

Opinion No. 42/2008 (Egypt)**Communication addressed to the Government on 30 May 2008****Concerning Messrs. A, B, C, and D (Full names were transmitted to the Government but are not published at source's request)****The State is a party to 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. According to the source, Messrs. A, B, C, and D were arrested on 20 November 2007 at the home of Mr. A in Agouza. An arrest warrant had only been issued against Mr. A. Their arrests were part of a crackdown on HIV-positive suspects.
5. The four men were charged with homosexual conduct and convicted by the Agouza Court of Misdemeanours (case file No. 26073/2007) to one year of imprisonment each on 13 January 2008 pursuant to article 9 (c) of Law 10/1961, which makes the "habitual practice of debauchery (*fujur*)" a crime. In addition, Mr. A was charged with "administering a house for debauchery" and the other three with "exploitation of the debauchery of others". The Agouza Court of Misdemeanours applied the underlying criminal provisions as to include and incriminate consensual homosexual conduct. The Agouza Appellate Court of Misdemeanours rejected the four men's appeals on 2 February 2008 and upheld their prison sentences.
6. Messrs. A, C, and D are currently imprisoned at Al Qota Prison, Giza. Mr. B was being held chained to his bed 23 hours a day at Imbaba Fevers Hospital in Cairo until his sentence was upheld on 2 February 2008. It is believed that he was to be transferred to the hospital at Al Qota Prison; however, his current place of detention could not be established.
7. The source alleges that the convictions were not based on any evidence except for coerced and repudiated statements, whose contents the men were not allowed to read, which were taken from them at the Ministry of Interior's Morality Police Department. No witnesses were heard. All men pleaded not guilty to the charges and denied before the prosecution to having ever engaged in homosexual conduct.
8. According to the arrest report the four men were fully dressed and not engaging in any illegal acts at the time of the arrest in the apartment of Mr. A. The report further stated that the arrests were based on "secret investigations" conducted by the arresting officer. However, the nature or the outcome of these investigations has never been presented to the Prosecutor, who has not asked for them, either. Motions by the defence attorneys before the Agouza Court of Misdemeanours, including a request that the judge order the Police to produce in court the contents of the report on the "secret investigations" and that the arresting officer be summoned for cross-examination, were rejected.
9. The source alleges that, after their arrests, Mr. B was ill-treated by police officers at Al-Agouza police station by being beaten across the head several times and all four were forced to stand in a painful position for three hours with their arms lifted into the air. They were not provided with any food, water or a blanket during the first four days of detention. The authorities also conducted HIV tests without their consent. When the prosecutor was informed about the positive HIV test results of Mr. B, he reportedly uttered the following: "People like you should be burned alive. You do not deserve to live".

10. It was reported that the arrest of the above-mentioned persons might solely be connected to that fact that they were present in an apartment, which had been formerly rented by Mr. E and Mr. F. This assertion is supported by the fact that an arrest warrant had reportedly been issued against Mr. A in connection with the investigation related to case No. 16087/2007 and by reports that the apartment had been placed under police surveillance after the arrests carried out in relation to this case.

11. The source argues that the arrest, detention and conviction of the four above-mentioned men violated their right to a fair trial and has led to arbitrary detention. Criminalizing adult consensual homosexual conduct is in violation of Egypt's obligations undertaken under applicable international human rights law, and particularly the discriminatory application of article 9 (c) of Law 10/1961 in such cases on the basis of assumed or declared HIV status; forced HIV tests; ill-treatment in detention; the conduct of trials driven by prejudice and the convictions based on no evidence, which violate the norms on prohibition of arbitrary deprivation of liberty.

12. These allegations were transmitted to the Government. The Government in its response, whilst acknowledging the detention and subsequent trial and sentencing of the four detainees, refutes the allegations presented by the source. It states that at all stages of the arrest, detention, trial and sentencing, legal processes and procedures were followed and there was no complaint of irregularity or violation of due process. These persons were arrested pursuant to a warrant issued by the Department of Public Prosecutions, following surveillance of the premises which Mr. A was reported to be running for the purposes of facilitating debauchery. Article 9 (c) of Anti-Prostitution Decree Law No. 10/1961 criminalizes prostitution, meaning the indiscriminate commission of lewd and obscene acts, without making distinction between the perpetrators of such acts. It explains that in so doing the State is acting within the margin of appreciation afforded to it under international law to protect public morals and safety.

13. The Government then proceeds to justify mandatory HIV testing as a measure of the Ministry of Health for safeguarding the health and safety of all citizens and to provide adequate medical coverage, including dispensing free antiretroviral treatment. HIV testing was made a requirement for all Egyptian citizens in 2004 in order to counter any discrimination against those undergoing testing for the disease.

14. According to the Government, the fact that both prostitution (when the person committing the offence is a woman) and debauchery (when the person is a man) are designated crimes under Egyptian penal law does not constitute discrimination on grounds of sex. This is a matter of "necessity" to protect morals in Egypt with a view to preserving the cohesiveness of society and public order. The trial judge handed down minimum sentences to the individuals concerned, which shows that he did not deal with them in an arbitrary manner.

15. The Working Group has considered the allegations received from the source as well as the information provided by the Government and believes it to be in a position to render an Opinion.

16. The Working Group is of the view that circumstances of arrest, detention, trial and sentence as well as conditions of detention form an integral component of its determination of whether a detention is arbitrary or not. In the instant case, the Government has not responded to the query raised by the source that the arrests may have been the result of mistaken facts and that it might have been the previous tenants, Messrs. E and F, whose residence was under surveillance by the police. Coincidental linkages between persons appear to have been the rationale for detaining these four persons. This is an important material fact overlooked in the case and which no doubt required clarification.

17. The Government did not comment on or refute a critical allegation that a detainee was chained to his hospital bed for months and only released from their chains on an order of the Ministry of the Interior on 25 February 2008. The Working Group considers that chaining to a bed a detainee has no legal basis in national or international law and cannot form part of any regime of detention.

18. The wide discretion given to the Morality Police, charged with oversight “moral” or “immoral” behaviour and to determine what constitutes immoral actions, is a cause of concern to the Working Group in its work on determining the arbitrariness or otherwise of a person’s detention. This wide discretion given to the Police to determine what constitutes “immoral” actions, does not bode well for basic human rights such as right to privacy, right to own liberty, freedom of opinion and freedom of expression.

19. It is apparent from the information received that homosexual orientation and behaviour is at a disadvantage in this regard and the subject of a number of factually incorrect assumptions. Thus homosexuality is perceived as necessarily leading to HIV/AIDS as a consequence of same sex relationships. Thus, the detainee who informed the police officer that he was HIV-positive was immediately considered homosexual, declared immoral and criminalized with debauchery for the sole reason of being HIV-positive. All persons arrested subsequent to the interrogation of this person were also labelled as homosexuals, subjected to contemptuous treatment by the law-enforcement agents and forcibly required to undergo HIV tests.

20. The Working Group is unable to agree with the Government’s view that these tests are in the best interests of Egyptian citizens, especially in view of the fact that a huge stigma is attached to HIV/AIDS-positive results and when, seen in conjunction with homosexuality, it results sufficient to marginalize and victimize a person for life. The investigation and prosecution procedures as well as the treatment meted out to such detainees, is one of multiple discriminations and falls far short of equality before law, equal protection of the law and fair trial.

21. The Working Group further notes that due process of legal standards as well as safeguards of a fair trial were not met in the instant case as the detainees were not given a fair hearing. Their ill-treatment, beatings, denial of food and bedding were not investigated by the authorities nor have these allegations been explicitly refuted or addressed vigorously in the Government’s response.

22. It is to be noted that in a similar case in Egypt in 2002, the so-called “Queen Boat” case, the Working Group found that the detention of more than 50 men, who were arrested after a police raid on a night club on a boat and prosecuted on the grounds of their sexual orientation, constituted arbitrary detention and contravened article 2 of the Universal Declaration on Human Rights and articles 2 and 26 of the International Covenant on Civil and Political Rights (Opinion No. 7/2002, E/CN.4/2003/8/Add.1).

23. While the Working Group respects national laws and health related laws to safeguard the interest of citizens, the right to privacy of medical information and non-divulgence of sexual orientation without the informed consent of the individual concerned remains a basic right accorded by international human rights law. Thus, the Working Group believes that presenting the HIV-positive status of detainees as supportive information concerning their sexual orientation or their homosexuality contributes to the arbitrariness of their detention since police officers and other law enforcing personnel have stated that these persons are a threat to the safety of others and should not be freed on the streets.

24. It is a well established principle of international law that the provisions on public morals and public health and safety, in order to restricting a right, may be invoked where undesirable and controversial acts are being committed in the public domain and likely to

be disruptive of the public order. There is no suggestion that this was the predicament in the instant case. Finally, as a matter of justice and equity, matters of such personal and societal sensitivity which if known publicly would cause ill repute and possible exclusion from society and loss of face for the person and his/her family, caution and balance is required.

25. The Working Group considers that these four persons were subjected to violations of their fundamental rights during their arrests, investigations and trial proceedings and also suffered discrimination on account of their sexual orientation and HIV/AIDS status. Because Egyptian law does not expressly prohibit homosexuality, they were tried for debauchery. The vilification and persecution of persons for their sexuality violate the principles of international human rights law. The right to freedom from discrimination on the basis of sex includes sexual orientation.

26. The Working Group believes that the use of article 9 (c) of the Anti-Prostitution Decree Law No. 10/1961 in these cases to detain people on the basis of their declared HIV status, and to test them without their consent for HIV infection, violates human rights protections to individual privacy and personal autonomy. Furthermore, the detention of persons on the basis of their HIV status violates the principles agreed to in 2001 by Member States in the Declaration of Commitment on HIV/AIDS.

27. The Working Group also considers that the interdiction of all discrimination based on sex, set forth in international human rights law, is to be understood as an interdiction to discriminate someone on the grounds of homosexuality.

28. In light of the above, the Working Group renders the following Opinion:

The detention of Messrs. A, B, C, and D constitutes arbitrary detention according to categories II and III of the categories applied by the Working Group in its consideration of cases. It is in violation of articles 2, 9, and 10 of the Universal Declaration on Human Rights and articles 2, 9, 14, and 26 of the International Covenant on Civil and Political Rights.

29. Consequently, the Working Group requires the immediate release of these persons. It further calls upon the Government to end arbitrary arrests based on HIV status; and to study the possibility of reconsidering the Anti-Prostitution Decree Law and its implementation in practice in order to bring them in conformity with the international human rights obligations undertaken by the Arab Republic of Egypt as a State party to International Covenant on Civil and Political Rights.

Adopted on 25 November 2008