
Advance Edited VersionDistr.: General
3 October 2019

Original: English

Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fifth session, 12–16 August 2019****Opinion No. 42/2019 concerning Essam El-Haddad and Gehad El-Haddad (Egypt)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.
2. In accordance with its methods of work (A/HRC/36/38), on 28 May 2019 the Working Group transmitted to the Government of Egypt a communication concerning Essam El-Haddad and Gehad El-Haddad. 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 Covenant (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 on the grounds 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. Essam El-Haddad is an Egyptian national who is 65 years old. He is a medical doctor, philanthropist, businessman and co-founder of Islamic Relief. He was actively involved in the Freedom and Justice Party. In 2012, Essam El-Haddad was appointed presidential adviser on foreign relations and international cooperation.

5. Gehad El-Haddad is a 37-year-old Egyptian national and son of Essam El-Haddad. Gehad El-Haddad was the chief media spokesperson for the Muslim Brotherhood until the date of his arrest and was an active political commentator in the foreign press and on social media. He was heavily involved in the Freedom and Justice Party, contributing to the planning of its Renaissance Project, which focused on the long-term economic recovery of Egypt. Prior to his involvement with the Muslim Brotherhood and the Freedom and Justice Party, he worked as the Cairo City Director at the Clinton Climate Initiative from 2007 to 2012.

(a) Arrest and detention

6. According to the source, both men were arrested and detained in the context of the military coup of July 2013 that led to the overthrow of the President and the subsequent crackdown on members of the Muslim Brotherhood and its affiliated party.

7. The source submits that, during the night of 3 July 2013, Essam El-Haddad was arrested and forcibly disappeared by the Republican Guard along with other advisers to the former President.¹ The source states that there was no arrest warrant issued, nor was there any legal justification for his arrest at the time. He was allegedly held in incommunicado detention for one month. In mid-August 2013, Essam El-Haddad indicated that he was detained at the communications building of the Republican Guard Club in Masr al-Gaeda. On 21 December 2013, he was transferred to the Al-Aqrab section in Tora prison (a maximum security facility for political prisoners).

8. With regard to Gehad El-Haddad, the source states that he was arrested as part of a crackdown on civil engagement and political protests following the Rab'a sit-ins. Allegedly, on 17 September 2013, the Egyptian Central Security Forces conducted a raid on the apartment in which he and two other individuals were residing. The source reports that the raid was carried out without prior knowledge of the identity of the apartment's occupants and that at the time there were no charges laid against Gehad El-Haddad, nor was there probable cause or any warrant issued for his arrest. After his arrest, he was first transferred to Tora Liman prison, where he was held in solitary confinement for 18 days. In January 2014, he was moved to the Al-Aqrab section, where he is currently detained.

9. Allegedly, both men have been held in indefinite solitary confinement since their arrest, although Gehad El-Haddad was allowed one hour of exercise outside of his cell prior to being transferred to Al-Aqrab. The source submits that solitary confinement and incommunicado detention are being used punitively by the Egyptian authorities against both men.

10. The source reports that the men's family members are rarely permitted to communicate with them and that the men have not been allowed to challenge their detention through a writ of habeas corpus nor have they been informed of when their detention will end.

11. Moreover, the source explains that both men have been denied critical medical care and face ongoing dire health consequences as a result of the conditions of their detention.

¹ See opinion No. 39/2013.

(b) Trial

12. The source explains that Essam El-Haddad has been charged, in a case known as the conspiracy with Hamas case (case No. 371 of 2013), with the following five offences: (a) “disclosing classified information regarding the defence secrets of the State”. According to the source, the prosecution submitted reports sent to Essam El-Haddad’s email, which the source states were mere summaries of newspaper articles which were publicly available; (b) “financing terrorism through the exploitation of global charities such as Islamic Relief”. According to the source, these charges are inconsistent with Islamic Relief’s membership of the United Nations Economic and Social Council and its recognition by the Government of the United Kingdom of Great Britain and Northern Ireland of its excellence in financial transparency; (c) “transferring six billion dollars to a bank in the Gaza Strip in June 2013”. The source claims that the prosecution provided no evidence in support of this charge and states that Egypt did not have this amount of money during the relevant period of time and that Egyptian law provides that any international bank transfers of more than US\$ 10,000 be subject to the supervision of the Central Bank of Egypt; (d) “sharing intelligence with the Islamic Republic of Iran”. According to the source, this charge was brought in relation to an article published in a British newspaper claiming that Essam El-Haddad had met with the Iranian Revolutionary Guard. He had filed a complaint stating that the story was false; (e) “sharing intelligence with Israel and Western countries”. According to the source, this charge was based on Essam El-Haddad’s communications with foreign organizations including an Arab world and Europe dialogue organized by the United Nations Alliance of Civilizations and a United Kingdom think tank. The think tank has condemned the charges in a statement.

13. With regard to Gehad El-Haddad, the source states that he was added as a defendant in two different cases after his arrest. In one, known as the Rab’a operations room case (case No. 317/2013), he was accused of spreading lies and trying to cause chaos. The evidence against him included interviews he conducted with foreign media. He was found guilty of speaking with journalists on 11 April 2015 and was sentenced to life in prison. The verdict was appealed and the retrial began on 1 March 2016. On 8 May 2017, Gehad El-Haddad was acquitted of all charges. In the second case (case No. 371 of 2013), Gehad El-Haddad is accused of affiliating with an outlawed group as well as “communicating with the West against the national security of Egypt”. Gehad El-Haddad’s formal visit to Norway with an Egyptian multiparty delegation in April 2011 is cited as the evidence for this accusation. Additional evidence presented against Gehad El-Haddad included communications with a United Kingdom-based think tank that conducts projects with the United Nations Alliance of Civilizations.

14. The source indicates that Essam El-Haddad was sentenced to life in prison in June 2015. That decision was overturned in 2016 by the Court of Cassation and it was decided in 2017 that that case would be retried, beginning on 31 March 2018. In the retrial, Gehad El-Haddad was convicted and sentenced to life in prison. That judgment was subsequently appealed and on 8 May 2017, he was acquitted of all charges in this case.

15. The source reports that Gehad El-Haddad was found guilty in June 2015 and sentenced to life in prison along with 37 others, including his father. That decision was overturned in 2016 by the Court of Cassation and it was decided in 2017 that that case would be retried, beginning on 31 March 2018.

16. The source raises numerous due process and fair trial concerns in regard to the arrest, detention and trial of Essam El-Haddad and Gehad El-Haddad. Firstly, the source points out that Essam El-Haddad was charged retroactively, based on his membership of the Muslim Brotherhood and his association with an opposition party, neither of which were banned at the time of his disappearance and detention. Even if the Court of Cassation overturned Essam El-Haddad’s guilty verdict in 2016, he remains in pretrial detention, and despite his acquittal, a decision was made to retry the case. With regard to Gehad El-Haddad, as explained above, he was retroactively added to two cases associated with the Rab’a sit-ins and membership of the Muslim Brotherhood. As for his father, despite his acquittal, he remains in pretrial detention.

17. Moreover, the source states that some of the members of the judiciary in Egypt are ideologically biased against activists who led the revolutionary process in Egypt. This bias can be illustrated by the mass sentencing of persons based on their political party affiliations, including Gehad El-Haddad for organizing opposition protests.

18. The source also states that the two individuals, as is the case for other political opponents, have been held in a soundproof glass box when appearing in court. It is reported that they have been able to communicate with their family members present only with basic sign language, as Essam El-Haddad and Gehad El-Haddad can barely see out and cannot hear through the glass.

19. The source also reports that Essam El-Haddad was prevented from seeking counsel until March 2014 and has been able to meet with his lawyer in person only once in the last five years. Similarly, Gehad El-Haddad has been prevented from meeting his lawyer numerous times, and when he does, the meetings usually last less than 10 minutes. Moreover, although the two individuals have been able to secure a lawyer of their choosing, the climate of fear and reprisals against lawyers in Egypt has driven them to switch lawyers three times. This is due to the fact that the lawyers want to avoid association with the two individuals because they risk seriously jeopardizing their own safety and their ability to practise law. The frequent periods during which the two men have had no legal counsel and their extremely limited and inadequate communication with legal counsel has severely impeded their enjoyment of due process rights. Moreover, both individuals are being prosecuted in locations controlled by the Ministry of the Interior, and no written judgments have been provided to their counsel or the public providing a rationale for their continued detention.

20. With regard to the pretrial detention, the source states that the prosecution has not presented sufficient evidence against either Essam El-Haddad or Gehad El-Haddad for them to be charged. Moreover, their right to communicate with their family when they were transferred to another prison was not upheld.

21. Furthermore, the source claims that the failure of Egypt to provide adequate food, sanitation and access to medical care violates the men's right to health. The source explains that the prison authorities are aware of their medical issues, but both men are persistently and unlawfully denied access to medical care.

22. In addition, the source considers that the treatment of the two individuals constitutes torture on the basis that they have been held in indefinite solitary confinement for a period of years in inhumane conditions, including being forced to sleep on the floor in cells without proper lighting or ventilation and being provided with insufficient food. It is clear that the treatment of Essam El-Haddad and Gehad El-Haddad by the Egyptian authorities falls far below the minimum standards provided by international and Egyptian law, and is endangering their lives.

(c) Legal analysis

23. The source submits that the detention of Essam El-Haddad and his son Gehad El-Haddad constitutes arbitrary deprivation of liberty under categories I, II, III and V of the Working Group's methods of work.

(i) Category I

24. According to the source, there is no legal basis for the continued pretrial detention of the two individuals, which violates international law. Moreover, the charges against them violate the principle of non-retroactivity.

25. Firstly, the source claims that Essam El-Haddad was detained and forcibly disappeared on the night of the former President's ouster and was held incommunicado for approximately one month. No charges were presented during that time justifying his detention or his arrest. Additionally, the source states that, although many of the charges against Essam El-Haddad involve crimes against public order and the national interest, these charges were brought retroactively and could therefore not have been the basis for his arrest. As an illustration, the authorities reportedly found an incriminating email containing

a receipt of money transfer sent by Essam El-Haddad, 10 days after his disappearance. Yet, Essam El-Haddad was stripped of all of his belongings at the time of his detention and had no access to his email. This demonstrates the arbitrariness of his detention and the State's fabrication or acceptance of fabricated evidence in an attempt to retroactively charge Essam El-Haddad. Moreover, at the time of his conviction and sentence to life imprisonment on 16 June 2015, he had never been presented before the prosecution. With regard to the charges relating to the conspiracy with Hamas case, Essam El-Haddad was never interrogated at all. As such, there is no legal basis for his continued detention. Likewise, Gehad El-Haddad was arrested as part of a sweep of the Cairo neighbourhood he was living in at the time. There were no charges against him at the time of his arrest and detention. Indeed, Gehad El-Haddad was not charged with any crime until after his arrest.

26. Secondly, the source alleges that the charges against Gehad El-Haddad are based on overbroad and vague provisions. Gehad El-Haddad is being charged with harming public order, as are thousands of Egyptians following the mass arrests after 14 August 2013. His pretrial detention is allegedly justified on the grounds that if released, he would harm public order. According to the source, this rationale is used regularly against opposition members and is rarely supported by any evidence. In Gehad El-Haddad's case, the evidence against him was found insufficient for a conviction, as his convictions were overturned. It is clear that threat to public order as a basis for pretrial detention is applied without distinction or individualized assessment based on substantiated evidence. Additionally, the source recalls that pretrial detention should be used in exceptional circumstances and that persons arrested should be promptly brought before a judge and referred to trial within a reasonable time. Therefore, the source alleges that Essam El-Haddad and Gehad El-Haddad's continued detention beyond the two-year maximum violates these norms, as well as article 143 of the Code of Criminal Procedure, which provides that a suspect can be kept in pretrial detention only on an exceptional basis for a maximum of two years. Essam El-Haddad and Gehad El-Haddad have been in pretrial detention since 2013, and as such should have been released in 2015.

27. Thirdly, the source claims that the charges brought against Essam El-Haddad and Gehad El-Haddad, which fall within the 2015 antiterrorism law, are being applied retroactively, which is illegal under both the domestic law of Egypt² and international law. In particular, the source argues that the charges related to their membership of the Muslim Brotherhood violate the principle of non-retroactivity. The Muslim Brotherhood was not banned until 13 September 2013, a month after both individuals were detained. Furthermore, the Government did not designate the Muslim Brotherhood a terrorist organization until 25 December 2013, several months after both individuals allegedly committed the crime of joining the group. Therefore, any application of the court decision that banned the Muslim Brotherhood and any application of the designation of the group as a terrorist organization retroactively is per se illegal and cannot lawfully be the basis for their detention.

28. The source alleges that the Government has failed to provide any legal basis justifying the two individuals' initial arrest and their continued detention. Furthermore, the pretrial detention law of Egypt does not meet international standards, as it gives the authorities too much discretion and is overly broad. Moreover, the authorities are likely relying on charges that were not crimes at the time of their commission, which violates the State's duties and obligations under international and domestic law.

(ii) Category II

29. The source submits that the detention is arbitrary because it violates the right to freedom of expression and of assembly of Gehad El-Haddad, as well as the rights of both individuals to be free from torture and other inhuman and degrading treatment.

² Article 95 of the Constitution.

30. The source states that Gehad El-Haddad's role as a media spokesperson is the basis for the charges against him. As such, the charges related to the exercise of his right to freedom of expression are arbitrary.

31. Moreover, the source reports that Essam El-Haddad has been held in prolonged and indefinite solitary confinement since December 2013. He has been forced to sleep on the floor of his solitary cell and is confined there for more than 23 hours a day. Prison authorities have regularly prevented him from buying food from the prison canteen and have prevented his family from bringing him food. He has persistently been denied access to medical care and treatment of medical problems, including surgery for a heart stent that was ordered by his doctor in September 2017.³ Even though he is currently in the hospital wing of the prison, he has not been examined by a doctor or been given the necessary course of treatment, including medication and an essential operation. The source thus argues that his conditions of detention are inadequate, cruel and degrading and may constitute torture, given the State's persistent failure to provide medical care. Similarly, the source reports that Gehad El-Haddad is in danger of dying and must be transferred to a hospital. After his arrest, he was held in solitary confinement for 24 hours a day for the first 18 days of his detention. Eventually, he was allowed one hour of exercise outside his cell until January 2014, when he was again placed in indefinite solitary confinement. Additionally, he was placed in a "punishment cell" on 26 February 2017, in response to an article published in his name printed in an international newspaper. Punishment cells have no ventilation, no bed, no toilet and no light. Given the timing of Gehad El-Haddad's placement in the punishment cell, it is clear, to the source, that it was an intentional, punitive action meant to inflict suffering. As a result of his prolonged solitary confinement, Gehad El-Haddad became unable to move without a wheelchair. Moreover, Gehad El-Haddad's critically low body weight as a result of his detention conditions have left him unable to stand without assistance. On 18 March 2018, the source reports that Gehad El-Haddad was severely beaten by a National Security Agency officer and prison guards who intentionally targeted his head. Shortly after that, on 8 April 2018, prison authorities moved him to Tora Liman prison because of his mobility issues. However, on 10 May 2018, his wheelchair was confiscated while he was in court and he was returned to solitary confinement in Al-Aqrab prison. This, to the source, amounts to torture.

(iii) Category III

32. The source argues that the authorities have failed to observe international norms related to the right to a fair trial, and to family visits by holding the two men in incommunicado detention.

33. Firstly, the source alleges that, like many political prisoners, both individuals have been held in soundproof glass boxes when appearing in court. In those circumstances, communication with their family has been limited to basic sign language, as they can barely see out and cannot hear through the glass. Moreover, neither they nor their counsel have seen any official documents or evidence from the Government of Egypt explaining the reasons for their arrest and detention, or any formal charges against them. As such, they are unable to meaningfully challenge their ongoing temporary detention and are unable to even contemplate preparing a defence to any potential charges that may be levelled against them. Furthermore, the two individuals have not been afforded the right to the presumption of innocence. Since their arrest, they have effectively been tried in the court of public opinion by virtue of their ongoing detention and the practice of holding them in a soundproof glass box when appearing in court. Their prolonged detention without trial and the extraordinarily severe conditions of that detention are also manifestations of the denial of the presumption of innocence, since the Government attempts to justify them on the grounds that the two men are a threat to national security.

34. Secondly, the source reports that Essam El-Haddad has been in prolonged and indefinite solitary confinement since December 2013. For the first month of his detention

³ The source explains that Essam El-Haddad has suffered four heart attacks while in detention and continues to suffer from a number of serious medical conditions.

his whereabouts were unknown to his family and his lawyer. His family has been denied visits permanently since October 2016. Gehad El-Haddad has been in indefinite solitary confinement since his arrest on 17 September 2013. According to Gehad El-Haddad and his family, after his arrest, he was held in solitary confinement for 24 hours a day for the first 18 days of his detention. Eventually he was allowed an hour of exercise outside his cell until January 2014, when he was again placed in indefinite solitary confinement. There is also evidence that the prison authorities are utilizing incommunicado detention against Gehad El-Haddad punitively and well in excess of lawful and common practice. For instance, both Gehad El-Haddad and Essam El-Haddad have been prevented from seeing each other in contradiction to the Egyptian prison law on family reunion, even though the distance between Essam El-Haddad and Gehad El-Haddad's cells is approximately 10 meters. The prison guards intentionally covered the small slots on the cell doors to prevent Gehad El-Haddad and Essam El-Haddad from seeing each other even by accident, which also prevents them from communicating with other prisoners or guards. Gehad El-Haddad's right to family visits is also routinely disrupted and frequently prevented altogether. For instance, he was denied family visits from September 2016 to August 2017. Visitation then resumed for 10 minutes per visit. However, since March 2018, prison authorities have not allowed Gehad El-Haddad to see his family except for through a glass enclosure when he appears in court, when they can communicate only by means of basic hand signals.

35. Because of these conditions, Essam El-Haddad and Gehad El-Haddad are suffering severe mental and emotional stress. However, the extent of their suffering is unknown as they are not permitted regular contact with the outside world. Given their documented severe and life-threatening medical issues, this makes them particularly vulnerable to cruel, inhuman and degrading treatment and to torture. Moreover, holding Essam El-Haddad and Gehad El-Haddad incommunicado violates their fundamental right to communicate with their family and is therefore arbitrary.

(iv) Category V

36. The source claims that the deprivation of the two individuals' liberty is arbitrary under category V because their detention and arrest were directly related to their membership of the Muslim Brotherhood and their participation in an opposition party. Essam El-Haddad was forcibly disappeared along with the former President and other presidential advisers. He was responsible for foreign relations and international cooperation. Gehad El-Haddad had been an active member of the Freedom and Justice Party, to which the former President belonged. He contributed to the Party's Renaissance Project, which focused on long-term economic recovery for Egypt. After the military coup and deposition of the former President, Gehad El-Haddad acted as the chief media spokesperson for the Muslim Brotherhood before and during the Rab'a sit-in and massacre until he was arrested in September 2013.

37. After the ouster of the former President in early July 2013, the Government launched an intense campaign of arrest and detention largely focused on members and sympathizers of the Muslim Brotherhood. Police also arrested the majority of the high-level and much of the mid-level leadership both of the Muslim Brotherhood and of its political party, the Freedom and Justice Party, including figures exclusively involved in politics and communications, such as Gehad El-Haddad.

38. Therefore, the source argues that the deprivation of the two individuals' liberty was based on discrimination against their political opinion, their membership of the Muslim Brotherhood and their participation in the Freedom and Justice Party, an arbitrary violation that falls under category V.

Response from the Government

39. On 28 May 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 29 July 2019, detailed information about the current situation of Essam and Gehad El-Haddad and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Essam and Gehad El-Haddad's physical and mental integrity.

40. The Working Group regrets that it did not receive a response from the Government to that communication, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

41. 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.

42. 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 (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.

43. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international and regional instruments.⁴ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.⁵

Category I

44. The Working Group will first consider whether there have been violations under category I, which concerns deprivation of liberty without any legal basis being invoked.

45. The source submits, and the Government does not contest, that Essam and Gehad El-Haddad were not presented with an arrest warrant or informed of the reasons for their arrest at the time of their arrests on 3 July 2013 and 17 September 2013 respectively, and that they were not promptly informed of any charges against them.

46. The Working Group recalls that the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, is procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation of liberty under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁶ The Working Group finds no valid grounds, such as arrest in flagrante delicto, to justify an exception to this principle in the present case.

47. The Working Group also finds that, in order to invoke a legal basis for deprivation of liberty, the authorities should have informed Essam and Gehad El-Haddad of the reasons for their arrest, at the time of arrest, and of the charges against them promptly. Their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant, as well as principle 10 of the Body of Principles, and renders their arrest devoid of any legal basis.⁷

48. The source further maintains, and the Government again does not dispute, that Essam El-Haddad was disappeared and held incommunicado for the first month of his

⁴ General Assembly resolution 72/180, fifth preambular paragraph; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; and Human Rights Council resolutions 6/4, para. 1 (a), and 10/9.

⁵ Opinions No. 1/1998, para. 13, No. 5/1999, para. 15, No. 1/2003, para. 17, No. 94/2017, para. 47, and No. 76/2017, para. 49.

⁶ For example, opinions No. 76/2017, para. 55, No. 38/2018, para. 63, No. 47/2018, para. 56, No. 51/2018, para. 80, No. 63/2018, para. 27, No. 68/2018, para. 39, and No. 82/2018, para. 29.

⁷ See also articles 14 (3) and 16 (1) of the Arab Charter on Human Rights.

detention. Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned or to acknowledge their detention, lacks any valid legal basis under any circumstance and is inherently arbitrary as it places the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.⁸

49. The Working Group also notes that neither Essam nor Gehad El-Haddad were brought promptly before a judge, within 48 hours of their arrest barring absolutely exceptional circumstances, in accordance with international standards,⁹ or afforded the right to take proceedings before a court so that it may decide without delay on the lawfulness of their detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights, articles 2 (3) and 9 (1), (3) and (4) of the Covenant and principles 11, 32 and 37 of the Body of Principles.¹⁰ In addition, the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37) indicate that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society (paras. 2–3). This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.¹¹

50. Moreover, the Working Group considers that Essam and Gehad El-Haddad's prosecution under the antiterrorism law for their membership of the Muslim Brotherhood, which was first banned on 13 September 2013 and later designated as a terrorist organization on 25 December 2013, which is after their arrest, does not meet the principle of legality under article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant.¹² The pretrial detention or imprisonment predicated on such retroactive application of the law is devoid of legal basis.

51. The Working Group therefore considers that Essam and Gehad El-Haddad's deprivation of liberty lacks a legal basis and is thus arbitrary, falling under category I.

Category II

52. The Working Group recalls that the rights to freedom of movement and residence, freedom to seek asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, legal equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities are among the most fundamental human rights, deriving from the inherent dignity of the human person, reaffirmed and ensured by the international community in 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.

53. The source alleges, and the Government does not contest, that Essam and Gehad El-Haddad were arrested as a result of their prominent roles in the Morsi Government that was ousted by the coup d'état of 3 July 2013. Their political thoughts and expression, as well as their membership of the outlawed Muslim Brotherhood, made them the target of persecution by the new military rulers. In Gehad El-Haddad's case, his part in the anti-coup sit-in at Rab'a square also weighed in in his arrest and trial.

⁸ General Assembly resolution 47/133. See also opinion No. 82/2018, para. 28, and article 5 of the African Charter on Human and Peoples' Rights and article 22 of the Arab Charter on Human Rights.

⁹ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 33, citing *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), paras. 7.3–7.5. See also CCPR/C/79/Add.89, para. 17, CCPR/C/SLV/CO/6, para. 14, CCPR/CO/70/GAB, para. 13, and opinions No. 57/2016, paras. 110–111, No. 2/2018, para. 49, No. 83/2018, para. 47, No. 11/2019, para. 63, and No. 30/2019, para. 30.

¹⁰ See also article 6 of the African Charter on Human and Peoples' Rights and articles 12, 14 (1), (5) and (6) and 23 of the Arab Charter on Human Rights.

¹¹ Opinion No. 39/2018, para. 35.

¹² See also articles 6 and 7 (2) of the African Charter on Human and Peoples' Rights and article 15 of the Arab Charter on Human Rights.

54. Essam and Gehad El-Haddad's cases appear to fit the pattern of systematic, widespread and grave violations of fundamental human rights directed against the senior figures of the ousted Government of Mohamed Morsi and their real or perceived fellow supporters, as identified by the Working Group in a series of cases brought to its attention.¹³

55. While the exercise of rights or freedoms is not without limitation, article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to the exercise of one's rights and freedoms must be for the purposes of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Articles 18 (3), 19 (3), 21 and 21 (2) of the Covenant similarly enumerate a number of legitimate limitations in an exhaustive manner.

56. In the present case, the Government has not provided any justification for its interference with Essam and Gehad El-Haddad's exercise of their fundamental human rights by depriving them of their liberty.

57. The Working Group is therefore of the opinion that Essam and Gehad El-Haddad's deprivation of liberty is arbitrary, falling within category II, as it violated articles 18, 19, 20 (1) and (2) and 21 (1), (2) and (3) of the Universal Declaration of Human Rights and articles 18 (1), 19 (1) and (2), 21, 22 (1) and 25 of the Covenant.

Category III

58. Given its finding that Essam and Gehad El-Haddad's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that their trials should never have taken place. However, as the trials did take place, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were of such gravity as to give their deprivation of liberty an arbitrary character so that it falls within category III.

59. The Working Group notes that the authorities failed to respect Essam and Gehad El-Haddad's right to legal assistance at all times, which is inherent in the right to liberty and security of person, or their right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant. Their interrogation without the presence of their lawyers deprived them of their right to legal counsel at the critical stage of criminal proceedings and removed effective checks against coercive means used to extract confession. They were denied access to legal counsel both throughout and also after the trial. The Working Group therefore finds serious violations of articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (b) and (d) of the Covenant.¹⁴

60. The Working Group also considers that the vague provisions of the antiterrorism law cannot qualify as *lex certa* and could be used to deprive individuals of their liberty without a specific legal basis and violate the due process of law underpinned by the principle of legality, as stipulated in article 11 (2) of the Universal Declaration of Human Rights and article 15 (1) of the Covenant.¹⁵ As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.¹⁶

¹³ See opinions No. 39/2013, No. 10/2014, No. 35/2014, No. 14/2015, No. 17/2015, No. 49/2015, No. 52/2015, No. 53/2015, No. 6/2016, No. 7/2016, No. 41/2016, No. 30/2017, No. 78/2017, No. 27/2018 and No. 87/2018.

¹⁴ See also article 7 (1) (c) of the African Charter on Human and Peoples' Rights and articles 12, 13 (1) and 16 (2) and (3) of the Arab Charter on Human Rights.

¹⁵ See also articles 6 and 7 (2) of the African Charter on Human and Peoples' Rights and article 15 of the Arab Charter on Human Rights.

¹⁶ Opinion No. 62/2018, para. 57.

61. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give Essam and Gehad El-Haddad's deprivation of liberty an arbitrary character that falls within category III.

Category V

62. The Working Group will now examine whether Essam and Gehad El-Haddad's deprivation of liberty constitutes illegal discrimination under international law for the purpose of category V.

63. The Working Group notes that Essam and Gehad El-Haddad are prominent members of the Muslim Brotherhood who served under the ousted Morsi regime. Neither the source nor the Government disputes that they have been arrested, tried and sentenced for their membership of and activities in that organization. The Working Group is also aware from its jurisprudence about the collective punishment meted out by the Government and courts over the past six years to the real or perceived members of the outlawed Muslim Brotherhood, including senior figures from the Morsi administration. The series of publicized, mass trials also leaves no doubt about the collective nature of punishment.¹⁷

64. The Working Group is thus of the view that guilt by association and discrimination by the Government on the basis of political opinion that aims at ignoring the equality of human beings is the only plausible explanation for Essam and Gehad El-Haddad's arrest, detention and imprisonment.

65. For these reasons, the Working Group considers that Essam and Gehad El-Haddad's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant on the grounds of discrimination based on their association with the Muslim Brotherhood while in power. Their deprivation of liberty therefore falls under category V.¹⁸

66. The Working Group expresses its concern at the allegations of ill-treatment, including solitary confinement and poor detention conditions, in violation of articles 5 and 25 (1) of the Universal Declaration of Human Rights and articles 7 and 10 (1) of the Covenant.¹⁹ The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for further consideration.

67. The Working Group notes the allegations made by the source concerning Essam and Gehad El-Haddad's medical issues and the fact that they are denied access to medical care. The Working Group wishes to remind the Government that, in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect to the inherent dignity of the human person and that denial of medical assistance constitutes a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular rules 24, 25, 27 and 30. The Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

68. The Working Group notes that the present opinion is only one of many opinions in the past six years in which the Working Group finds the Government to be in violation of its international human rights obligations.²⁰ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in Egypt, which, if it continues, may amount to a serious violation of international law.²¹ The duty to comply with international

¹⁷ Opinion No. 87/2018, para. 79.

¹⁸ See also article 2 of the African Charter on Human and Peoples' Rights and article 3 (1) of the Arab Charter on Human Rights.

¹⁹ See also article 5 of the African Charter on Human and Peoples' Rights and article 8 (1) of the Arab Charter on Human Rights.

²⁰ See, for example, opinions No. 6/2016, No. 7/2016, No. 41/2016, No. 42/2016, No. 54/2016, No. 60/2016, No. 30/2017, No. 78/2017, No. 83/2017, No. 26/2018, No. 27/2018, No. 47/2018, No. 63/2018, No. 82/2018, No. 87/2018, No. 21/2019 and No. 29/2019.

²¹ Opinion No. 47/2018, para. 85.

human rights standards that are peremptory and *erga omnes* norms, such as the prohibition of arbitrary deprivation of liberty, rests with all State organs, officers and agents, as well as all other natural and legal persons.²² The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.²³

Disposition

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

The deprivation of liberty of Essam El-Haddad and Gehad El-Haddad, being in contravention of articles 2, 3, 6, 7, 8, 9, 10, 11, 18, 19, 20 (1) and (2), 21 and 25 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 10 (1), 14 (1), (2) and (3) (a), (b), (d) and (g), 15 (1), 16, 18 (1), 19 (1) and (2), 21, 22 (1), 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

70. The Working Group requests the Government of Egypt to take the steps necessary to remedy the situation of Essam and Gehad El-Haddad without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

71. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Essam and Gehad El-Haddad immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

72. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Essam and Gehad El-Haddad and to take appropriate measures against those responsible for the violation of their rights.

73. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, for appropriate action.

74. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

75. 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 Essam and Gehad El-Haddad have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Essam and Gehad El-Haddad;

²² The domestic political and judicial organs are under a positive obligation to ensure an effective remedy and reparation for violations of international human rights law by removing the statute of limitations, sovereign immunity, *forum non conveniens* doctrine or other procedural obstacles to redress in such cases through legislative or judicial action. For example, opinion No. 52/2014, para. 51. See also CAT/C/CAN/CO/6, para. 15, and CAT/C/CAN/CO/7, paras. 40–41.

²³ A/HRC/13/42, para. 30, and, e.g., opinions No. 32/2017, para. 40, No. 33/2017, para. 102, No. 36/2017, para. 110, No. 51/2017, para. 57, and No. 56/2017, para. 72.

(c) Whether an investigation has been conducted into the violation of Essam and Gehad El-Haddad'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 Egypt with its international obligations in line with the present opinion;

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

76. 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.

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

78. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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.²⁴

[Adopted on 14 August 2019]

²⁴ Human Rights Council resolution 33/30, paras. 3 and 7.