

Working Group on Arbitrary Detention

REFERENCE: WGAD/2020/LBY/OPN

3 June 2020

Dear Sir,

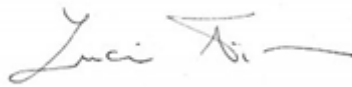
I would like to refer to the 87th session of the Working Group on Arbitrary Detention, during which the Working Group adopted several Opinions on cases of deprivation of liberty submitted to it.

In accordance with paragraph 18 of the Working Group's revised methods of work, I am sending to you, attached herewith, the text of Opinion No. 13/2020 (Libya) adopted on 1 May 2020, regarding a case submitted by you.

In conformity with its revised methods of work, the Working Group transmits its Opinions to the source of the petitions forty-eight hours after having transmitted it to the relevant Government.

This Opinion will be published on the website of the Working Group and reflected in its annual report to the Human Rights Council. In the meanwhile, we would encourage you to treat the information given to you by the Working Group on this matter with discretion.

Yours sincerely,



Lucie Viersma
Secretary
Working Group on Arbitrary Detention

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**Human Rights Council
Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary
Detention at its eighty-seventh session, 27 April 2020–1 May
2020****Opinion No. 13/2020 concerning Mustafa Taleb Younes Abdelkhalek Al
Darsi (Libya)**

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 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 15 October 2019 the Working Group transmitted to the Government of Libya a communication concerning Mustafa Taleb Younes Abdelkhalek Al Darsi. 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. Mustafa Taleb Younes Abdelkhalek Al Darsi, born in 1968, is an Islamic teacher. He works at the General Authority of Awqaf and Islamic Affairs based in Benghazi. Originally from Benghazi, he has been internally displaced as a result of the clashes between Islamist militants and the Libyan National Army during “Operation Dignity”. At the time of his arrest he was residing in Zliten, where he had found refuge.

(a) Arrest and disappearance

5. The source reports that on 9 January 2016, Mr. Al Darsi was arrested in the city of Zliten, 180 km east of Tripoli, shortly after exiting one of the city’s mosques after afternoon prayers. The arrest was conducted by members of the Special Deterrence Force, dressed in plain clothes, who forced him to get into one of their cars. They did not present an arrest warrant nor did they state any reasons for the arrest. Mr. Al Darsi was then transferred to the headquarters of the Special Deterrence Force located in Souq Al Joma near Tripoli.

6. It is submitted that Mr. Al Darsi was arrested for preaching progressive religious views contested by the Special Deterrence Force whose members, for a large part, follow a Salafist movement.

7. The source submits that the authorities did not acknowledge Mr. Al Darsi’s detention until 28 May 2016, nor did they inform his family about his fate and whereabouts. On 28 May, Mr. Al Darsi’s relatives were granted permission by the Special Deterrence Force to talk to him. He was able to inform his family that he was being detained in Souq Al Joma. In January 2018, Mr. Al Darsi was transferred to the unofficial detention centre at Mitiga airport, where he has been allowed to receive family visits on an irregular basis. However, the family has not been allowed to visit Mr. Al Darsi for the past eight months. To date, Mr. Al Darsi remains unaware of the charges against him and he has never been brought before a judicial authority. In addition, he has never been granted permission to meet with a lawyer or had the possibility to challenge the lawfulness of his detention.

8. The source reports that the force responsible for Mr. Al Darsi’s arrest is the Special Deterrence Force, which is the main security force in Tripoli acting on behalf and with the consent of the Ministry of the Interior of the Government of National Accord. Its mandate covers law enforcement operations, especially counter-narcotics, organized crime and counter-terrorism, and it carries out arrests and investigations. Its main operational areas are in the south and east of Tripoli, including some important zones such as Souq Al Joma.

9. The source notes that the Special Deterrence Force receives support, including salaries, uniforms and equipment, from the Government of National Accord, but effectively maintains its own command structures and operates with a significant level of autonomy.¹

10. According to the source, the majority of members of the Special Deterrence Force follow the Madkhali ideology, which promotes a doctrine of obedience to a sitting political authority. The members of the Force oppose the Muslim Brotherhood and all forms of political Islam, as well as the country’s more dominant Maliki school of jurisprudence. The Special Deterrence Force and Madkhali supporters in general have also been accused of carrying out sectarian attacks on the Sufi community.

11. The source recalls that in accordance with article 30, paragraph 1, of the Libyan Political Agreement, signed on 17 December 2015: “The Government of National Accord shall have full power and control over all the Libyan territory, all airports, maritime ports, land crossings and all vital installations in the Libyan State.” As such, the Government of National Accord, which is officially recognized by the United Nations, exercises governmental authority and has control over the Special Deterrence Force through the

¹ See Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Support Mission in Libya, “Abuse behind bars: arbitrary and unlawful detention in Libya” (April 2018), p. 18.

Ministry of the Interior. However, the Government of National Accord does not ensure that the Special Deterrence Force operates under judicial control, since it is not accountable to the Ministry of Justice but to the Ministry of the Interior. This lack of oversight hinders Mr. Al Darsi's right to challenge the legality of his detention.

12. According to the source, in May 2018 the Presidential Council, which presides over the Government of National Accord, announced the dissolution of the Special Deterrence Force and the establishment of an anti-organised crime and terrorism deterrence apparatus incorporated within the Ministry of the Interior. In practice, the militia remains fully operational.

13. The source notes that the positive obligation of the State to prevent and punish crimes in order to uphold its human rights duties remains intact, irrespective of whether the actions of the Special Deterrence Force can be attributed to the Government.

14. The source argues that in light of the above, the Government is responsible for the actions of the Special Deterrence Force.²

15. The source submits that Mr. Al Darsi is detained in the unofficial detention centre at Mitiga airport and is subjected to conditions of detention that amount per se to torture and other cruel, inhuman or degrading treatment or punishment. He is suffering from high blood pressure and diabetes and is denied adequate medical care. Reportedly, his health has considerably worsened since his detention. During the family visit in May 2018, he appeared extremely weak and suffered from significant weight loss. Since then, the requests for visits made by Mr. Al Darsi's relatives have been systematically refused by the prison wardens who enjoy discretionary power with regard to family visits.

(b) Analysis of violations

16. The source submits that the deprivation of liberty of Mr. Al Darsi is arbitrary and falls under categories I, II, III and V of the Working Group.

(i) Category I

17. The source submits that the arrest and detention of Mr. Al Darsi should be considered as falling under category I from the onset of the arrest to his current detention.

18. The source reports that Mr. Al Darsi was arrested by members of the Special Deterrence Force in civilian clothes, who neither presented an arrest warrant, nor explained the reasons of the arrest, in violation of articles 9 (1) and (2) of the International Covenant on Civil and Political Rights and guideline 5 of 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. Furthermore, the circumstances of his arrest do not give any reasonable cause for flagrante delicto.

19. The source recalls that guideline 1 of the Basic Principles states that any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary. Mr. Al Darsi was arrested by members of the Special Deterrence Force acting on behalf of the Ministry of the Interior. Those forces are provided with discretionary powers to arrest, interrogate and detain in non-official places of detention individuals suspected of ordinary law crimes and terrorism, without any judicial oversight.

Enforced disappearance

20. The source submits that Mr. Al Darsi was in a state of enforced disappearance from 9 January to 28 May 2016, which renders his arrest and four months in custody in secret detention prima facie arbitrary. During that period, he was denied all access to the outside world and was thus placed in a situation of enforced disappearance, as defined in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance. The source recalls that no jurisdiction should allow for individuals to be

² See opinion No. 39/2018, para. 32.

deprived of their liberty in secret for potentially indefinite periods, outside the protection of the law, without the possibility of resorting to legal procedures, including habeas corpus.

21. In the light of the above, the source argues that Mr. Al Darsi's arrest followed by four months of secret and unacknowledged detention was void of legal basis and in violation of his right to life, security and liberty, his right to be recognized as a person before the law and his right to habeas corpus.

Right to be informed of the charges

22. The source submits that Mr. Al Darsi has not yet been brought before a judicial authority nor informed of the charges against him, despite being held in custody for over two and a half years. His right to be informed promptly of the reasons for his arrest and the charges against him have therefore been denied, in violation of article 9(2) and (3) and 14 (3) of the Covenant.

Prolonged detention without a legal basis

23. The source argues that the current detention of Mr. Al Darsi for over two and a half years is arbitrary and ungrounded in law for the following reasons. Article 187 bis (b) of the Libyan Code of Criminal Procedures states that the "accused shall be referred to the Public Prosecution within seven days from his arrest. The Public Prosecution shall question the accused within three days from his referral, following which it shall order his placement in provisional detention or release". In the present case, the authorities have detained Mr. Al Darsi outside this framework and the protection of the law from the onset of the arrest. He has not yet been presented before a judicial authority nor charged with any offence, despite being held in custody for more than two and a half years. As a result, he has been denied the right to take proceedings before a court of law within the jurisdiction of the Government of National Accord in order to challenge the arbitrariness and lawfulness of his prolonged deprivation of liberty.

24. The source recalls that the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to obtain without delay appropriate remedies is a peremptory and non-derogable norm of international law.³ It applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention and detention under counter-terrorism measures.⁴ Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.⁵ In addition, the right to challenge the arbitrariness and lawfulness of one's deprivation of liberty also applies to detention by non-State actors that is authorized under national law (principle 3 of the Basic Principles).

25. According to the source, therefore, the Government of National Accord may not invoke the prevailing security situation or the operational leeway enjoyed by the Special Deterrence Force to justify any derogation from the right to habeas corpus. In the light of the above, the arrest, the four months of enforced disappearance and the prolonged detention by the Special Deterrence Force is void of any legal basis and should be considered as falling under category I.

(ii) Category II

26. The source submits that Mr. Al Darsi was arrested because of his religious beliefs, which are considered subversive by the Special Deterrence Force. He is well known for preaching a moderate Islam in line with the Maliki doctrine traditionally observed in Libya. Mr. Al Darsi's detention constitutes a means to shut down a dissenting voice on

³ See 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, principle 4, para. 4.

⁴ See Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 2. See also A/HRC/34/42, para. 22.

⁵ Ibid., para. 47 (b).

religious matters that did not conform to the Salafi-Madkhali ideology embraced by a significant number of members of the Special Deterrence Force, which consider Mr. Al Darsi's religious beliefs as "heretical". While expressing his views, Mr. Al Darsi was merely exercising his rights to freedom of thought, conscience, religion and expression guaranteed by articles 18 and 19 of the Covenant. Mr. Al Darsi's deprivation of liberty therefore results from his exercise of the aforementioned fundamental rights and should be considered as arbitrary under category II.

(iii) Category III

27. The source submits that given the severity of the violations of Mr. Al Darsi's fundamental guarantees since his arrest, any trial that may follow should be considered *prima facie* as unfair.

The right to legal assistance

28. The source recalls that principle 9 of the Basic Principles states that: "Persons deprived of their liberty shall have the right to legal assistance by counsel of their choice, at any time during their detention, including immediately after the moment of apprehension." Mr. Al Darsi has been denied access to legal assistance at all stages of his detention. He was interrogated during the initial investigation conducted by the Special Deterrence Force without the assistance of a lawyer and was further denied prison visits by his lawyer in violation of the right to legal counsel. Lawyers do not have access to the detention centre at Mitiga airport, as it is an unofficial detention facility. Furthermore, in the absence of a criminal case against him, it is impossible for Mr. Al Darsi to retain the services of a lawyer. As a result and in the event of a trial, his rights to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing enshrined in article 14 (3) of the Covenant have not been not respected.

Prolonged incommunicado detention

29. The source submits that Mr. Al Darsi was held in secret detention for four months, denied all access to the outside world and therefore put in a state of enforced disappearance. By refusing to provide any information on the fate and whereabouts of Mr. Al Darsi to his relatives, the authorities inflicted severe suffering on the victim and his family, amounting to a violation of the absolute prohibition of torture enshrined in article 7 of the Covenant. Furthermore, the failure to allow Mr. Al Darsi to notify his family of his whereabouts and to allow family visits is a violation of principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. While Mr. Al Darsi's relatives were informed of his arrest and of his place of detention on 28 May 2016, his right to contact them and to receive regular visits remains restricted. Additionally, the Libyan authorities have failed to charge and try Mr. Al Darsi in a timely manner.

The right to be tried promptly by an independent tribunal

30. The source recalls that principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that: "(1) A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law. (2) A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor. (3) A judicial or other authority shall be empowered to review as appropriate the continuance of detention."

31. The source submits that the Libyan authorities failed to observe the aforementioned rules with regard to Mr. Al Darsi's deprivation of liberty as he has been detained for more than two and a half years without due process. Considering the absence of a scheduled date for a trial in the absence of an indictment, the source argues that such delay has violated his right to be tried without undue delay enshrined in article 14 (3) (c) of the Covenant.

32. The source also recalls that in its general comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, the Human Rights Committee established that the principles of legality and the rule of law require that the fundamental

requirements of a fair trial must be respected at all times, including in times of emergency, and that includes principles such as respect for the presumption of innocence and the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention (para. 16). Consequently, the Government of National Accord may not invoke the prevailing security situation in Libya to justify derogations from the right to a fair trial.

(iii) Category V

33. The source submits that Mr. Al Darsi's arrest and the resulting violations to his fundamental rights are a consequence of his perceived political and ideological affiliation, resulting in unequal treatment before the law. Mr. Al Darsi was arrested because of his religious stance that was perceived as dissenting, which constituted the sole reason for his arrest. The source argues that he would not have been subjected to arbitrary arrest and prolonged detention without charge had he not been perceived as "heretical" by the Special Deterrence Force. His ongoing detention outside any legal framework aims to silence a dissenting voice. The source recalls that the right to bring proceedings before a court to challenge the arbitrariness and lawfulness of detention and to receive without delay accessible domestic remedies may be exercised by anyone regardless of, *inter alia*, ethnic or social origin, religion or political opinion.⁶

34. The source submits that Mr. Al Darsi's arrest and subsequent detention on religious and politically motivated grounds is not unprecedented. The Special Deterrence Force regularly conducts arbitrary arrests and abductions of people on the basis of their region of origin, perceived political opinions, profession or perceived wealth for the purpose of extraction. The Force has at times also used abduction as a means to exert political pressure on political opponents. In recent years, it has been targeting religious figures from the Maliki school of thought.

Response from the Government

35. On 15 October 2019, the Working Group transmitted the allegations made by the source to the Government of National Accord through its regular communications procedure. The Working Group requested the Government to provide, before 17 December 2019, detailed information about the current situation of Mr. Al Darsi and any comments on the source's allegations. The Working Group also called upon the Government to ensure Mr. Al Darsi's physical and mental integrity.

36. The Working Group regrets that it did not receive a response from the Government to its communication, 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.

Discussion

37. 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.

38. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

39. 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, the Covenant and other

⁶ See 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, principle 5.

applicable international and regional instruments.⁷ 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.⁸

40. As a preliminary matter, the Working Group notes that Mr. Al Darsi has been arrested and deprived of liberty by the Special Deterrence Force, a militia group nominally under the authority of the Ministry of the Interior of the Government of National Accord, which has been recognized as the sole legitimate Government of Libya by the Security Council in its resolution 2259 (2015).⁹ Further, the source contends, and the Government does not dispute, that the Special Deterrence Force is a special security unit whose members and equipment are funded by that Government, although it effectively maintains its own command structure and operates with a significant level of autonomy.¹⁰ The Working Group thus considers that it is difficult to deny that Mr. Al Darsi has been deprived of liberty by State actors or by armed groups acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government.¹¹

41. As developed in its previous opinions,¹² the Working Group notes that the above-mentioned descriptions indicate that the Special Deterrence Force must be considered a State organ, whose conduct shall be considered an act of that State under international law for the purpose of article 4 of the draft articles on responsibility of States for internationally wrongful acts, which restates customary law.¹³ Even assuming *arguendo* that the Special Deterrence Force is not an organ of the State under article 4, its conduct must be considered an act of the State under international law in accordance with article 5 of the draft articles, as it has been empowered by the law to exercise elements of governmental authority and has been acting in that capacity in the present case, most prominently by virtue of decree No. 555 (2018) of the Presidency Council, in which the Council authorizes the Special Deterrence Force to implement State security policy and combat organized crime and terrorism on behalf of the Government by arresting suspected offenders.¹⁴

42. Moreover, the positive obligation of the State to respect, protect and fulfil fundamental human rights, including personal liberty and security, by preventing and punishing their arbitrary deprivation by State or non-State actors remain intact, irrespective of whether the actions of the Special Deterrence Force can be attributed to the Government. The Working Group therefore concludes that, in the present case, the Government is fully responsible for the actions of the Special Deterrence Force under international law.¹⁵

43. In that regard, the Working Group notes the recommendation of the High Commissioner that the Government urgently address the proliferation of armed groups, including through disarmament, demobilization and reintegration, and the building of national security forces under the command and control of the State. It also notes the recommendation of the High Commissioner that the Government address the situation of

⁷ See 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.

⁸ See opinions No. 1/1998, para. 13; No. 5/1999, para. 15; No. 1/2003, para. 17; No. 76/2017, para. 49; and No. 94/2017, para. 47. .

⁹ See Opinion No. 6/2017, para. 35 and No. 39/2018, para. 26.

¹⁰ See also OHCHR and the United Nations Support Mission in Libya “Abuse behind bars: arbitrary and unlawful detention in Libya”, p. 18.

¹¹ See opinion No. 3/2016, para. 15.

¹² See, for example, opinions No. 18/2019 and No. 39/2018.

¹³ See opinion No. 6/2017, para. 37.

¹⁴ See opinion No. 39/2018, para. 31. The Special Deterrence Force has also been legally empowered to exercise elements of governmental authority when it runs one of the largest detention facilities in Tripoli at Mitiga airport.

¹⁵ See opinions No. 6/2017, para. 38 and No. 39/2018, para. 32. See principle 2 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and A/HRC/34/42, para. 22.

detainees, whether foreign or Libyan nationals, by ensuring that the State is in control of all detention facilities and that cases are screened with a view to detainees being released or charged and judged in a trial affording all procedural guarantees, in accordance with Libyan law and international standards.¹⁶

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 Mr. Al Darsi was not presented with an arrest warrant or informed of the reasons for his arrest at the time of that arrest.

46. As the Working Group has stated, in order for deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant, which was not implemented in the present case.¹⁷

47. The international human rights law on detention includes the right to be presented with an arrest warrant to ensure the exercise of effective control by a competent, independent and impartial judicial authority, which is procedurally inherent in the right to liberty and security and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights, article 9 (1) of the Covenant and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.¹⁸ The Working Group has not been presented with any valid grounds, such as arrest in flagrante delicto, to justify an exception to this principle in the present case.

48. The Working Group therefore finds that, in order to invoke a legal basis for deprivation of liberty, the authorities should have informed Mr. Al Darsi of the reasons for his arrest at the time of arrest and informed him promptly of the charges against him.¹⁹ Their failure to do so violates article 9 of the Universal Declaration of Human Rights, article 9 (2) of the Covenant and principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and renders his arrest devoid of any legal basis.

49. The Working Group also notes that Mr. Al Darsi has not yet been presented before a judicial authority in violation of article 9 (3) of the Covenant. The Working Group regards judicial oversight of the deprivation of liberty as a fundamental safeguard of personal liberty that is essential in ensuring that detention has a legal basis. Such oversight by an independent judicial authority was absent in the present case. As a result, Mr. Al Darsi's right to an effective remedy under article 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (3) of the Covenant were also violated.

¹⁶ See OHCHR and the United Nations Support Mission in Libya "Abuse behind bars: arbitrary and unlawful detention in Libya", para. 86 (a) and (c).

¹⁷ See, for example, opinions No. 93/2017, para. 44; No. 10/2018, par. 45-46; No. 36/2018, paras. 40; No. 46/2018, par. 48; No. 9/2019, para. 29; No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51.

¹⁸ The Working Group has maintained from its early years that the practice of arresting persons without a warrant renders their detention arbitrary. See, for example, decisions No. 1/1993, paras. 6-7; No. 3/1993, paras. 6 and 7; No. 4/1993, para. 6; No. 5/1993, paras. 6, 8 and 9; No. 27/1993, para. 6; No. 30/1993, paras. 14 and 17 (a); No. 36/1993, para. 8; No. 43/1993, para. 6; No. 44/1993, paras. 6-7. For more recent jurisprudence, see opinions No. 38/2013, para. 23; No. 48/2016, para. 48; No. 21/2017, para. 46; No. 63/2017, para. 66; No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; 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. See also article 14 (1) of the Arab Charter on Human Rights.

¹⁹ See, for example, opinion No. 10/2015, para. 34. See also opinions No. 32/2019, para. 29; No. 33/2019, para. 48; No. 44/2019, para. 52; No. 45/2019, para. 51; No. 46/2019, para. 51.

50. Furthermore, the Working Group recalls that pretrial detention “must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances”.²⁰ It stems from the facts however that no such assessment was done by any judicial authority, which is a further violation of article 9 (3) of the Covenant.

51. The source further maintains, and the Government does not dispute, that Mr. Al Darsi was held in prolonged incommunicado for more than four months from 9 January to 28 May 2016. 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.²¹ It also negates the right to challenge the legality of detention in violation of articles 6 and 8 of the Universal Declaration of Human Rights and articles 2 (3) and 9 (4) of the Covenant.²² The Working Group considers that judicial oversight of detention is a fundamental safeguard of personal liberty (see para. 3 of 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) and is essential in ensuring that detention has a legal basis. Given that individuals here were not able to challenge their detention, their right to an effective remedy was also violated.

52. The Working Group recalls that enforced disappearances violate numerous substantive and procedural provisions of the Covenant, including articles 9 and 14, and constitute a particularly aggravated form of arbitrary detention.²³ Moreover, the Working Group has classified secret detention as being per se arbitrary, falling within category I of the categories of arbitrary detention that it has developed (A/HRC/13/42, para. 20).

53. For these reasons, the Working Group considers that Mr. Al Darsi’s deprivation of liberty lacks a legal basis and is thus arbitrary, falling under category I.

Category II

54. The source alleges, and the Government does not contest, that Mr. Al Darsi has been arrested and detained for his progressive religious beliefs of the Malikite doctrine, considered subversive by the Special Deterrence Force, whose members largely follow the Salafist Madkhali movement.

55. The right to freedom of thought, conscience and religion includes the freedom to have or to adopt a religion or belief of one’s choice and the freedom, either individually or in community with others and in public or in private, to manifest one’s religion or belief in worship, observance, practice and teaching, as codified in article 18 (1) of the Covenant.

56. While the right to manifest one’s religious belief is subject to the limitations such as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others under article 18 (3) of the Covenant, the right to hold or adopt a religion or belief is not subject to such limitations.

57. Even if Mr. Al Darsi had been arrested and detained for the manifestation of his religious belief through his sermons and other activities, the Government has offered no justifiable grounds to impose legitimate limitations on his activities, as provided in article 18 (3) of the Covenant.

58. Similarly, the source contends, and the Government does not dispute, that Mr. Al Darsi has been arrested and detained for preaching progressive religious views contested by the Special Deterrence Force. The Working Group thus considers that Mr. Al Darsi has been deprived of liberty owing to his exercise of his right to freedom of expression.²⁴

²⁰ See general comment No. 35, para. 38. See also A/HRC/19/57, paras. 48–58.

²¹ See the Declaration on the Protection of All Persons from Enforced Disappearance, opinion No. 82/2018, para. 28, and article 22 of the Arab Charter on Human Rights.

²² See opinions No. 28/2016, No. 79/2017, No. 35/2018 and No. 82/2018.

²³ See Human Rights Committee, general comment No. 35, para. 17. See also opinion No. 6/2020.

²⁴ See opinion No. 35/2017, para. 40.

Again, none of the legitimate limitations as set out in article 19 (3) of the Covenant appear to be applicable in the present case.

59. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on freedom of religion or belief for appropriate action.

60. The Working Group is therefore of the opinion that Mr. Al Darsi's deprivation of liberty is arbitrary, falling within category II, as it violates articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 (1) and (3) and 19 (1) and (2) of the Covenant.

Category III

61. Given its finding that Mr. Al Darsi's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that in such circumstances no trial should take place. However, as Mr. Al Darsi has been detained by the authorities with the likelihood of criminal prosecution, the Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give his deprivation of liberty an arbitrary character, so that it falls within category III.

62. The source alleges, and the Government does not contest, that Mr. Al Darsi has been denied his right to legal counsel, including during his initial interrogation by the Special Deterrence Force. His lawyers still do not have access to the detention centre, an unofficial detention facility at Mitiga airport, where Mr. Al Darsi is currently detained.²⁵ The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access shall be provided without delay.²⁶ The Working Group considers in particular that Mr. Al Darsi's interrogation in the absence of his lawyers during his *incommunicado* detention deprived him of his right to legal counsel at a critical stage of criminal proceedings and exposed him to a risk of coercion. In view of these facts, the Working Group finds a violation of article 10 of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) and (d) of the Covenant.

63. Mr. Al Darsi's prolonged detention from 9 January 2016 for over four years with no prospect of a trial is in clear violation of the right to be tried without undue delay under article 14 (3) (c) of the Covenant. Such prolonged pretrial detention also contravenes the presumption of innocence, in violation of article 14 (2) of the Covenant.

64. Furthermore, there can be no justification for such prolonged pretrial detention with no prospect for trial, a manifest violation of the right to be tried without undue delay, guaranteed under articles 10 and 11 (1) of the Universal Declaration and article 14 (1) and (3) (c) of the Covenant.²⁷

65. The Working Group also considers that the denial of adequate medical care for Mr. Al Darsi's high blood pressure and diabetes, which has resulted in significant weight loss, and the allegations of ill-treatment appear to undermine his ability to defend himself and hinder his right to a fair trial, especially in the light of the right to be presumed innocent under article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant. The Working Group therefore 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 for further consideration.

²⁵ The Working Group recalls that article 10 of the Declaration on the Protection of all Persons from Enforced Disappearance states that: "Any person deprived of liberty shall be held in an officially recognized place of detention".

²⁶ See Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 32 and 34 and principle 9 and guideline 8 of 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..

²⁷ See also article 7 (1) (d) of the African Charter on Human and Peoples' Rights and article 13 (1) of the Arab Charter on Human Rights.

66.

67. 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 Mr. Al Darsi's deprivation of liberty an arbitrary character that falls within category III.

Category V

68. The Working Group will now examine whether Mr. Al Darsi's deprivation of liberty constitutes discrimination under international law for the purpose of category V.

69. The Working Group notes that Mr. Al Darsi is a religious preacher of the Malikite tradition, considered "heretical" by the Special Deterrence Force and that Mr. Al Darsi was arrested outside the mosque following afternoon prayers.

70. The Working Group notes that Mr. Al Darsi's religious views and convictions are at the centre of the present case and that the authorities have displayed an attitude towards them that can only be characterized as discriminatory. Indeed, his real or perceived religious dissent appears to be the sole reason for his arrest and detention.

71. For these reasons, the Working Group considers that Mr. Al Darsi'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 religious discrimination. His deprivation of liberty therefore falls under category V.

72. The Working Group expresses its grave concern at the documented pattern of mass arbitrary detention in Libya.²⁸ The circumstances in the present case are also similar to those detailed in the report on the investigation of Libya by the Office of the United Nations High Commissioner for Human Rights (A/HRC/31/47). The Working Group considers that Mr. Al Darsi's case is thus not an isolated incident. In that regard, the Working Group observes 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 (A/HRC/13/42, para. 30).²⁹

73. The Working Group would welcome the opportunity to visit Libya in order to engage with the Government in a constructive manner.

Disposition

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

The deprivation of liberty of Mustafa Taleb Younes Abdelkhalek Al Darsi, being in contravention of articles 2, 3, 6–10, 11 (1), 18 and 19 of the Universal Declaration of Human Rights and articles 2 (1) and (3); 9 (1)–(4); 14 (1), (2) and (3) (b)–(d); 18 (1) and (3); 19 (1) and (2); and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

75. The Working Group requests the Government of Libya to take the steps necessary to remedy the situation of Mr. Al Darsi without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

76. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Al Darsi immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Al Darsi.

²⁸ See OHCHR and the United Nations Support Mission in Libya "Abuse behind bars: arbitrary and unlawful detention in Libya".

²⁹ See also opinions No. 1/2011, para. 21; No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 68/2018, para. 60; No. 73/2018, para. 69; No. 82/2018, para. 53; No. 83/2018, para. 68; and No. 87/2018, para. 80.

77. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Al Darsi and to take appropriate measures against those responsible for the violation of his rights.

78. 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 the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health for appropriate action.

79. The Working Group encourages the Government to ratify the Enforced Disappearance Convention and the Rome Statute.

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

Follow-up procedure

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

- (a) Whether Mr. Al Darsi has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Al Darsi;
- (c) Whether an investigation has been conducted into the violation of Mr. Al Darsi'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 Libya with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

82. 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.

83. 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.

84. 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.³⁰

[Adopted on 1 May 2020]

³⁰ See Human Rights Council resolution 42/22, paras. 3 and 7.