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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. 34/2016 concerning Adil Bakheit, Al Shazali Ibrahim El Shiekh, Alhassan Kheiri, Arwa Elrabie, Imany Leyla Raye, Khalafalla Alafif Mukhtar, Khuzaini Elhadi Rajab, Midhat Afifi Hamdan, Mustafa Adam, and Nudaina Kamal (Sudan)

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 and 24/7 of 26 September 2013. The mandate was extended for a further three years in resolution 33/ 22 of 30 September 2016.
2. In accordance with its methods of work (A/HRC/30/69), on 17 June 2016 the Working Group transmitted a communication to the Government of Sudan concerning Adil Bakheit, Al Shazali Ibrahim El Shiekh, Alhassan Kheiri, Arwa Elrabie, Imany Leyla Raye, Khalafalla Alafif Mukhtar, Khuzaini Elhadi Rajab, Midhat Afifi Hamdan, Mustafa Adam, and Nudaina Kamal. 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 sentence or despite an amnesty law applicable to him) (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);

(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 or disability or other status, that aims towards or can result in ignoring the equality of human rights (category V).

### Submissions

#### *Communication from the source*

4. The following individuals have been arrested, some of them remain in detention, in relation to a workshop in 2015 organized by the Khartoum Centre for Training and Human Development (TRACKS), a Khartoum-based organisation which provides and facilitates trainings on a variety of topics ranging from human rights to information technology.

5. Mr. Khalafalla Alafif Mukhtar, born in 1956, is a Sudanese human rights defender and director of TRACKS.

6. Ms. Arwa Elrabie, administrative manager of TRACKS;

7. Ms. Nudaina Kamal, staff of TRACKS;

8. Ms. Imany Leyla Raye: a national of Cameroon, working as a volunteer with TRACKS;

9. Mr. Midhat Afifi Hamdan, staff of TRACKS;

10. Mr. Al Shazali Ibrahim El Shiekh, staff of TRACKS;

11. Mr. Khuzaini Elhadi Rajab, staff of TRACKS;

12. Mr. Alhassan Kheiri, computer technician working with TRACKS;

13. Mr. Mustafa Adam, director of Al Zarqa organization for rural development (ZORD);

14. Mr. Adil Bakheit, born on 8 July 1966, is a Sudanese human rights defender and a member of the Board of Trustees of Sudanese Human Rights Monitor organisation (SHRM), a Khartoum-based human rights group and member organisation of the Confederation of Sudanese Civil Society Organisations, documenting human rights violations in Sudan, providing legal assistance to victims of State abuse and working on the defence of minorities in Sudan.

15. On 26 March 2015, during the last day of a five-day workshop on “social responsibility and active citizenship”, around 10 officers from the National Intelligence and Security Service (NISS) raided the office of TRACKS. They searched the office without presenting a search warrant and confiscated computers, laptops and office documents.

16. Following the raid, Mr. Bakheit and Mr. Mukhtar were charged in March and May 2015, respectively. Both of them were facing seven charges under the Criminal Act of 1991, including “joint acts in the execution of criminal conspiracy (article 21), criminal conspiracy (article 24), undermining the constitutional system (article 50), waging war

against the State (article 51), calling for opposition to public authority by use of violent or criminal force (article 63), publication of false news (article 66), and impersonating a public servant (article 93).” Among these seven charges, “undermining the constitutional system” under article 50 and “waging war against the State” under article 51 are considered as crimes against the State and punishable by the death penalty.

17. Mr. Mukhtar was detained for one day following the raid and later released on bail. On 3 June 2015, Mr. Bakheit was released on bail as well.

18. On 10 February 2016, Mr. Mukhtar received a phone call from the NISS Prosecution Office of Crimes against the State, he was informed by the prosecutor that after 11 months of looking into the 5 laptops and the server of the centre, they did not find any evidence to support the charges made against them and therefore they decided to drop the case. The prosecutor also informed him that NISS had two weeks to appeal their decision. If NISS did not appeal within the timeframe, then Mr. Mukhtar should come to the NISS Prosecution Office in order to collect his laptops and the server that had been confiscated.

19. On 29 February 2016, the office of TRACKS was raided for the second time by plain-clothed NISS agents who did not produce a search warrant. They confiscated nine mobile phones, five laptops, as well as publications, flip charts and other office documents. They also confiscated staff members' passports, which have not yet been returned, and referred them to the police station where they were interrogated, verbally abused, ill-treated and threatened. The interrogations lasted for about three weeks and were concluded on 20 March 2016.

20. With regard to the raid of the office of the TRACKS on 29 February 2016 and the questioning and detention of 10 individuals, including Mr. Mukhtar, an urgent appeal joined by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on the situation of human rights in the Sudan; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment was transmitted to the Government of the Republic of the Sudan on 5 April 2016. Regrettably, no response has been received to this joint urgent appeal.

21. On 19 May 2016, Mr. Mukhtar and Mr. Bakheit both received summons verbally via a telephone call. The caller is believed to be from the NISS. They were asked to come to the court at 10 a.m. and 11 a.m. respectively on 22 May 2016. Neither of them received a written summons. After receiving the phone calls, the two individuals, for the first time realised that perhaps the case from 2015 had not been dropped.

22. On 22 May 2016, Mr. Mukhtar and Mr. Bakheit attended court hearing at 10.00 a.m. They were informed that the trial was postponed for 8 June 2016. Subsequently, Mr. Bakheit went home.

23. In the meantime, Mr. Mukhtar left the court and joined his colleagues to the NISS office because on the same day, Mr. Mukhtar and Ms. Nudaina Kamal, Ms. Arwa Elrabie, Ms. Imany Leyla Raye, Mr. Mustafa Adam, Mr. Midhat Hamdan, Mr. Khuzaini Elhadi Rajab, Mr. Alhassan Kheiri, and Mr. Al Shazali Ibrahim El Shiekh were also summoned to the NISS office.

24. The aforementioned individuals arrived at the NISS office in Khartoum at approximately 11.00 a.m. They remained there for four hours without being asked any question or informed why they were summoned. Around 3.00 p.m., the group was transferred to the NISS Prosecution Office of Crime against the State in Al Amarat neighbourhood, street 51, in Khartoum. They realised they were arrested upon arrival. No

arrest warrant was presented to them. Ms. Nudaina Kamal was released shortly after her arrest, as she was on maternity leave.

25. The arrest and detention of Mr. Mukhtar is believed to be related to charges against him for a workshop on social responsibility he attended in March 2015 at the premises of TRACKS. No reason was provided for the arrest and detention of the rest of the individuals mentioned above.

26. The cell where the male detainees are kept is overcrowded, very hot with basic ventilation and one window. They are allowed to use the bathroom twice a day; once at 6.00 a.m., and once at 6.00 p.m. No one is allowed to use the toilet in between these hours. They use empty bottles of water to urinate in. They sleep sitting with their backs to the wall because there are 25 men kept in a 15 square-meters cell. The authorities provide them with sandwiches twice a day. The detainees have to provide drinking water, tea and coffee for themselves. Family visits are severely restricted. Most of the time, family members fail to obtain permission from the chief prosecutor to visit detainees.

27. Ms. Arwa Elrabie and Ms. Imany Leyla Raye were kept under guard in the reception area of the NISS prosecutor's office during the day and allowed to sleep in one of the offices in the premises at night.

28. According to the source, their lawyer was only allowed to speak to the two female staff of TRACKS, he did not have access to the male detainees.

29. Among the arrested individuals, Ms. Nudaina Kamal was released on 22 May 2016, Ms. Arwa Elrabie and Ms. Imany Leyla Raye were released on 30 May 2016; Mr. Khuzaini Elhadi Rajab, Mr. Alhassan Kheiri and Mr. Al Shazali Ibrahim El Shiekh were released on 7 June 2016. No charge was brought against any of them.

30. The trial against Mr. Mukhtar and Mr. Bakheit postponed for 8 June 2016 has been postponed again for 18 July 2016.

31. At the time of the current communication, Mr. Mukhtar, Mr. Mustafa Adam, and Mr. Midhat Hamdan remain in detention. None of them knows the grounds of their detention. Mr. Khalafalla Alafif Mukhtar's health is reported to be deteriorating rapidly due to a weak heart condition.

32. The source submits that the continued deprivation of liberty of Mr. Khalafalla Alafif Mukhtar is arbitrary and falls under the category II of the categories applied by the Working Group. The source argues that the arrest and deprivation of liberty of Mr. Mukhtar result from his exercise of the right to freedom of expression and the right to freedom of peaceful assembly and association as guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights (UDHR) and articles 19 and 21 of the International Covenant on Civil and Political Rights (ICCPR). More specifically, the source submits that the arrest and deprivation of liberty of Mr. Mukhtar relate to his work at the TRACKS and, especially, to the workshop on "social responsibility and active citizenship".

33. The source also submits that the continued deprivation of liberty of Mr. Mustafa Adam and Mr. Midhat Hamdan; the deprivation of liberty of Ms. Arwa Elrabie and Ms. Imany Leyla Raye between 22 and 30 May 2016; and the deprivation of liberty of Mr. Khuzaini Elhadi Rajab, Mr. Alhassan Kheiri and Mr. Al Shazali Ibrahim El Shiekh between 22 May and 7 June 2016 are arbitrary and fall under category I of categories applied by the Working Group. The source is of the view that the above mentioned individuals have been or were detained without any legal basis which is in violation of article 9 of the ICCPR.

*Response from the Government*

34. On 17 June 2016, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 16 August 2016 about the current situation of abovementioned individuals, and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying detention of abovementioned individuals, and to provide details regarding the conformity of the legal proceedings against her with international human rights treaties to which the Republic of Sudan is a party.

35. The Working Group regrets that it did not receive a response from the Government to this communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

**Discussion**

36. In the absence of a response from the Government, the Working Group has decided to render this Opinion in conformity with paragraph 15 of its methods of work:

In the present case, the Government has chosen not to rebut the *prima facie* reliable allegations submitted by the source. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues.<sup>1</sup> 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 given allegations. Hence, the Working Group should base its Opinion on the *prima facie* case made out by the source.

*Arrest without warrant*

37. The Working Group notes that Mr. Al Shazali Ibrahim El Shiekh, Mr. Alhassan Kheiri, Ms. Arwa Elrabie, Ms. Imany Leyla Raye, Mr. Khalafalla Alafif Mukhtar, Mr. Khuzaini Elhadi Rajab, Mr. Midhat Afifi Hamdan, Mr. Mustafa Adam, and Ms. Nudaina Kamal were arrested on 22 May 2016 and were not told the reasons for their arrest. An arrest warrant was not presented to them.

38. While being bound by article 9 of the UDHR that proscribes arbitrary arrest and detention, Sudan has ratified the ICCPR: article 9(2) of the ICCPR requires contracting parties to commit that "anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest." Messrs Al Shazali Ibrahim El Shiekh and the eight others were not informed, at the time of arrest, of the reasons for their arrest and so Sudan has not met its obligations of Article 9(2) of the ICCPR.

39. Because they were not informed of the reasons for their arrest, and with no warrant for it, the arrest of the nine people on 22 May 2016 was a violation of Sudan's ICCPR treaty obligations.

40. The deprivation of liberty of the aforementioned individuals is arbitrary under the category I of the criteria used in considering cases submitted to the Working Group.

*Detention without charge*

41. Having been arrested without a warrant, the group of nine were then detained for various lengths of time without being told the charges, if any, against them. The Working

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<sup>1</sup> See, for example, Report of the Working Group, A/HRC/19/57, para. 68.

Group considers that, as of June 2016, Mr. Mustafa Adam, Mr. Midhat Hamdan and Mr. Khalafalla Alafif Mukhtar were still being detained without charge since 22 May 2016; that Ms. Arwa Elrabie and Ms. Imany Leyla Raye were detained without charge between 22 and 30 May 2016; and that Mr. Khuzaini Elhadi Rajab, Mr. Alhassan Kheiri and Mr. Al Shazali Ibrahim El Shiekh were detained without charge between 22 May and 7 June 2016.

42. The ICCPR, along with the UDHR, specifically require that the people should not be deprived of their liberty in arbitrary manner. Article 9(2) of the ICCPR states that “anyone who is arrested shall be promptly informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” If individuals were not informed of the charges against them, then they are denied the opportunity to defend themselves.

43. The detention by the Sudanese authorities of the eight people is therefore a violation of Sudan’s ICCPR treaty obligations.

44. Such a practice of detention, along with the above-mentioned acts of arrest, falls under the category I of the categories available to the Working Group when considering cases.

*Detention resulting from exercising the rights to freedom of expression and assembly*

45. The Working Group notes that the arrests were a response by the Sudanese authorities for the detainees’ involvement in organising training about social responsibility and active citizenship.

46. Article 19(2) of the ICCPR imposes the responsibility on the contracting parties of guaranteeing that “everyone shall have the right to freedom of expression” and that this right “shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 19 of the UDHR imposes similar obligations.

47. Arresting and detaining persons for exercising their lawful rights under article 19 of both the ICCPR and the UDHR would be a severe violation of Sudan’s treaty and customary law obligations, coming under Category II of the categories available to the Working Group when considering cases.

48. The Working Group confirms that the Sudanese authorities, with no apparent legal justification for the arrest without warrant nor for the detention without charge, have violated article 9 of both the ICCPR and UDHR, which require that Sudan ensures that no one shall be subjected to arbitrary arrest or detention. In this regard, the continued detention of Khalafalla Alafif Mukhtar is arbitrary and falls under category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

49. The Working Group also takes serious note of the fact that the above-mentioned arrests and detentions are not the product of isolated incidents of arbitrary deprivation of liberty concerning the victims in this case. We remain concerned about the non-response of the Republic of Sudan with regard to the raid of the office of the TRACKS on 29 February 2016 and the questioning and detention of 10 individuals, including Mr. Mukhtar, and the joint urgent appeal transmitted to the Republic of Sudan by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on the situation of human rights in the Sudan; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

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### Disposition

50. In the light of the foregoing, the Working Group renders the following opinion:
- (i) The arrest of eight persons without an arrest warrant and without informing them of the reasons for their arrest is a violation of the international norms against the arbitrary deprivation of liberty, including article 9 of the UDHR and articles 9(1) and 9(2) of the ICCPR, and the deprivation of liberty consequent is arbitrary under Category I of the criteria used in considering cases submitted to the Working Group.
  - (ii) The detentions without charge in this case are also violations of the international norms against the arbitrary deprivation of liberty, including article 9 of the UDHR and articles 9(1) and 9(2) of the ICCPR, and are arbitrary under Category I of the criteria used in considering cases submitted to the Working Group.
  - (iii) The detention of persons for their lawful expression of opinion is a violation of both articles 19 of the UDHR and the ICCPR, and is arbitrary under Category II of the criteria used in considering cases submitted to the Working Group.
51. Consequent to the Opinion rendered, the Working Group requests the Government, , to take the necessary steps to remedy the situation without delay and to bring it into conformity with the standards and principles enshrined in the UDHR, the ICCPR, and all other relevant international norms against the arbitrary deprivation of liberty.
52. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be the immediate release of the three remaining detainees and the provision of reparation to all who have been detained for the harm suffered through their arbitrary detention.

### Follow-Up Procedure

53. 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 follow-up action taken on the recommendations made in this Opinion, including:
- (a) whether the persons in detention have been released, and if so, on what date;
  - (b) whether compensation or other reparations have been made to all abovementioned persons;
  - (c) whether an investigation has been conducted into the violation of the aforementioned persons' rights, and if so, the outcome of the investigation;
  - (d) whether any legislative amendments or changes in practice have been made to harmonise the Government's laws and practices with its international obligations in line with this Opinion, and
  - (e) whether any other action has been taken to implement this Opinion.
54. The Government is further invited to inform the Working Group of any difficulties which it may have encountered in implementing the recommendations made in this Opinion, and whether further technical assistance is required, for example, through a Working Group visit.
55. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of this Opinion. However, the Working Group reserves the possibility of undertaking its own follow-up of this Opinion if new concerns in relation to this case are brought to its attention. This follow-up procedure will enable the Working Group to keep the Human Rights Council informed of

the progress made in implementing its recommendations, as well as any failure to take action.

56. The Working Group recalls that the Human Rights Council has called for all States to cooperate with the Working Group, 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.<sup>2</sup>

*[Adopted on 25 August 2016]*

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<sup>2</sup> Human Rights Council Resolution 24/7, A/HRC/RES/24/7, 8 October 2013, paragraph 3.