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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. 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 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 or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in

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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 rights (category V).

Submissions

Communication from the source

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

(a) Khalafalla Alafif Mukhtar, born in 1956, a Sudanese human rights defender and director of TRACKS;

(b) Arwa Elrabie, administrative manager of TRACKS;

(c) Nudaina Kamal, staff of TRACKS;

(d) Imany Leyla Raye, a national of Cameroon, working as a volunteer with TRACKS;

(e) Midhat Afifi Hamdan, staff of TRACKS;

(f) Al-Shazali Ibrahim El-Shiekh, staff of TRACKS;

(g) Khuzaini Elhadi Rajab, staff of TRACKS;

(h) Alhassan Kheiri, computer technician at TRACKS;

(i) Mustafa Adam, director of Al-Zarqa organization for rural development (ZORD);

(j) Adil Bakheit, born 8 July 1966, a Sudanese human rights defender, member of the Board of Trustees of Sudanese Human Rights Monitor (SHRM) — a Khartoum-based human rights group affiliated with the Confederation of Sudanese Civil Society Organizations, which documents human rights violations in the Sudan, provides legal assistance to victims of State-abuse and defends minorities in the Sudan.

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

6. Messrs. Mukhtar and Bakheit were arrested following the raid and were charged in March and May 2015, respectively. Both of them faced seven charges under the Criminal Act of 1991, including joint act in the execution of criminal conspiracy (art. 21), criminal conspiracy (art. 24), undermining the constitutional system (art. 50), waging war against the State (art. 51), calling for opposition to public authority by use of violent or criminal force (art. 63), publication of false news (art. 66) and impersonating a public servant (art. 93). Of

these seven charges, “undermining the constitutional system” (art. 50) and “waging war against the State” (art. 51) are considered crimes against the State and punishable by the death penalty.

7. Mr. Mukhtar was detained for one day and was released on bail. Mr. Bakheit was released on bail on 3 June 2015.

8. On 10 February 2016, Mr. Mukhtar received a telephone call from the NISS Prosecution Office for Crimes against the State. He was informed by the prosecutor that after examining the five laptops that were confiscated and the server of the centre for 11 months, they had not found any evidence to support the charges made against him and had therefore decided to drop the case. The prosecutor also informed him that NISS had two weeks to appeal the decision of the Prosecution Office. If NISS did not appeal the decision within the time frame, then Mr. Mukhtar should come to the NISS Prosecution Office and collect the laptops and the server.

9. On 29 February 2016, the premises 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 the passports of staff members — which have not yet been returned — and referred the staff members 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.

10. With regard to the raid of the premises of TRACKS on 29 February 2016 and the questioning and detention of 10 individuals, including Mr. Mukhtar, a joint urgent appeal 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 Sudan on 5 April 2016. Regrettably, no response has been received to this joint urgent appeal.

11. On 19 May 2016, Messrs. Mukhtar and Bakheit were summoned verbally by telephone. The caller is believed to have been from NISS. They were told to come to court at 10 a.m. and 11 a.m. respectively on 22 May 2016. Neither of them received a written summons. After receiving the telephone calls, the two individuals realized that perhaps the case from 2015 had not been dropped.

12. On 22 May 2016, Messrs. Mukhtar and Bakheit attended the court hearing at 10 a.m. They were informed that the trial was postponed to 8 June 2016. Mr. Bakheit left the court and went home.

13. Mr. Mukhtar left the court and went to the NISS office to join his colleagues, Mses. Kamal, Elrabie and Raye, and Messrs. Adam, Hamdan, Rajab, Kheiri and El-Shiekh, as they had all been summoned to the NISS office on the same day.

14. The aforementioned individuals arrived at the NISS office in Khartoum at approximately 11 a.m. They were there for four hours without being asked any questions or without being informed as to why they had been summoned. At around 3 p.m., the group was transferred to the NISS Prosecution Office for Crimes against the State located in Street No. 51 in the Al-Amarat neighbourhood of Khartoum. Upon arrival there, they realized that they were under arrest. No arrest warrant was presented to them. Ms. Kamal was released the same day, as she was on maternity leave.

15. The arrest and detention of Mr. Mukhtar is believed to be related to his participation in the workshop on social responsibility that was held in March 2015 at the premises of TRACKS. No reason was provided for the arrest and detention of the other individuals.

16. The male detainees were held in an overcrowded cell that was very hot as it had only basic ventilation and one window. They were allowed to use the bathroom twice a day, once at 6 a.m. and again at 6 p.m. No one was allowed to use the toilet between those hours. They urinated in empty water bottles and slept sitting with their backs against the wall because there are 25 men in a 15 square-metre cell. The authorities provided them with sandwiches twice a day, but the detainees had to get drinking water, tea and coffee for themselves. Family visits were severely restricted. Most of the time, family members could not obtain permission from the chief prosecutor to visit detainees.

17. Mses. Elrabie and Raye were held under guard in the reception area of the NISS Prosecution Office during the day and allowed to sleep in one of the offices on the premises at night.

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

19. Ms. Kamal was released on 22 May 2016; Mses. Elrabie and Raye were released on 30 May 2016; Messrs. Rajab, Kheiri and El-Shiekh were released on 7 June 2016. No charges were brought against any of them.

20. The trial concerning Messrs. Mukhtar and Bakheit, which was postponed to 8 June 2016, was again postponed to 18 July 2016.

21. At the time of submission of the present communication, Messrs. Mukhtar, Adam and Hamdan were still in detention. None of them has been informed of the grounds for their detention. Mr. Mukhtar's health is reported to be deteriorating rapidly owing to a heart condition.

22. The source submits that the continued deprivation of liberty of Mr. 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. The source argues that the arrest and deprivation of liberty of Mr. Mukhtar are the result of his exercising his rights to freedom of expression and freedom of peaceful assembly and of association guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights and articles 19 and 21 of the International Covenant on Civil and Political Rights. More specifically, the source submits that the arrest and deprivation of liberty of Mr. Mukhtar relate to his work at TRACKS and, in particular, the workshop on social responsibility and active citizenship that was held in March 2015.

23. The source also submits that the continued deprivation of liberty of Messrs. Adam and Hamdan, the deprivation of liberty of Ms. Elrabie and Ms. Raye between 22 and 30 May 2016, and the deprivation of liberty of Messrs. Rajab, Kheiri and El-Shiekh between 22 May and 7 June 2016 are arbitrary and fall under category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. The source is of the view that the above-mentioned individuals are being or were detained without any legal basis, in violation of article 9 of the International Covenant on Civil and Political Rights.

Response from the Government

24. On 17 June 2016, the Working Group transmitted the source's allegations to the Government through its regular communication procedure. The Working Group requested the Government to provide detailed information by 16 August 2016 about the current situation of the above-mentioned individuals and any comments on the source's allegations.

The Working Group also requested the Government to clarify the factual and legal grounds justifying the detention of the above-mentioned individuals and to provide details regarding the conformity of the legal proceedings with international human rights treaties to which the Sudan is a party.

25. The Working Group regrets that it did not receive a reply from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work. Further to paragraph 15 of its methods of work, in the absence of a reply from the Government, the Working Group may render an opinion on the basis of information obtained from the source.

Discussion

26. In its jurisprudence, the Working Group has established the ways in which it deals with evidentiary issues.¹ If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof rests upon the Government if it wishes to refute the allegations. In the present case, the Government has not rebutted the prima facie credibility of the allegations made by the source. Hence, the Working Group accepts the information submitted by the source as reliable.

Arrest without warrant

27. The Working Group notes that 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 were arrested on 22 May 2016. An arrest warrant was not presented to them and they were not informed of the reasons for their arrest.

28. In addition to being bound by article 9 of the Universal Declaration of Human Rights, which proscribes arbitrary arrest and detention, Sudan has also ratified the International Covenant on Civil and Political Rights. Pursuant to article 9 (2) of the Covenant, States parties agree that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest. Messrs. El-Shiekh, Kheiri, Mukhtar, Rajab, Hamdan and Adam, and Ms. Elrabie, Raye and Kamal were not informed, at the time of their arrest, of the reasons for their arrest, therefore, in the Working Group's view, Sudan has breached its obligations under article 9 (2) of the Covenant.

29. Owing to the fact that they were not informed of the reasons for their arrest and no arrest warrant was presented to them at the time of their arrest, the Working Group is of the view that the arrest of the nine aforementioned individuals on 22 May 2016 is a violation by the Sudan of its obligations under the Covenant.

30. For those reasons, the Working Group considers that the deprivation of liberty of the nine aforementioned individuals is arbitrary and falls under category I of the arbitrary detention categories to which it refers when considering cases submitted to it.

Detention without charge

31. After being arrested without a warrant, the nine individuals were detained for various lengths of time without being informed of the charges against them. The Working Group considers that, as at June 2016, Messrs. Adam, Hamdan and Mukhtar were still in detention without charge, since 22 May 2016; that Ms. Elrabie and Raye were detained without charge between 22 and 30 May 2016; and that Messrs. Rajab, Kheiri and El-Shiekh were detained without charge between 22 May and 7 June 2016.

¹ See, for example, A/HRC/19/57, para. 68.

32. The International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights specifically state that no one shall be deprived of their liberty in an arbitrary manner. Article 9 (2) of the Covenant 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. The Working Group emphasizes that individuals who are not informed of the charges against them are denied the opportunity to defend themselves.

33. In the Working Group's view, the detention without charge of the nine aforementioned individuals by the authorities of the Sudan constitutes a violation by the Sudan of its obligations under the Covenant.

34. Such detention, combined with the above-mentioned arrest conditions, falls under category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Detention resulting from exercise of the rights to freedom of expression and assembly

35. The Working Group considers that the nine individuals were arrested by the Sudanese authorities because of their involvement in organizing training on social responsibility and active citizenship.

36. Article 19 (2) of the International Covenant on Civil and Political Rights imposes on States parties the responsibility 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 Universal Declaration of Human Rights imposes similar obligations.

37. Arresting and detaining the individuals concerned for exercising their lawful rights under article 19 of the Covenant and article 19 of the Declaration constitute a severe violation by the Sudan of its obligations under the treaty and under customary law and fall under category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

38. The Working Group confirms that, in the light of no apparent legal justification for arresting the individuals concerned without a warrant and detaining them without charge, the Sudan has violated article 9 of the International Covenant on Civil and Political Rights and article 9 of the Universal Declaration of Human Rights, both of which require that the Sudan ensure that no one is subjected to arbitrary arrest or detention. In this regard, the Working Group considers that 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.

39. The Working Group notes that the above-mentioned arrests and detentions were not the product of isolated incidents of arbitrary deprivation of liberty concerning the victims in this case. It remains concerned about the lack of response on the part of the Sudan with regard to the raid of the office of TRACKS on 29 February 2016 and the questioning and detention of 10 individuals, and the joint urgent appeal transmitted to the Sudan by five special procedure mandate holders of the Human Rights Council.

Disposition

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

- (a) The arrest of the nine individuals 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 Universal Declaration of Human Rights and articles 9 (1) and 9 (2) of the International Covenant on Civil and Political Rights. Such deprivation of liberty is arbitrary and falls under category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it;

(b) The detention without charge of the individuals concerned is also a violation of the international norms against the arbitrary deprivation of liberty, including article 9 of the Universal Declaration of Human Rights and articles 9 (1) and 9 (2) of the International Covenant on Civil and Political Rights. Such detention is arbitrary and falls under category I of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it;

(c) The detention of the individuals concerned owing to their lawful exercise of the right to freedom of expression of opinion is a violation of article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. Such detention is arbitrary and falls under category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

41. Consequent upon the opinion rendered, the Working Group requests the Government of the Sudan to take the steps necessary to remedy the situation without delay and to bring it into conformity with the standards and principles enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and all other relevant international norms against the arbitrary deprivation of liberty.

42. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to immediately release the three individuals remaining in detention and to provide them and the other individuals who were detained with reparation for the harm suffered as a result of their arbitrary detention.

Follow-up procedure

43. 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 the individuals in detention have been released and, if so, on what date;

(b) Whether compensation or other reparations have been provided to all the individuals named in this case;

(c) Whether an investigation has been conducted into the violation of the rights of the individuals named in this case 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.

44. The Government is invited to inform the Working Group of any difficulties which 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.

45. The Working Group requests the source and the Government to provide the requested information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to undertake its own action in follow-up to

the present opinion if new concerns relating to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of the progress made in implementing its recommendations, as well as of any failure to take action.

46. The Working Group recalls the Human Rights Council's call 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 25 August 2016]

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