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

5. On 14 August 2013, Shawkan was arrested while covering a violent dispersal of a protest on Rabaa Square. The police officers who arrested him did not present any arrest warrant nor did they explain the reason for the arrest. Shawkan 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. Shawkan was beaten with a belt and then put in a car. He was transferred to the Cairo Stadium 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 on Rabaa Square.

6. At the police station, Shawkan 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. Shawkan was beaten by the police officers many times a day. The police officers also threatened him of further abuse to cause more pain. Shawkan 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, Shawkan could not see light. He did not receive any medical care for the injuries he sustained during the beating.

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

8. In September 2013, the Egyptian general prosecutor's office extended Shawkan's pre-trial detention, accusing him of "possession of weapons", "illegal assembly", "murder", and "attempted murder". These accusations were not official charges. The aforementioned accusations were identical for the over 700 individuals accused in the same "Rabaa sit-in dispersal" case, without consideration of Shawkan's individual criminal responsibility. The lawyers of Shawkan did not have access to the prosecutor's documentation. They were not allowed to visit Shawkan in the prison either. Furthermore, on 7 November 2013, the prosecutors did not allow Shawkan's legal team to enter the room where he was interrogated.

9. In December 2013, Shawkan was transferred to Tora Prison. At the prison, he was detained with 12 persons in a 3 by 4 meters cell. During his detention, Shawkan and the other prisoners had no access to open air for days or even weeks. They had to cook, eat and

use the bathroom in the same cell. Shawkan was sleeping on cold tiled floor. He and his cell mates were using an electric cooker to prepare food and heat the cell in winter time. Shawkan's detention was again extended.

10. The source informs that since his arrest, Shawkan's detention was renewed almost every 45 days. The renewals were conducted sometimes not even in Shawkan's presence and never with the presence of his legal counsel. On 2 October 2014, Shawkan was interrogated by a prosecutor. On 9 February 2015, Shawkan was interrogated by an assistant to the Minister of Interior without the presence of his lawyer. On 11 May 2015, Shawkan was taken to a court. He was permitted to leave the cage and speak to a judge for the first time. The judge renewed his detention for 45 days.

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

12. In August 2015, Egyptian court referred Shawkan's case to a criminal court to start a trial. Shawkan's detention was further extended. Shawkan was one of the over 700 defendants facing charges in relation to the "Rabaa sit-in dispersal" (case No. 15899 of 2013). All of them were going to be tried *en masse*. The trial was initially scheduled for 12 December 2015. It was adjourned due to lack of space in the dock for all the defendants to stand in. On 6 February 2016, the Cairo Criminal Court decided to reschedule the trial for 26 March 2016.

13. In February 2016, Shawkan 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 directed nine charges against Shawkan. These charges include "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, Shawkan had access to a list of charges that were specific against him. Shawkan is at risk of being punished with the death penalty. Before the trial, the lawyers of Shawkan were denied access to key documents relating to the case, including the list of charges.

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

15. On 10 May 2016, the Cairo Criminal Court postponed the trial of the "Rabaa sit-in dispersal" case to 17 May 2016 to "allow for 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, Shawkan 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. Since his arrest, Shawkan has been denied access to a lawyer for a significant period of time. Although he has been assigned a lawyer since the beginning of the case, he is only allowed to see his lawyer on an ad hoc and arbitrary basis. The meetings with his lawyers were not conducted in private. Shawkan and his legal counsel were prevented from being present during several hearings for the renewal of detention. Shawkan was not notified of these meetings in various occasions. The source stresses that mass trials raise concerns over the protection of the defendants' rights and due process and over the individuality of the criminal sanction.

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

19. The source submits that the continued deprivation of liberty of Mahmoud Abdel Shakour Abou Zeid Attitallah (Shawkan) 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, Shawkan was arrested without a warrant and no reason was provided to him at the time of the arrest. He was held without charges or trial until 26 March 2016. The source argues that there was no legal basis to justify the detention of Shawkan between 14 August 2013 and 26 March 2016 which is in violation of article 9 of the International Covenant on Civil and Political Rights (ICCPR).

20. The source further argues that the arrest and deprivation of liberty of Shawkan 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 ICCPR. More specifically, the source submits that the arrest and deprivation of liberty of Shawkan are related to his profession as a photojournalist since he was arrested when reporting on the violent dispersal of a protest on Rabaa Square.

21. The source also submits that Mahmoud Abdel Shakour Abou Zeid Attitallah (Shawkan) has not been guaranteed the international norms of due process and guarantees to 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 ICCPR. The source contends that Shawkan was subjected to ill-treatment and torture while in detention and he has been denied medical treatment; Shawkan was held in solitary confinement for four days; he was held in pre-trial detention between 14 August 2013 and 26 March 2016 without any charges which exceeded the maximum amount of time allowed under the domestic laws in Egypt; 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; Shawkan was interrogated on several occasions without the presence of his lawyers; the pre-trial detention of Shawkan was simply extended without further consideration of the requests submitted by Shawkan's lawyers; Shawkan's defence team has not been 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; Shawkan and other over 700 defendants are tried in mass trials which makes it difficult to ensure the right to a fair trial is guaranteed for each of the defendants; all of which are in violation of articles 9 (1) (2) (3) (4), 14 (2), (3) (a) (b) (c) and (e) of the ICCPR.

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 the current situation of Mr. Mahmoud Abdel Shakour Abou Zeid Attitallah, and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Mr. Mahmoud Abdel Shakour Abou Zeid Attitallah's continued detention and to provide details regarding the conformity of the legal proceedings against him with international human rights treaties to which the Arab Republic of 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 and pursuant to paragraph 15 of the methods of work, the Working Group may render an opinion on the basis of the information available to it.

25. In that regard, the Working Group observes that the set of information provided by the source is coherent and fully supported. There is therefore *prima facie* credible allegations provided by a reliable source.

26. 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.¹ In this case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

Category I

27. An arrest in *flagrant* provides this unique feature that the circumstances of the arrest should give anyone the cause of the arrest. But the authorities still need to make a formal notification of charges once they have decided on a criminal course of action, if the person is not released. Unfortunately the source has not provided enough information here to assess the sequence of events. However, it is clear that Mr. Attitallah did not have his trial starting within the first two years after his arrest, bearing in mind that, as the source puts it, the maximum duration of a pre-trial detention in Egypt is two years. The Working Group is of the view that even that legal framework which allows a pre-trial detention for up to two years could be in violation of the right of an accused to be tried without undue delay (Art. 14(3)(c) of the ICCPR), and only specific circumstances of each case would permit an appropriate assessment. However, assuming that this case did not suffer any undue delay as the source does not allege any, the Working Group is of the view that, since 5 August 2015, the continuous detention of Mr. Attitallah has ceased to be grounded in law.

¹ See, for example, Report of the Working Group, A/HRC/19/57, 26 December 2011, para. 68, and Opinion No. 52/2014.

Category III

28. The source also alleges that the fair trial rights were violated and the Working Group finds that the circumstances of the case support such a conclusion. First, the Working Group notes that this was a trial *en masse*, involving about 700 accused: it is difficult to ensure that in such a trial, each accused would be considered individually for his or her criminal responsibility. In addition, in many instances, the accused was not present during certain important moments of his case, while he had not waived his right to be present. Among others, the Working Group notes the renewal of the detention order 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, while he was never afforded any private meeting with those lawyers. For all those reasons, the Working Group considers that the fair trial right of Mr. Attitallah was violated.

Category II

29. This category protect 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 International Covenant on Civil and Political Rights. Journalists are specifically covered by article 19 of the UDHR and article 19 of the ICCPR. Mr. Attitallah was a photojournalist and therefore cannot be arrested and detained for the exercise of freedoms granted to him in these international instruments. As a result, his arrest and detention are arbitrary and fall within this category. Moreover, this conclusion subsumes the previous ones: whenever the arrest and detention 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

30. The source reports some allegations of torture which seem credible to the Working Group, based on the specific circumstances of this case, but also because of a pattern known in this country. It is therefore necessary, in accordance with paragraph 33 of its Methods of Work, to refer those allegations to the Special Rapporteur on Torture for appropriate action.

Disposition

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

The arrest and deprivation of liberty of Mr. Mahmoud Abdel Shakour Abou Zeid Attitallah is arbitrary, being in violation of 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; and fall within category II of the categories referred to by the Working Group when considering cases submitted to it.

32. As a result, the Working Group requests the Government of Egypt to take the necessary steps in order to remedy the situation of Mr. Mahmoud Abdel Shakour Abou Zeid Attitallah 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.

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

34. Finally the Working Group refers the specific allegation of torture to the Special Rapporteur on torture for appropriate measures, in accordance to paragraph 33(a) of the methods of work.

Follow-up procedure

35. 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 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.

36. The Government is further 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.

37. 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 possibility of undertaking its own follow-up of the opinion if new concerns in relation to the 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.

38. 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.²

[Adopted on 26 August 2016]

² See Human Rights Council resolution 24/7, para. 3.