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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session, 22-26 August 2016

Opinion No. 41/2016 concerning Mahmoud Abdel Shakour Abou Zeid Attitallah (Egypt)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.
2. In accordance with its methods of work (A/HRC/30/69), on 24 June 2016 the Working Group transmitted a communication to the Government of Egypt concerning Mahmoud Abdel Shakour Abou Zeid Attitallah. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (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);

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(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 for reasons 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. Mahmoud Abdel Shakour Abou Zeid Attitallah (also known as Shawkan), born in 1987, is an Egyptian national and a freelance photojournalist working for Demotix, a London-based citizen journalism site and photography agency.

5. On 14 August 2013, Mr. Attitallah was arrested while covering the violent dispersal of a protest in Rabaa Square, Cairo. The police officers who arrested him did not present him with an arrest warrant nor did they explain the reason for the arrest. Mr. Attitallah informed them that he was a journalist covering the event. Nevertheless, the police officers arrested him. They tied his hands behind his back with a plastic ligature. Mr. Attitallah was beaten with a belt and then put in a car. He was transferred to the main stadium in Cairo for the rest of the day and later transferred to the new Cairo police station. On the same day, thousands of people were reportedly arrested in relation to the protest in Rabaa Square.

6. At the police station, Mr. Attitallah was beaten and kept in a small cell with 39 persons. There was no ventilation in the cell. He was not given anything to eat or drink for three days and was beaten by police officers many times a day. Police officers also threatened him with further abuse, to cause more pain. Mr. Attitallah was beaten by five officers at the same time. He was beaten with a belt and kicked with boots. He was hit in the eyes. As a result, at one point, Mr. Attitallah could not see light. He did not receive any medical care for the injuries he sustained during the beating.

7. On 16 August 2013, Mr. Attitallah was questioned by a prosecutor without his lawyer being present. On 17 August 2013, Mr. Attitallah and other detainees who had been arrested in relation to the protest in Rabaa Square were transferred to Abu Zaabal Prison. During the transfer, police officers punched, kicked and beat Mr. Attitallah with batons. Together with dozens of detainees, Mr. Attitallah was handcuffed and left in a van for seven hours without water, food or fresh air, when the outdoor temperature was above 30°C. Some 15 trucks full of detainees were reportedly left in the same conditions and 37 persons allegedly died because of the heat and poor ventilation in the trucks.

8. In September 2013, the office of the prosecutor general of Egypt accused Mr. Attitallah of “possession of weapons”, “illegal assembly”, “murder” and “attempted murder” and extended his pretrial detention period. The accusations, which were not official charges, were identical to those levelled at more than 700 other individuals accused in the same “Rabaa sit-in dispersal” case, without any consideration for Mr. Attitallah’s individual criminal responsibility. Mr. Attitallah’s lawyers did not have access to the prosecutor’s documentation, nor were they allowed to visit Mr. Attitallah in prison. Furthermore, on 7 November 2013, the prosecutors did not allow Mr. Attitallah’s legal team to enter the room where he was being interrogated.

9. In December 2013, Mr. Attitallah was transferred to Tora Prison, where he was detained with 12 persons in a cell measuring three by four metres. During his detention, Mr. Attitallah and the other prisoners had no access to fresh air for days or even weeks. They

had to cook, eat and use the bathroom in the same cell. Mr. Attitallah was sleeping on a cold, tiled floor. He and his cell mates used an electric cooker to prepare food and heat the cell during the winter. Mr. Attitallah's detention was extended again.

10. The source reports that, since his arrest, Mr. Attitallah's detention was extended almost every 45 days. The decisions to extend were not always made in Mr. Attitallah's presence, and never in the presence of his legal counsel. On 2 October 2014, Mr. Attitallah was interrogated by a prosecutor. On 9 February 2015, he was interrogated by an assistant to the Minister of the Interior without his lawyer being present. On 11 May 2015, he was taken to a court. He was permitted to leave the cage and speak to a judge for the first time. The judge extended his detention by 45 days.

11. In August 2015, Mr. Attitallah's lawyers submitted a petition to the Court of Appeal requesting their client's immediate release, as the prolonged pretrial detention had exceeded the two-year maximum period set out in article 143 of the Criminal Code of Egypt. According to the source, the Criminal Code allows for pretrial detention to last for up to two years if the alleged offence is punishable with life imprisonment or the death penalty.

12. In August 2015, an Egyptian court referred Mr. Attitallah's case to a criminal court for trial. Mr. Attitallah's detention was extended further. Mr. Attitallah and the more than 700 defendants facing charges in relation to the "Rabaa sit-in dispersal" case were going to be tried en masse. The trial was initially scheduled for 12 December 2015 but was adjourned because there was not enough space in the dock for all the defendants to stand in. On 6 February 2016, Cairo Criminal Court decided to reschedule the trial for 26 March 2016.

13. In February 2016, Mr. Attitallah was reportedly held in solitary confinement for four days. On 26 March 2016, during the first trial hearing in Cairo, an official from the public prosecution brought the following nine charges against Mr. Attitallah: "joining a criminal gang", "murder", "attempted murder", "participating in a gathering with the purpose of intimidation and creating terror and exposing people's life to danger", "obstructing public utilities", "overthrowing the regime through the use of force and violence, a show of strength and the threat of violence", "resisting the authorities", "obstructing the implementation of laws, surveillance" and "disturbing public space". For the first time, Mr. Attitallah had access to a list of charges that were specific to him. He is at risk of being punished with the death penalty. Before the trial, his lawyers were denied access to key documents relating to the case, including the list of charges.

14. The subsequent court hearing was initially scheduled for 23 April 2016, to allow the defence lawyers to obtain the case files and prepare a defence and for the prosecution to submit evidence backing up the charges. On 23 April 2016, however, the court hearing was postponed to 10 May 2016. The reason given for the postponement was that one of the co-defenders in the case was in police custody and not present in the courtroom.

15. On 10 May 2016, Cairo Criminal Court postponed the trial in the "Rabaa sit-in dispersal" case to 17 May 2016, to "allow the prosecution to bring the remaining physical evidence to the court". On 17 May 2016, the court examined some evidence and adjourned the trial to 21 May 2016.

16. On 21 May 2016, Mr. Attitallah had the opportunity to address the court and speak directly to the judge. The trial was then postponed to 28 June 2016 to "give enough time for lawyers to take a look at technical documents that the prosecution presented to the court, as well as videos and flash drives that are supposed to contain evidence backing up the charges against the defendants".

17. After his arrest, Mr. Attitallah was denied access to a lawyer for a significant period of time. Although he was assigned a lawyer at the beginning of the case, he was only allowed to see his lawyer on an ad hoc and arbitrary basis. The meetings with that lawyer and subsequent lawyers were not conducted in private. Mr. Attitallah and his legal counsel were prevented from being present during several hearings relating to the extension of detention. On several occasions, Mr. Attitallah was not notified of those meetings. The source stresses that mass trials raise concerns over the protection of the defendants' rights and due process and over the individual nature of the criminal sanction.

18. Serious concerns have been raised regarding the health of Mr. Attitallah, who was diagnosed with hepatitis C before his arrest and whose family submitted many appeals to the prosecutor requesting his release on medical grounds without success. His lawyers have unsuccessfully appealed to the Public Prosecutor at least 17 times for his release on medical grounds. According to the source, Mr. Attitallah has been denied appropriate medical treatment. He does not have access to a doctor, nor is he being sent to the prison hospital for treatment.

19. The source submits that Mr. Attitallah's continued deprivation of liberty is arbitrary and falls under categories I, II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. In its view, Mr. Attitallah was arrested without a warrant and, at that time, was given no reason why. He was held without charges or trial until 26 March 2016. The source argues that there was no legal basis for justifying the detention of Mr. Attitallah between 14 August 2013 and 26 March 2016, in violation of article 9 of the Covenant.

20. The source further argues that Mr. Attitallah's arrest and deprivation of liberty result from his exercise of the right to freedom of expression and the right to freedom of peaceful assembly and association, both of which are guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the Covenant. More specifically, the source submits that Mr. Attitallah's arrest and deprivation of liberty are related to his profession as a photojournalist since he was arrested while reporting on the violent dispersal of a protest in Rabaa Square.

21. The source also submits that Mr. Attitallah was not guaranteed the international norms of due process and a fair trial during the period of his deprivation of liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. The source contends that Mr. Attitallah was subjected to ill-treatment and torture while in detention and that he was denied medical treatment; he was held in solitary confinement for four days; he was held in pretrial detention between 14 August 2013 and 26 March 2016 without any charges, and his pretrial detention exceeded the maximum amount of time allowed under Egyptian law; he was denied access to his lawyer for a significant period and, when he was allowed to see his lawyers, the meetings were not conducted in private; he was interrogated on several occasions without his lawyers being present; his pretrial detention was extended without taking into consideration the requests submitted by his lawyers; his defence team was not afforded any opportunity to challenge the detention; his lawyers were denied access to key documents in relation to the case, which made it very difficult for them to prepare the defence; and he and more than 700 other defendants were being tried in mass trials, which made it difficult to ensure the right to a fair trial for each of the defendants. The source concludes that all of the above constitutes a violation of articles 9 (1)-(4) and 14 (2) and (3) (a)-(c) and (e) of the Covenant.

Response from the Government

22. On 24 June 2016, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group

requested the Government to provide detailed information by 23 August 2016 about Mr. Attitallah's current situation and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Mr. Attitallah's continued detention and to provide details regarding the conformity of the legal proceedings against him with international human rights treaties to which Egypt is a party.

23. The Working Group regrets that it has not received a response from the Government to that communication. The Government has not requested an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

24. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

25. 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 (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

Category I

26. A unique feature of an arrest *in flagrante* is that the circumstances of the arrest should make clear to anyone the cause of the arrest. Nevertheless, if the person arrested is not released, the authorities still need to make a formal notification of the charges once they have decided on a criminal course of action. Unfortunately, the source has not provided enough information in the present case to make it possible to assess the sequence of events. It is clear, however, that Mr. Attitallah's trial did not start within the first two years of his arrest, despite the fact that, as the source puts it, the maximum duration of pretrial detention in Egypt is two years. The Working Group is of the view that even a legal framework that allows pretrial detention to last two years could violate the right of an accused person to be tried without undue delay (see art. 14 (3) (c) of the Covenant), and that only the specific circumstances of a case would permit an appropriate assessment. However, assuming that in the present case there was no undue delay, as the source does not allege any, the Working Group is of the view that, since 5 August 2015, Mr. Attitallah's continued detention has ceased to be grounded in law.

Category III

27. The source alleges that Mr. Attitallah's right to a fair trial was violated and the Working Group finds that the circumstances of the case support such a conclusion. First, the Working Group notes that Mr. Attitallah and more than 700 other accused were tried as a group and that it is difficult, in such a trial, to hold each accused individual criminally responsible. Second, in many instances Mr. Attitallah was not present during certain important moments of his case, even though he had not waived his right to be present. The Working Group notes, for example, that the detention order was extended in the absence of the accused and his lawyers. It is also worth noting that the accused was interviewed in the absence of his lawyers and that he was never allowed to meet with those lawyers in private. For all these reasons, the Working Group considers that Mr. Attitallah's right to a fair trial was violated.

Category II

28. Category II protects the exercise of freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant. Journalists are specifically covered by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. As Mr. Attitallah was a photojournalist, he cannot be arrested and detained for the exercise of freedoms guaranteed to him in these international instruments. Consequently, his arrest and detention are arbitrary and fall within category II. Moreover, this conclusion subsumes the findings in paragraphs 26 and 27 above: whenever arrests and detentions are arbitrary because their only justification is the exercise of rights and freedoms, it is void to question their legal basis or the fairness of the criminal justice process.

Referral

29. The source reports some allegations of torture that seem credible to the Working Group, both because of the specific circumstances of this case and because of a known pattern in the country. It is therefore necessary, in accordance with paragraph 33 (a) of the Working Group's methods of work, to refer the allegations to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

Disposition

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

The arrest and deprivation of liberty of Mahmoud Abdel Shakour Abou Zeid Attitallah, being in violation of articles 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

31. As a result, the Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Mr. Attitallah and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the Covenant.

32. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to immediately release Mr. Attitallah and accord him an enforceable right to reparation.

33. Finally, the Working Group refers the specific allegation of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate measures, in accordance with paragraph 33 (a) of the methods of work.

Follow-up procedure

34. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Attitallah has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Attitallah;
- (c) Whether an investigation has been conducted into the violation of Mr. Attitallah's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

35. 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.

36. The Working Group requests the source and the Government to provide the above information within six months of the date of the 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.

37. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.¹

[Adopted on 26 August 2016]

¹ See Human Rights Council resolution 24/7, paras. 3 and 7.