and others. The members of the organizing committee tasked with implementing the plan were also identified. In order to execute the plan, they had established a number of paramilitary groups among the ranks of Al-Azhar University students, who were recruited to the proscribed organization according to the same methods as those used for militias of some religio-political parties in neighbouring States. They were armed with knives and clubs and instructed to stage riots and commit acts of violence in the area around the university, in order to terrorize other students and faculty members. The organizers instructed the students to hold a paramilitary parade on 10 December 2006, at which the participants wore a uniform and black headgear bearing the words “Steadfast Combatants”. Some also wore black face masks in order to evade police surveillance. They demonstrated martial arts using knives and clubs and, when they came out onto the public highway, the demonstrators tried to create an atmosphere of panic and terror.

(b) The accused —university students who are members of the proscribed organization— were picked up at their university residence and at apartments rented for them by the leaders of the organization as centres for organizational meetings. The accused kept knives and instruments for use as weapons at these residences, in addition to printed materials and documents on the activities of the organization. The investigation also identified the sources of funding for these activities, which are handled by leaders of the proscribed organization through what are known as the “domestic financial committee” and the “external financial committee”. These committees oversee the spending and administration of the organization’s funds and support the above-mentioned operations of the organization by collecting subscriptions from members and receiving voluntary donations under the pretext that they will be used to support the Palestinian cause. They also have contacts with charitable associations and institutions abroad, and receive sums of money from them under the pretext that they will be used for charitable work. They invest the money in commercial ventures, establishing enterprises and economic undertakings registered in the names of members of the proscribed organization, their spouses and relatives; allocating part of the profits for the organization’s activities and investing the remainder in order to leverage its resources and maximize its financial capacities.

44. As soon as it received this report, the Office of the Public Prosecutor issued a warrant for the arrest of the leaders of the proscribed organization and the students of Al-Azhar who were members and for a search of their persons, residences and the head office of a company owned by Mohamed Khirat Al-Shatar. Pursuant to that warrant and subsequent warrants, 32 leaders of the organization and 109 Al-Azhar students who were members were arrested. The following results were achieved:

(a) Sums of money in Egyptian pounds and foreign currency, estimated in the order of millions of Egyptian pounds, were found in the residences of the arrested persons and at the head office of the aforementioned company and trading companies operating on behalf of the organization. In addition, printed and handwritten documents were found, including plans for the coming period based on the aims and principles of the proscribed organization.

(b) The university students were found to have knives (ordinary knives and penknives) and instruments for use as weapons in their clothes cupboards and desk drawers. Several items of black head gear bearing the word “steadfast” were also seized, as were quantities of printed, photocopied and handwritten documents of the organization containing details of the principles and ideas of the Muslim Brotherhood, propaganda for

“Jihad” and material calling for the formation of a students’ union under the name Al-Ittihad al-Hurr (The Free Union). Assorted printed materials and statements bearing the name and slogan of the organization were also seized.

45. The Office of the Public Prosecutor examined the documents seized from the accused leaders of the organization and found them to include plans to infiltrate student bodies, with a particular focus on Al-Azhar University, as a priority. There were also studies showing that the approach taken by the proscribed organization was to use force and violence in order to change the current political system in Egypt and that the organization was looking to expand its activities abroad through missionary work and investments in various Islamic and African countries. The printed materials contained information indicating that the organization owns commercial establishments and economic enterprises at home and abroad and wishes to acquire media outlets to serve as its mouthpiece. The documents also included data showing that the organization relies on voluntary donations from individuals and institutions and has opened bank accounts for this purpose.

46. The Office of the Public Prosecutor analysed the organizational documents seized from the university students and established that they consisted of handwritten, printed and photocopied materials, including questionnaires and forms for the evaluation of students recruited to the Muslim Brotherhood. In addition to details about the organization’s methods and plans in the context of Al-Azhar University, there were propaganda posters bearing the name and slogan of the illegal organization and books and studies by its leaders, promoting the ideas, principles and aims of the organization.

47. The Office of the Public Prosecutor searched the student residences for which search warrants had been issued and seized knives and numerous documents similar to those seized during the execution of the warrant dated 13 December 2006. It established the extent of the control exercised by the accused over the residences, in view of the propaganda posters visible on the walls promoting the organization and the signs, images and drawings with its slogan and propaganda on apartment doors inside the residences. The Office of the Public Prosecutor established that the items seized during the search belonged to the accused, as they were found in their cupboards and desk drawers in their private rooms at these residences.

48. The Office of the Public Prosecutor began its investigations by questioning the prosecution witnesses; namely, the police officers who had served the warrants and had witnessed the discovery of the items seized at the university residences and at the apartments which the leaders of the organization had rented for the students in places under their effective physical control. It also took statements from the Rector of Al-Azhar University and his deputy, both of whom confirmed the findings of the investigation and the events at the university which had led to the arrest of the accused.

49. The Office of the Public Prosecutor questioned the accused in the presence of their defence lawyers and then charged two of their leaders with leading and running a proscribed organization, the object of which is to incite others to flout the provisions of the Constitution and the law; to violate the public rights and freedoms guaranteed by the Constitution and the law and to undermine national unity and social peace, using terrorism in order to achieve those objectives. The leaders were also charged with possession of printed materials and recordings promoting the objectives of the organization, for distribution or for viewing by others, and with laundering the proceeds of the crime of leading the proscribed organization—which uses terrorism to achieve its ends—in order to conceal what they are and where they come from.

50. The Office of the Public Prosecutor charged the university students with being members of the organization while knowing what its objectives are. It also charged them with possession of printed materials promoting those objectives and with possession of

knives without a licence or evidence of personal need. These offences are punishable under articles 86, 86 *bis* and 86 *bis* (a) of the Criminal Code and articles 1, paragraph 1, 25 *bis* of Act No. 394 of 1954 on firearms and ammunition, as amended by Act No. 26 of 1987 and Act No. 165 of 1981, as well as under items 5, 10 and 11 of schedule 1, annexed to the first-mentioned Act and articles 2 and 14 of Act No. 80 of 2006 on money laundering.

51. Having questioned and confronted the accused with the evidence, the Office of the Public Prosecutor decided to remand them in custody for 15 days for the purpose of the investigations. It continued to apply for extensions of the custody orders, within the time limits established by law, as the investigation had not been completed, in order to prevent the accused from absconding and to avoid serious breaches of security and public order.

52. On 29 January 2007, 16 of the leaders of the illegal organization appealed against the custody extension order and, on 31 January 2007, 42 of the university students also appealed against the order before the Cairo Criminal Court, which decided to revoke the order and release all the appellants.

53. In view of the gravity of the criminal activities of the leaders of the illegal organization and of the crimes with which they had been charged in Higher State Security Case No. 963 of 2006, the President of the Republic issued Decree No. 40/2007 of 5 February 2007, in conformity with the Emergency Act in effect in the country to counter the threat of terrorism, particularly article 6 thereof, referring the offences in the case and the accused, Mohamed Khirat Al-Shatar and other leaders of the organization, to a military court.

54. On 11 February 2007, after concluding its investigations into the university students charged in Higher State Security Case No. 148 of 2007, the Office of the Public Prosecutor decided to release those who were still in custody and to refer them to the competent disciplinary board at Al-Azhar University for disciplining for the offences with which they had been charged. It took this decision in order to safeguard their academic future and spare them the serious consequences of a criminal trial and because the Office of the Public Prosecutor is empowered to consider the most appropriate means of instituting criminal proceedings.

55. At the outset, the Government clarifies the legal status of the public emergency provisions and of the military courts in the Egyptian legal system. The Egyptian Constitution provides for the regulation of any state of emergency in Egypt in article 148, which stipulates that a state of emergency must be declared by the President of the Republic and the declaration must then be submitted to the People's Assembly, within 15 days, for a decision. The same article provides that a state of emergency in all cases shall be for a limited period, which may not be extended unless by approval of the People's Assembly.

56. The International Covenant on Civil and Political Rights, to which Egypt is a Party, provides in article 4 that, in times of public emergency which threaten the life of the nation and the existence of which is officially proclaimed, States parties to the Covenant may take measures derogating from their obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. It further provides that these measures may not derogate from articles 6, 7, 8, 11, 15, 16 and 18 of the Covenant, which deal with the right to life, safeguards against capital punishment and torture, subjection to slavery, servitude, imprisonment for civil debt, the legality of crimes and punishments, recognition as a person before the law, and the freedoms relating to religion and religious beliefs.

57. The nations of the world, with their different legal systems, have adopted various methods for dealing with the emergencies and exceptional circumstances that confront their

societies. Some grant exceptional powers through provisions in the relevant laws and leave it to the competent authorities to evaluate the measures that are needed, while others follow the course set by prior legislation in dealing with public emergencies and others still leave the entire matter to the discretion of the authorities concerned. Since 1923, the Egyptian legislator has followed the system of prior legislation for emergencies. Martial Law Act No. 15 of 1923 was followed by Act No. 162 of 1958, as amended by Acts Nos. 60 of 1968, 37 of 1972, 164 of 1981 and 50 of 1982 containing provisions relating on the proclamation of a state of national emergency. The law stipulates: the circumstances under which a state of emergency may be proclaimed; the authority competent to proclaim it; the procedures for extending a state of emergency; the measures that may be adopted; the conditions bringing a complaint relating to the state of emergency; emergency courts and their procedures; and the effects of ending a state of emergency. The law upholds all the international standards set out in the International Covenant on Civil and Political Rights. The Emergency Act does not stipulate that the Constitution, or the law, or parliamentary life should be suspended. Moreover, the Act does not give free rein to the executive authorities but affords rights and guarantees to persons harmed by the arbitrary use of these rights. In addition, the Code of Military Justice authorizes the President of the Republic to refer any offence punishable under the Criminal Code or any other law to a military court when a state of emergency has been declared.

58. The Government notes that although the African Charter on Human and Peoples' Rights does not regulate states of emergency and exceptional circumstances, article 60 thereof states that the [African] Commission [on Human and Peoples' Rights] is to draw inspiration from international human rights law and the instruments adopted by the United Nations specialized agencies in this field. It is therefore necessary to refer back to the International Covenant on Civil and Political Rights, which regulates this matter, as mentioned above, and contains nothing that would prevent States parties from bringing civilians to trial before military courts. Moreover, General Comment No. 13 of the Human Rights Committee states that while the Covenant does not prevent military courts from trying civilians, it clearly indicates that such trials must be the exception and must afford the guarantees stipulated for in article 14 of the Covenant. The key factor in the referral of civilians to military courts is the availability of fair trial guarantees. The Working Group emphasized precisely this point in its report of 10 January 2008 (A/HRC/7/4).

59. Under the Egyptian legal system, military courts are a permanent, independent judicial authority. Their affairs, levels and scope are regulated by the Code of Military Justice No. 25 of 1966 and the amending laws, the most recent of which is Act No. 16 of 2007. By necessity, the military courts are special courts with criminal jurisdiction, as defined in articles 4, 5 and 6 of the Act, and try offences under ordinary law committed by military personnel and civilians working for the military authorities, in addition to offences committed by civilians on armed forces' premises and military bases.

60. Military judges are specialist judges who must satisfy the criteria set out in the Judicial Authority Act. Military judges enjoy legal immunity, may not be removed from their posts and are subject to no higher authority in the performance of their functions than that of the law. Appeals against military court judgements may be brought before the Supreme Court of Military Appeals on the same grounds as appeals before the Court of Cassation. This ensures that judgements are reviewed by a higher court composed of a rotating panel of five judges. Trials before the court are conducted in accordance with the Code of Criminal Procedures and judgements must be consistent with the Criminal Code. This law was adopted on the basis of specific considerations, determined by the Egyptian legislature, taking into account the military status of those subject to its provisions and the need to protect facilities and installations under its purview in a manner consistent with military requirements. Hence, military courts are not special courts, within the limits of their jurisdiction, but are natural courts that hand down judgements in conformity with the

law and conduct proceedings and afford guarantees which meet all the international standards for a fair and equitable trial, whether from the point of view of public hearings, the presence of, and representation by, defence counsel for the accused (legal representatives or court appointees) and the right to appeal against judgements before the Supreme Court.

61. Under the Egyptian legal system, appeals may be made against administrative decisions in general and at all levels by applying to the State Council for an annulment of a decision and compensation. The State Council assures all the international standards for a fair and equitable hearing, in that it is an Egyptian judicial authority that considers cases at two levels of jurisdiction, the higher of which is the Supreme Administrative Court.

62. Orders freezing the assets [of the accused persons], including assets of wives and children, which actually come from the accused in a criminal case (because of the dependency relationship and the need to track down illegal assets) are interim orders issued by the Office of the Public Prosecutor while criminal proceedings are under way and a final decision on them is taken during the criminal proceedings.

63. Military courts provide the guarantees required of judicial systems in accordance with international standards, namely, independence, immunity and two levels of jurisdiction. Thus, the military courts meet the criteria for them to be considered a permanent and independent judicial authority under the Egyptian legal system, and provide guarantees equivalent to those provided by the ordinary courts.

64. The substantive and legal aspects considered above point to the following: The offences with which the complainants were charged and for which they are on trial are offences under public law, to which all persons are subject without distinction or discrimination. The offences consist of grave acts against the security of the community and the rights and freedoms of others and have nothing to do with religious beliefs or freedoms. Moreover, the measures imposed as a result of the continuing state of emergency are not contrary to the international standards set out in the International Covenant on Civil and Political Rights in this regard. Cases referred to military courts are referred to a judicial authority which meets all the international standards for a fair and equitable trial, is regulated by law and conducts proceedings in accordance with the laws in force. Consequently, military courts are not a special judicial authority and these laws do not contain any provisions that are discriminatory or breach the principle of equality before the law.

65. The acts with which the complainants were charged are serious offences under the Criminal Code and other criminal laws. In view of the state of emergency in the country, the grave nature of the criminal activities of the accused of the proscribed organization and the gravity of the crimes with which they were charged in Higher State Security Case No. 963 of 2006, the President of the Republic issued Decree No. 40 of 2007 referring the case and the accused, Mohamed Khirat Al-Shatar and others (leaders of the organization), to the military courts, in accordance with Act No. 25 of 1966, article 6 of which authorizes the President of the Republic to refer to military courts any offence punishable under the Criminal Code or any other law when a state of emergency has been proclaimed.

66. With regard to the decision to release the accused in the appeal by the complainants against the decision of the Office of the Public Prosecutor to remand them in custody, the role of the court was limited to examining the grounds for extending custody and did not include an examination of the charges against the appellants. The Office of the Public Prosecutor complied with the decision of the court in the case of the students and, having completed its investigations, decided to discontinue proceedings and refer them for disciplinary measures, instead taking into consideration the students' future.

67. The accused who were referred to the military courts appealed to the State Council Administrative Court against the referral decision, which ordered the suspension of the decision. That decision was in turn appealed before the Supreme Administrative Court, in Appeal No. 12761, judicial year 53. The Court ordered the suspension of the appealed decision on 4 June 2007, and the appeal was examined in hearings before the Supreme Administrative Court. The date of the trial was set for 12 April 2008.

68. The case forming the subject of the communication remains before the military courts. The trial proceedings were held in public, in the presence of the defence counsel of the accused. The case is still at the deliberations stage; the hearings have been completed and the court has reserved the case for judgement, although no judgement has been handed down to date.

69. The forthcoming judgement can be appealed by the Office of the Military Prosecutor or the accused, as the case may be, before the Military High Court, on the same grounds as an appeal before the Court of Cassation. The rules and procedures relating to appeals in criminal cases apply. Therefore, the appeal court has the same powers as the Court of Cassation with regard to the review of the legal arguments and the judgement and the decision to overturn or uphold the judgement, depending on the admissibility of the arguments presented by the two parties in a criminal case (the defendants and the Office of the Public Prosecutor). The chambers of the Supreme Court are composed of five judges other than those who handed down the appealed judgement.

70. The use by the President of the Republic of his right to refer a case to the military courts in the context of the continuing state of emergency, is confined to, and aimed only at, serious terrorist offences, of which there have been few cases.

71. It should be noted that the Government has announced its intention of ending the state of emergency once the text of the draft counter-terrorism law has been finalized. Article 179 of the Constitution provides that the President of the Republic may refer any terrorism offence to any judicial body recognized in the Constitution or the law. This in itself constitutes a basic guarantee of a fair and equitable trial, as the laws governing the various judicial authorities stipulate that trials must be fair and equitable from the point of view of procedures and judgements. Hence, any judicial body selected by the President of the Republic will guarantee a fair and equitable trial as provided for in the Constitution (Chapter IV, on the rule of law) and the various laws.

72. With regard to the substantive issues, it should be clear from the facts set out above, that the allegations in the complaint about discriminatory treatment of the persons concerned are groundless. With regard to the formal issues, Egypt takes the view that consideration of this communication does not come under the purview of the Working Group according to the relevant procedures, since domestic remedies have not been exhausted (the trial is not yet over and the final judgement may be challenged at appeal and then before the Court of Cassation). Moreover, the same communication is currently being considered by the African Commission on Human and Peoples' Rights (communication No. 354/2007), which is a regional recourse mechanism.

73. In its observations on the Government's response, the source states that it reports that 109 university students were arrested while preparing to perpetrate serious acts of extreme violence, described as having a quasi-insurrectionary character, and that the investigation that followed found that the students would actually be responsible as main organizers and financiers. The proceedings against the students by the State Security Prosecutor (Niyabat Amn Addawla Al Ôlya) originated criminal proceedings. Those proceedings were not under the Office of the Public Prosecutor, as the Government pretends.

74. The source recalls that on 11 February 2007, the State Security Prosecutor decided the nullity of the proceedings concerning the arrested 124 (and not 109) students of the University of Al-Azhar. The Rector of Al-Azhar University, his Deputy and other university authorities who declared as witnesses, exonerated the students of any responsibility in acts of violence or of possession of knives. All the students were also brought before the Disciplinary Committee of the University at the request of the State Security Prosecutor, and this Committee exonerated them.

75. The source adds that the main witness presented by the prosecution was Colonel Atef Al Hussein, who was simultaneously the official in charge of the investigations. Colonel Al Hussein did not provide any evidence on actions or meetings taken by the incriminated persons that could prove the allegations against them. All arrests were ordered by telephone by Colonel Al Hussein and not by regular arrest warrants, which was a violation of both Egyptian and international law.

76. The continued indefinite detention of the above-mentioned persons was decided by a political authority in contradiction with a judicial decision, which was also a violation of article 134 of the Penal Code. This administrative detention order was taken simply for political reasons and was given despite a clear court decision rendered by a competent criminal tribunal ordering the immediate release of those accused.

77. The source concludes by pointing out that the use of military tribunals in Egypt has become selective, and is currently applied solely to the members of the Muslim Brotherhood. These tribunals are not independent, impartial nor competent and fail in guaranteeing due process of law according to international standards.

78. According to the Working Group, the following allegations have not been contradicted by the Government's response:

(a) All 26 persons to whom this Opinion refers were arrested at their homes or places of work in simultaneous predawn raids on 14, 23 and 24 December 2006 and 14, 16 and 17 January 2007 by agents of the State Security forces (Amn Addawia) acting with the support of special units of the Army. Their houses and offices were searched and personal computers; cellular phones; books and documents pertaining to them and to members of their families were confiscated. No reasons were given to them or their relatives for their arrests.

(b) On 29 January 2007, the Cairo Criminal Court, after having interrogated the accused, dismissed all charges against them and ordered their immediate release. It considered that there was no evidence against the detainees and that the extension of the detention period was not justified.

(c) Despite this Court ruling, the Ministry of the Interior issued arrest warrants against these persons and they were all immediately re-arrested by the Police, and on 4 February 2007, the President of the Republic, acting in his capacity as Supreme Commander of the Armed Forces, ordered that the detainees be tried by the Supreme Military Tribunal of Heikstep, Cairo; trial which took place on 15 April 2008. The principle *non bis in idem*, enshrined by article 14, paragraph 7, of the International Covenant on Civil and Political Rights, was not observed.

(d) The Supreme Military Tribunal of Heikstep acquitted Messrs Khaled Abdelkader Owda; (2) Ahmad Ahmad Nahhas; (3) Ahmed Azzedin El-Ghoul; (4) Amir Mohamed Bassam Al-Naggar; (5) Gamal Mahmoud Shaaban; (6) Yasser Mohamed Ali; (7) Mahmoud Abdul Latif Abdul Gawad; (8) Mahmoud Morsi Koura; (9) Mohamed Mahmoud Hafez; (10) Mohamed Mehany Hassan; (11) Mohammed Ali Baligh; (12) Osama Abdul Muhsin Shirby.

(e) The Military Tribunal also condemned to three to seven years' imprisonment to Messrs. (1) Mohamed Khirat Al-Shatar; (2) Hassan Ezzudine Malek; (3) Ahmed Ashraf Mohamed Mostafa Abdul Warith; (4) Ahmad Mahmoud Shousha; (5) Esam Abdul Mohsen Afifi; (6) Essam Abdul Halim Hashish; (7) Farid Aly Galbt; (8) Fathy Mohamed Baghdady; (9) Mamdouh Ahmed Al-Husseini; (10) Medhat Ahmad El-Haddad; (11) Mohamed Ali Bishr; (12) Mostafa Salem; and (13) Murad Salah El-Desouky, for their membership in a proscribed organization.

(f) The Government justified such intervention with the situation of state of emergency, which provides specific competences to the President of the Republic to refer any offence punishable under the Penal Code or any other law to a military court.

79. The Working Group reiterates its prior considerations on similar cases of detention in Egypt (such as its Opinion No.3/2007 (Egypt)), as well as the views of the Committee against Torture and the Committee on Economic, Social and Cultural Rights, on the situation caused by the declaration of state of emergency in Egypt since 6 October 1981 (see, for instance, CAT/C/CR/29/4, para. 5 and E/C.12/1/Add.44, para. 10).

80. Considering the above, the Working Group notes that two different periods of time should be differentiated:

(a) On the arrest of Messrs. Khaled Abdelkader Owda; Ahmad Ahmad Nahhas; Ahmed Azzedin El-Ghoul; Amir Mohamed Bassam Al-Naggar; Gamal Mahmoud Shaaban; Yasser Mohamed Ali; Mahmoud Abdul Latif Abdul Gawad; Mahmoud Morsi Koura; Mohamed Mahmoud Hafez; Mohamed Mehany Hassan; Mohammed Ali Baligh; Osama Abdul Muhsin Shirby; and

(b) On the convictions against Messrs. Mohamed Khirat Saad El-Shatar; Hassan Ezzudine Malek; Ahmed Ashraf Mohamed Mostafa Abdul Warith; Ahmad Mahmoud Shousha; Ayman Abd El-Ghani Hassanin; Esam Abdul Mohsen Afifi; Essam Abdul Halim Hashish; Farid Aly Galbt Fathy Mohamed Baghdady; Mamdouh Ahmed Al-Husseini; Medhat Ahmad El-Haddad; Mohamed Ali Bishr; Mostafa Salem and Murad Salah El-Desouky.

81. One period concerns the arrest of all these persons before the judicial decision ordering their immediate release was taken by the Cairo Criminal Court. The other period concerns the re-arrest of all these persons as a consequence of the administrative order of the Executive authorities without taking into account the judicial resolution ordering their release.

82. Articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights establish that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal. This has to be interpreted as meaning that if such independent and impartial judicial authority decides that an order issued by an administrative authority is not appropriate, those arrested should be immediately released. Although the police forces can arrest these persons again under the same charges, the new arrest by administrative authorities will have no legal basis and will imply a non-observance of a judicial decision.

83. The absence of a legal basis for the re-arrest of all these persons is a sufficient element for the Working Group to consider their detention as arbitrary. However, the Working Group notes that, even without such element, these detentions would have been considered as arbitrary due to the fact that all these persons, all of them civilians, were tried before a military court which did not show the necessary qualities of competence, independence and impartiality.

84. Article 14 of the International Covenant on Civil and Political Rights establishes that everyone shall be entitled to a fair and public hearing by a competent, independent and

impartial tribunal established by law. The independence, impartiality and objectivity of the tribunal are a fundamental requisite determined by International Law. Egyptian military courts are dependent on the Ministry of Defence. They are composed by judges appointed by the Armed Forces command and can be dismissed at any time. In addition, their members lack the necessary professionalism and legal knowledge.

85. The Working Group considers that, in principle, military tribunals should not try civilians. The Human Rights Committee has also expressed concern that these tribunals as well as State Security Courts show no guarantees of independence. In addition, their decisions are not subject to appeal before a higher court as established by article 14 of the International Covenant on Civil and Political Rights (see CCPR/CO/76/EGY, para. 16).

86. In the light of the foregoing, the Working Group renders the following Opinion:

(a) The deprivation of liberty of Messrs. Mohamed Khirat Saad Al-Shatar; Hassan Ezzudine Malek; Ahmed Ashraf Mohamed Mostafa Abdul Warith; Ahmad Mahmoud Shousha; Ayman Abd El-Ghani Hassanin; Esam Abdul Mohsen Afifi; Essam Abdul Halim Hashish; Farid Aly Galbt; Fathy Mohamed Baghdady; Mamdouh Ahmed Al-Husseini; Medhat Ahmad El-Haddad; Mohamed Ali Bishr; Mostafa Salem; and Murad Salah El-Desouky is arbitrary, being in contravention of articles 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights, and falls within categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group;

(b) The Working Group, without prejudging the arbitrary nature of their detention, on the basis of paragraph 17 (a) of its methods of work, decided to file the cases of Messrs. Khaled Abdelkader Owda; (2) Ahmad Ahmad Nahhas; (3) Ahmed Azzedin El-Ghoul; (4) Amir Mohamed Bassam Al-Naggar; (5) Gamal Mahmoud Shaaban; (6) Yasser Mohamed Ali; (7) Mahmoud Abdul Latif Abdul Gawad; (8) Mahmoud Morsi Koura; (9) Mohamed Mahmoud Hafez; (10) Mohamed Mehany Hassan; (11) Mohammed Ali Baligh; (12) Osama Abdul Muhsin Shirby.

87. Consequent upon the Opinion rendered, the Working Group requests the Government of Egypt to take the necessary steps to remedy the situation of the above-mentioned persons and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 12 September 2008