
Advance Edited Version

Distr.: General
15 January 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eightieth session, 20–24 November 2017

Opinion No. 76/2017 concerning Nasser Bin Ghaith (United Arab Emirates)

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. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.
2. In accordance with its methods of work (A/HRC/36/38), on 4 August 2017, the Working Group transmitted to the Government of the United Arab Emirates a communication concerning Nasser Bin Ghaith. The Government replied to the communication on 3 October 2017. The State is not 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. Nasser Bin Ghaith, a citizen of the United Arab Emirates, is a 47-year-old prominent activist who works as an economist and scholar. He usually lives in Jumeirah 2, Dubai.

5. The source reports that Mr. Bin Ghaith has been prosecuted for peaceful criticism of his Government in the past. In 2011, after having peacefully called for economic and democratic reforms, Mr. Bin Ghaith, along with four other activists, was arrested. Their case came to be known as the “UAE 5”. According to the source, the five men were convicted of “publicly insulting officials of the United Arab Emirates” after a flawed trial in which allegations of torture emerged. Mr. Bin Ghaith was subsequently sentenced to two years in prison. However, on the day after sentencing, a presidential pardon was issued and all five men were released.

Arrest and detention

6. According to the source, Mr. Bin Ghaith was arrested on 18 August 2015, without being shown a warrant, at his workplace in Abu Dhabi by 13 plain-clothes officers from the State security forces. The officers took Mr. Bin Ghaith to his home and searched it for half an hour. They then took Mr. Bin Ghaith to an unknown location.

7. The source reports that Mr. Bin Ghaith was held incommunicado for nearly eight months. On 4 April 2016, he was taken to appear before the State Security Chamber of the Federal Supreme Court in Abu Dhabi.

8. Reportedly, during the first hearing before the State Security Chamber of the Federal Supreme Court, Mr. Bin Ghaith was not allowed to defend himself, as he was not permitted to talk to his lawyer or to meet him in private before the hearing. The hearing was not public, although Mr. Bin Ghaith’s family and lawyer were allowed to attend. When given the opportunity to address the court, Mr. Bin Ghaith stated that he had been subjected to acts of torture while in detention and that he was being held in secret. Mr. Bin Ghaith also specified that he did not even know where he was being held. However, these allegations were reportedly not taken into account by the judge.

9. It was only during the second hearing, on 2 May 2016, that Mr. Bin Ghaith was charged with, inter alia, “committing a hostile act against a foreign country” under the Federal Criminal Code for tweets in which he had criticized the Egyptian authorities for the killing, in August 2013, of more than one thousand peaceful demonstrators by the Egyptian security forces during an event known as the “Rabaa massacre”.

10. Mr. Bin Ghaith was reportedly further charged under the Law on Combating Cybercrimes with “prejudicing public order and national unity” in relation to a tweet in which he had criticized the authorities of the United Arab Emirates for their lack of understanding of religious tolerance. He was also charged with “publishing information intended to harm the reputation of the State” under the Law on Combating Cybercrimes for having publicly denounced the torture and unfair trial to which he had been subjected in the case of the “UAE 5”. Lastly, Mr. Bin Ghaith was charged with “collaborating with a terrorist organization” (Al Ummah party) under the law on combating terrorist crimes and with “collaborating with an organization that promotes opposition to the fundamental principles of State governance” (Al Islah party) under the Federal Criminal Code.

11. The source reports that, on 18 May 2016, Mr. Bin Ghaith was transferred from his place of secret detention to the Al Sadr prison in Abu Dhabi, where he was detained in solitary confinement. Reportedly, he was detained, except for a period of two weeks, in solitary confinement from the beginning of his detention until his sentencing.

12. In December 2016, the case of Mr. Bin Ghaith was transferred from the Federal Supreme Court to the Abu Dhabi Federal Court of Appeal, following the amendment of Federal Law No. 11 of 2016, and an Egyptian judge was appointed to adjudicate his case.

13. On 29 March 2017, the Abu Dhabi Federal Court of Appeal convicted Mr. Bin Ghaith of all the charges against him and sentenced him to 10 years in prison.

14. The source further states that, on 2 April 2017, Mr. Bin Ghaith published a letter from the Al Sadr prison announcing that he had begun a hunger strike in protest at the unfair trial that he had been subjected to and that he rejected the verdict against him. The source alleges that, in retaliation, the authorities of the United Arab Emirates transferred him to Al Razeen prison, located approximately 100 kilometres from Abu Dhabi, which is known for its poor detention conditions. In addition, Mr. Bin Ghaith was deprived of visitation rights. He reportedly continues to serve his sentence at the Al Razeen prison.

Joint communications by special procedures

15. Mr. Bin Ghaith has been the subject of two recent joint communications by special procedure mandate holders. He was the subject of a joint urgent appeal¹ (ARE 3/2015) issued on 27 August 2015 by the Working Group and a number of special procedure mandate holders, and he was also the subject of a joint allegation letter² (AL ARE 3/2017) sent on 3 May 2017 by the Working Group and certain special procedure mandate holders. The Working Group acknowledges the responses from the Government of the United Arab Emirates on 31 May 2016 and 5 July 2017, respectively.

Analysis of violations

16. In the light of the above information, the source submits that the detention of Mr. Bin Ghaith falls under categories I, II and III of the categories applicable to the cases under consideration by the Working Group.

Category I — absence of a legal basis justifying the deprivation of liberty

17. According to the source, Mr. Bin Ghaith was arrested on 18 August 2015 and subsequently held in secret detention. He was charged only during his second trial hearing on 2 May 2016, that was, more than eight months after his arrest. The source thus submits that his detention was devoid of any legal basis from 18 August 2015 to 2 May 2016 and that it was therefore arbitrary, falling within category I.

18. Furthermore, during his secret detention, Mr. Bin Ghaith was allegedly placed outside the protection of the law and was deprived of his legal safeguards as a detainee, including his right to challenge the legality of his detention and his right to be recognized as a person before the law. The source submits that his detention thus violates article 9 of the Universal Declaration of Human Rights, which provides that no one shall be subjected to arbitrary arrest or detention, as well as article 6 of the Universal Declaration of Human Rights, which states that everyone has the right to recognition everywhere as a person before the law.

19. The source further argues that the secret detention of Mr. Bin Ghaith violated his right to life, liberty and security (article 3 of the Universal Declaration of Human Rights) and constitutes, at the very least, a form of cruel, inhuman or degrading treatment, if not a form of torture per se (article 5 of the Universal Declaration of Human Rights).

Category II – deprivation of liberty resulting from the exercise of the right to freedom of expression

20. According to the source, three of the five charges against Mr. Bin Ghaith are in direct violation of his right to freedom of opinion and expression, as the charges refer directly to

¹ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=13706>.

² See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23098>.

the incriminating tweets that he posted on his personal account, in which he peacefully expressed his opinion about State policies.

21. Furthermore, the allegations regarding the torture and unfair trial that Mr. Bin Ghaith was subjected to in the “UAE 5” case were reportedly brought under the charge of “harming the reputation of the State”. The source notes that the charge clearly criminalizes Mr. Bin Ghaith’s fundamental right to freedom of expression and opinion, as enshrined in article 19 of the Universal Declaration of Human Rights. The source highlights that the charge is of particular concern as it relates to Mr. Bin Ghaith’s right to seek a remedy for the severe human rights violations that he had been subjected to and constitutes a severe form of revictimization of a victim of torture.

22. The source recalls that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has warned that legitimate online expression is being criminalized in contravention of States’ international human rights obligations and this criminalization is justified on the basis of protecting an individual’s reputation, national security or countering terrorism, but in practice is used to censor content that the Government and other powerful entities do not like or agree with.³ The Special Rapporteur further explained that restrictions should never be applied to, inter alia, discussion of government policies and political debate, and reporting on human rights and government activities.⁴

Category III — non-observance of the international norms relating to a fair trial

23. The source also asserts that the detention and trial of Mr. Bin Ghaith are marked by a number of severe violations of his legal safeguards and fair trial rights.

Arbitrary arrest

24. According to the source, Mr. Bin Ghaith was arrested by plain-clothes State security officers, who did not show him an arrest warrant or provide a reason for his arrest. As such, his arrest was in violation of article 9 of the Universal Declaration of Human Rights and of principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The latter provides that anyone who is arrested should be informed at the time of his or her arrest of the reason for the arrest and should be promptly informed of any charges against him or her.

Secret detention

25. From the beginning of his detention, Mr. Bin Ghaith was reportedly secretly detained and not allowed to communicate with the outside world. Furthermore, he was not aware of the location of his detention. The source submits that this constitutes a violation of principle 16 of the Body of Principles, which states that promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person should be entitled to notify or to require the competent authority to notify members of his or her family or other appropriate persons of his or her choice of his arrest, detention or imprisonment or of the transfer and of the place where he or she is kept in custody. Moreover, the source alleges that Mr. Bin Ghaith’s right to be recognized as a person under the law, as provided for by article 6 of the Universal Declaration of Human Rights, was violated, given that he was detained in secret.

Torture and lack of subsequent investigation

26. During his first trial hearing, Mr. Bin Ghaith reportedly informed the judge that he had been tortured; yet, his allegations were reportedly ignored by the court. The fact that no investigation was launched in relation to his allegation is in direct violation of article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that each State Party should ensure that its competent authorities

³ See A/HRC/17/27, para. 34.

⁴ Ibid., para. 37.

proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

27. Furthermore, according to the source, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has deemed prolonged secret detention to be a form of incommunicado detention amounting to torture.⁵ The source notes that the Special Rapporteur has come to the same conclusion with regard to prolonged solitary confinement,⁶ which Mr. Bin Ghaith was reportedly also subjected to throughout his detention.

Violations of the right to defence

Right to legal counsel and the principle of equality of arms

28. According to the source, Mr. Bin Ghaith was not allowed to communicate with his lawyer before his first trial hearing and even then was not allowed to speak to him or meet with him before the hearing. According to principle 18 of the Body of Principles, a detained or imprisoned person should be entitled to communicate and consult with his or her legal counsel. As such, Mr. Bin Ghaith's right to "all legal guarantees for his defence", as provided for by article 11 of the Universal Declaration of Human Rights, was violated.

29. Consequently, Mr. Bin Ghaith was allegedly unable to prepare his defence and to present his case to the court, in violation of the principle of equality of arms.

Violation of the right to be tried by an independent and impartial tribunal

30. According to the source, Mr. Bin Ghaith's case was decided by a foreign judge of Egyptian nationality. The source submits that this appointment casts doubt on the impartiality of the tribunal, given that Mr. Bin Ghaith was being prosecuted for tweets in which he had criticized the Egyptian authorities. Furthermore, in her report following a country visit to the United Arab Emirates, the Special Rapporteur on the independence of judges and lawyers highlighted the temporary nature of the employment of non-national judges in the United Arab Emirates whose contracts need to be renewed annually, which makes them vulnerable to pressure from the public prosecution or the executive.⁷ The Special Rapporteur thus expressed her concern about the independence of those judges.⁸

31. The source also notes with concern that, although Mr. Bin Ghaith's case was transferred to the Federal Court of Appeal, which allows him to appeal his sentence to a higher jurisdiction, his right to appeal is illusory given the nature of the charges brought against him.

32. In the light of the above, the source submits that the non-observance of the international norms relating to the right to a fair trial is of such gravity as to give the deprivation of liberty of Mr. Bin Ghaith an arbitrary character, thereby falling under category III.

Response from the Government

33. On 4 August 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure, requesting the Government to provide detailed information by 3 October 2017 about the current situation of Mr. Bin Ghaith and to comment on the source's allegations.

34. In its response dated 3 October 2017, the Government stated that Mr. Bin Ghaith was arrested in accordance with the law and due process on 18 August 2015, after having been informed of the reasons for his arrest and the authority that carried out the arrest and the search. His family was informed of his place of detention in Abu Dhabi and was aware that he was able to communicate with them from the central prison, which preserved the rights of

⁵ A/56/156, para. 14.

⁶ A/63/175, para. 56.

⁷ A/HRC/29/26/Add.2, paras. 40–45.

⁸ Ibid.

detainees during their detention period. Mr. Bin Ghaith was also provided with periodic health care and allowed to instruct his lawyer.

35. The Government states that the case of Mr. Bin Ghaith was referred to the competent prosecution service on 16 November 2015 and then to the Federal Supreme Court on 3 March 2016 in connection with charges of: harming political relations between the United Arab Emirates and Egypt; abusing religion and thereby prejudicing national unity and public order; openly inciting against and disrespecting a group of persons; publishing intentionally malicious news and posting provocative propaganda that undermines public order and harms public interest; involvement in an organization that advocates against the basic principles of the State's system of governance; participating in the activities of a terrorist organization despite being informed of its purpose and goals; disseminating information on a network in order to harm the reputation of the State and its institutions.

36. The Government adds that the trial hearings on 4 April 2016 were held in the presence of Mr. Bin Ghaith's brother, his wife and his lawyer. The charges against him were read out in public, he was provided with the case file for reference and allowed to coordinate with his lawyer before the court hearing in order to ensure his right of defence.

37. Furthermore, on 5 December 2016, the Federal Supreme Court decided to refer Mr. Bin Ghaith's case to the Abu Dhabi Federal Appeals Court pursuant to Federal Law No. 11 of 2016 concerning the judiciary. His trial was held in public, with the same rights of defence before the court, on 29 March 2017. He was sentenced to 10 years' imprisonment.

38. According to the Government, Mr. Bin Ghaith is currently being held in Al Razeen prison; he is provided with medical care on a regular basis, and his family is allowed to visit him. The allegations concerning his hunger strike and denial of family visiting rights are reportedly false.

Further comments from the source

39. The response from the Government was transmitted to the source for further comments on 5 October 2017. In the response of the source dated 17 October 2017, the source welcomes the Government's response but stresses that most of the information provided either fails to address the allegations raised or denies them outright without providing compelling evidence.

40. According to the source, the Government has failed to provide any documentary evidence to show it abided by the law and respected due process, such as visitation logs or telephone records, and to substantiate its claim that Mr. Bin Ghaith's place of initial detention was known to his family, who were allowed regular communication. The source reiterates that Mr. Bin Ghaith was not only arrested without a warrant or being informed of the reasons for his arrest, but that he was held incommunicado in secret detention from 18 August 2015 until 2 May 2016, without his family or even himself knowing the location of his detention and without the possibility of communicating with the outside world.

41. The source also points out that the Government claimed that Mr. Bin Ghaith had been allowed to instruct a lawyer, without specifying when he had been granted his right to legal counsel and whether they had been able to confer in private. The source states that Mr. Bin Ghaith was denied the right to instruct a lawyer from the beginning of his arrest or to have a lawyer present during interrogations and that he was not allowed to communicate with his lawyer before his first hearing on 2 May 2017, which made it impossible for him to prepare his defence, in violation of the principle of equality of arms.

42. The source also notes that, while the Government states that Mr. Bin Ghaith's wife, brother and lawyer were present in court, it fails to refute the allegation that the hearings were still not open to the general public. Contrary to the Government's claim that the charges against Mr. Bin Ghaith were read out during the first trial hearing on 4 April 2016, they were in fact read out during the second trial hearing. Even by the Government's own admission, the failure to promptly inform him of the charges against him constitutes a violation of article 9 of the Universal Declaration of Human Rights and principle 10 of the Body of Principles.

43. The source maintains that Mr. Bin Ghaith began his hunger strike on 2 April 2017 to protest against the confirmation of his sentence by the Federal Court of Appeal on 29 March

2017 and was denied family visitation rights from 27 September 2017, notwithstanding the Government's denial. The source regrets the Government's failure to provide any documentary evidence to substantiate its claims.

44. The source further notes the Government's failure to respond properly to the allegations of torture in the case of Mr. Bin Ghaith, despite the statement that he made during his first court hearing. The lack of an investigation into such allegations of torture reportedly violates article 12 of the Convention against Torture.

45. The source therefore maintains that Mr. Bin Ghaith is currently detained arbitrarily according to categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

Discussion

46. The Working Group thanks the source and the Government for their extensive engagement and for their submissions in relation to the detention of Mr. Bin Ghaith.

47. 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).

48. The Working Group recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.⁹

49. The Working Group wishes to reaffirm that any national law allowing deprivation of liberty should be made and implemented in compliance with the relevant international provisions set forth in the Universal Declaration of Human Rights, the Convention against Torture and other relevant international legal instruments. Consequently, even if the detention is in conformity with national legislation, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.¹⁰

50. The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.¹¹ However, the Working Group reiterates that it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of national law by the judiciary.¹²

51. At the outset, the Working Group notes with concern that it has been seized of a series of cases over the past few years in which the Government has subjected its citizens and foreign nationals to secret detention or incommunicado detention.¹³ The Working Group recalls that such practices of incommunicado detention effectively place the victims outside the protection of the law and deprive them of any legal safeguards. More specifically, the Working Group has heard many complaints of arbitrary deprivation of liberty of social activists by the agents of the State Security Department (Amn al-Dawla) in the context of the Arab Spring and its aftermath. The Working Group notes that there are disturbing similarities between the factual patterns of the present case and those of opinions No. 12/2014, No.

⁹ See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at para. 55, pp. 660–661. See also opinions No. 41/2013, para. 27; and No. 59/2016, para. 61.

¹⁰ See opinions No. 20/2017, para. 37; and No. 28/2015, para. 41.

¹¹ See opinion No. 33/2015, para. 80.

¹² See opinion No. 63/2017, para. 45; No. 59/2016, para. 60; No. 12/2007, para. 18; No. 40/2005, para. 22; and No. 10/2002, para. 18.

¹³ See opinions Nos. 21/2017; 51/2015; 35/2015; 56/2014; 12/2014; 60/2013; 42/2013; 27/2013; 61/2012; and 64/2011.

60/2013, No. 42/2013 and No. 64/2011, in which the Working Group found the deprivation of liberty to be arbitrary.

52. The Working Group also reiterates that it applies a heightened standard of review in cases in which the freedom of expression and opinion is restricted or where human rights defenders are involved.¹⁴ The role of Mr. Bin Ghaith as a prominent social activist and his involvement in the “UAE 5” case require the Working Group to undertake this kind of strict scrutiny.¹⁵

Category I

53. The Working Group will examine the relevant categories applicable to its consideration of this case, including category I, in which it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.

54. According to the information provided by the source, Mr. Bin Ghaith was arrested without a warrant and was not promptly informed of either the reasons for his arrest or of the charges against him. While the Government states that Mr. Bin Ghaith was arrested in accordance with the law and due process on 18 August 2015 and that his family was informed of his place of detention and was able to communicate with him, it failed to substantiate its claims in order to refute the prima facie allegations put forward by the source. The Government has offered no documentary evidence, such as a copy of the arrest warrant, visitation logs or telephone records.

55. The Working Group notes that any deprivation of liberty without a valid arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks any legal basis in violation of articles 3 and 9 of the Universal Declaration of Human Rights, article 14 (1) of the Arab Charter on Human Rights, as well as principles 2, 4 and 10 of the Body of Principles.¹⁶

56. The Working Group underlines that the right to liberty and security of the person, enshrined in article 3 of the Universal Declaration of Human Rights, applies to everyone and is further guaranteed through article 9, which prohibits arbitrary arrest and detention. Both provisions are deeply entrenched human rights norms, reflected in both State practice and the jurisprudence of international judicial bodies and the Working Group.¹⁷ Prohibition of arbitrary detention is part and parcel of customary law that bears an absolute character and is in fact a peremptory norm (*jus cogens*) of international law and therefore binding upon all States, irrespective of their treaty obligations.¹⁸ The Working Group notes the statement made by the International Court of Justice that “wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself

¹⁴ See opinions No. 57/2017, para. 46; No. 38/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20. National authorities and international supervisory bodies should apply the heightened standard of review of government action, in particular, when there are claims of a pattern of harassment. See opinion No. 39/2012, para. 45. See also General Assembly resolution 53/144, annex, art. 9 (3).

¹⁵ Human rights defenders, in particular, have the right to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters (*ibid.*, art. 6 (c)). Human rights defenders have the right to investigate, gather information regarding and report on human rights violations. See opinion No. 8/2009.

¹⁶ See opinions No. 63/2017, para. 66; No. 21/2017, para. 46; and No. 48/2016, para. 48.

¹⁷ See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at para. 65, p. 663; and, *ibid.*, Separate Opinion of Judge Cañado Trindade, paras. 107–142, pp. 763–777. See also opinions Nos. 14/2014, para. 18; 53/2012, para. 20; 22/2012, para. 44; 45/2011, para. 21; 44/2011, para. 18; 43/2011, para. 16; 42/2011, para. 21; 41/2011, para. 15; 33/2011, para. 16; 31/2011, para. 16; and No. 30/2011, para. 18.

¹⁸ See deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (see A/HRC/22/44, paras. 37–75), at paras. 42–51. See also A/HRC/30/37, para. 11, as well as opinions No. 63/2017, para. 51; No. 15/2011, para. 20; and No. 16/2011, para. 12.

manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".¹⁹

57. In addition, as stated in 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, deprivation of liberty is regarded as unlawful when it is not on such grounds and in accordance with procedures established by law.²⁰ In order to ascertain such legal basis, the authorities must present the charges when a person is arrested and detained, which did not happen in the present case.²¹

58. The source has also alleged, and the Government has failed to refute with documentary proof, that Mr. Bin Ghaith was held incommunicado in a secret location by the State Security Department for eight months, which placed him outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights.²² The Working Group notes with concern that incommunicado detention also violates the right to a fair trial and presumption of innocence under articles 10 and 11 of the Universal Declaration of Human Rights. Furthermore, the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture.²³ The Working Group also notes that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has consistently urged States to declare incommunicado detention illegal.²⁴

59. The Working Group notes that the incommunicado detention of Mr. Bin Ghaith in a secret location also appears to amount to a prima facie enforced disappearance, which has been universally condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.²⁵

60. The incommunicado detention in a secret location also prevented Mr. Bin Ghaith from being brought promptly before a judge or other officer authorized by law to exercise judicial power and from taking proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention.²⁶ It also violated his right to be tried within a reasonable time or to be released.

61. The Working Group therefore considers that the arrest and prolonged incommunicado detention of Mr. Bin Ghaith by the State Security Department lack any legal basis in violation of articles 3, 6 and 9 of the Universal Declaration of Human Rights and principle 2 of the Body of Principles. The Working Group thus concludes that his detention is arbitrary since it falls within category I.²⁷

Category II

62. The Working Group recalls that holding and expressing opinions, including those that are not in accordance with official government policy, are protected by article 19 of the Universal Declaration of Human Rights. The Government must respect, protect and fulfil the right to freedom of opinion and expression even if the views expressed by the right-holder are not to its liking under the peremptory norms (*jus cogens*) of customary international law.

¹⁹ See *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at para. 91, p. 42.

²⁰ See A/HRC/30/37, para. 12.

²¹ See also article 14 (3) of the Arab Charter on Human Rights.

²² *Ibid.*, art. 22.

²³ See A/54/44, para. 182 (a).

²⁴ See A/54/426, para. 42; and A/HRC/13/39/Add.5, para. 156.

²⁵ Declaration on the Protection of All Persons from Enforced Disappearance, art. 1. See General Assembly resolution 47/133.

²⁶ See, for example, opinions No. 56/2016 and No. 53/2016.

²⁷ See opinions No. 63/2017, para. 53; No. 21/2017, para. 37; No. 17/2017, para. 37; and No. 39/2016, para. 45.

63. More specifically, the Working Group notes that, according to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the right to freedom of expression includes expression of views and opinions that offend, shock or disturb.²⁸ In the same vein, the Human Rights Council stated in its resolution 12/16 that restrictions on discussion of government policies and political debate were not consistent with article 19 (3) of the Covenant (see para. 5 (p) (i)).

64. The Working Group also points out that it has affirmed, in its deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the Internet, that freedom of expression constitutes one of the basic conditions of the development of every individual without which there is no social progress. It has also affirmed that peaceful, non-violent expression or manifestation of one's opinion, or dissemination or reception of information, even via the Internet, if it does not constitute incitement to national, racial or religious hatred or violence, remains within the boundaries of freedom of expression (see E/CN.4/2006/7, paras. 44–47).²⁹

65. In the present case, the Government has accepted the allegation put forward by the source that Mr. Bin Ghaith was charged and convicted for his peaceful online criticism of the killing of more than a thousand protesters in the August 2013 Rabaa massacre in Egypt,³⁰ of the religious issues in the United Arab Emirates and of the torture and unfair trial in the "UAE 5" case, in which Mr. Bin Ghaith was one of the defendants.

66. The Working Group is of the view that Mr. Bin Ghaith's online comments fall squarely within the boundaries of the right to expression of opinion, which is protected by article 19 of the Universal Declaration of Human Rights. Moreover, article 29 (2) of the Universal Declaration of Human Rights provides that the only legitimate limitations to the exercise of that right 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 general welfare in a democratic society.

67. The Working Group, in its deliberation No. 9, confirmed that the notion of "arbitrary" *stricto sensu* includes both the requirement that a particular form of deprivation of liberty is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary (see A/HRC/22/44, para. 61).

68. In its jurisprudence, with regard to the application of the principle of proportionality, the Working Group has applied the test of (a) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (b) whether the measure is rationally connected to the objective; (c) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (d) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.³¹

69. In applying its four-prong test of proportionality from its jurisprudence, the Working Group finds that Mr. Bin Ghaith's arrest, detention, prosecution and conviction for his online comments cannot be considered proportionate.³² In the view of the Working Group, the maintenance of friendly relations with a foreign nation, Egypt in this case, may be a legitimate aim, but silencing the just criticism of massive human rights violations against the Egyptian people cannot be rationally connected to that aim.

70. The Working Group therefore considers that the deprivation of liberty of Mr. Bin Ghaith is arbitrary, as it resulted from his exercise of the rights or freedoms guaranteed under article 19 of the Universal Declaration of Human Rights, and falls within category II.³³

²⁸ See A/HRC/17/27, para. 37.

²⁹ See opinions No. 56/2017, para. 48; and No. 51/2017, para. 35.

³⁰ See opinion No. 7/2016, para. 47.

³¹ See opinions No. 56/2017, para. 51; and No. 54/2015, para. 89.

³² See opinions No. 41/2017, para. 86; and No. 54/2015, para. 89.

³³ See also article 32 of the Arab Charter on Human Rights.

Category III

71. The Working Group will now consider whether the violations of the right to a fair trial and due process suffered by Mr. Bin Ghaith were of such gravity as to give his deprivation of liberty an arbitrary character, thus falling within category III.

72. As noted above in paragraphs 54 and 55, Mr. Bin Ghaith was arrested without a warrant and was not promptly informed of either the reasons for his arrest or of any charges against him. He was also held incommunicado in a secret location for a period of eight months, as elaborated in paragraphs 58 to 60 above.

73. The Working Group is concerned that the incommunicado detention of Mr. Bin Ghaith also entailed the denial of his right to notify and communicate with his family and lawyer in accordance with principles 15, 16, 17, 18 and 19 of the Body of Principles, and his right to be brought promptly before a judge and to be tried within a reasonable time, as stipulated in principles 37 and 38 of the Body of Principles.

74. The Working Group recalls that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has deemed that prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture.³⁴ The Working Group also notes that the Special Rapporteur has come to the same conclusion with regard to prolonged solitary confinement,³⁵ as he has defined such confinement in excess of 15 days as “prolonged”, at which point some of the harmful psychological effects of isolation can become irreversible.³⁶ The Working Group is thus of the view that the prolonged incommunicado detention of Mr. Bin Ghaith for all but two months at Al Sadr prison would appear to qualify as a prima facie violation of the prohibition of torture. The Working Group also considers that it is prejudicial to the right to a fair trial and the presumption of innocence in violation of articles 10 and 11 of the Universal Declaration of Human Rights.³⁷ The Working Group will refer the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

75. The Working Group reminds the Government of the legal obligations undertaken by it as a State party to the Convention against Torture, which include the duty to ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction (art. 12) and ensure that any individual who alleges that he or she has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his or her case promptly and impartially examined by, its competent authorities (art. 13).

76. The Working Group notes that the dismissal of Mr. Bin Ghaith’s claims of torture, as in other similar cases, is not compatible with the Government’s international obligations. In this respect, the Working Group recalls that, after her official visit to the United Arab Emirates in 2014, the Special Rapporteur on the independence of judges and lawyers reported that more than 200 complaints relating to torture and/or ill-treatment had been presented before judges and/or prosecutors over the previous few years, but that those complaints had not been taken into account in judicial proceedings and no independent investigation into them had allegedly taken place.³⁸

77. Furthermore, the Working Group finds that the denial of adequate time and facilities to Mr. Bin Ghaith for the preparation of his defence and communication with his legal counsel constitute a violation of principles 17 (1) and 18 (1), (2) and (3) of the Body of Principles and of principle 9 of the United Nations Basic Principles and Guidelines on

³⁴ See A/56/156, para. 14.

³⁵ See A/63/175, para. 56.

³⁶ See A/66/268, paras. 26 and 61. See also rule 44 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which likewise refers to solitary confinement for a time period in excess of 15 consecutive days as prolonged solitary confinement.

³⁷ See also articles 12, 13 and 16 of the Arab Charter on Human Rights.

³⁸ See A/HRC/29/26/Add.2, para. 53. See also opinion No. 21/2017, para. 48.

Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

78. The Working Group notes that Mr. Bin Ghaith's trial, conviction and 10-year sentence by an Egyptian judge also cast serious doubt on the independence and impartiality of the Abu Dhabi Federal Court of Appeal. As the Special Rapporteur on the independence of judges and lawyers noted from her official visit in 2014, the tenure of non-national judges is not guaranteed in the same way as that of national judges, as they are recruited on temporary contracts that have to be renewed annually.³⁹ The Special Rapporteur thus expressed her concern that non-national judges could be dismissed at any time, which rendered them particularly vulnerable to pressure from any quarter, including from the public prosecution and members of the executive branch.⁴⁰

79. The Working Group also notes that the total length of the contracts for non-national judges depends on their secondment in their country of origin. As the Egyptian officials can grant or refuse secondment for the annual renewal of such contracts, it is most inappropriate for an Egyptian judge to preside over the case of Mr. Bin Ghaith, who stands accused of criticizing the Rabaa massacre perpetrated by the Egyptian authorities. The Working Group thus considers that Mr. Bin Ghaith did not receive a fair hearing by an independent and impartial tribunal in violation of article 10 of the Universal Declaration of Human Rights, as well as peremptory norms (*jus cogens*) of customary international law.⁴¹ The Working Group will refer the case to the Special Rapporteur on the independence of judges and lawyers for appropriate action.

80. The Working Group further notes with concern that Mr. Bin Ghaith's hearing was not public as, although it was attended by his family and lawyers, it was not open to the general public. The Government has failed to provide any circumstances in its response that would warrant excluding the press and the public from all or part of the trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. For these reasons, the Working Group concludes that Mr. Bin Ghaith did not receive a public hearing by an independent and impartial tribunal in violation of article 10 of the Universal Declaration of Human Rights, as well as peremptory norms (*jus cogens*) of customary international law.⁴²

81. In addition, the Working Group expresses its concern at Mr. Bin Ghaith's announcement of his intention not to appeal the judgment rendered against him because of his lack of confidence in the integrity of the judiciary and the Government's refusal to provide his lawyer with a copy of the judgment and to allow his lawyer to visit him at Al Razeen prison, fearing that he would convince Mr. Bin Ghaith to exercise his right to appeal against the judgment.⁴³ The Working Group notes that, while Mr. Bin Ghaith is free to decide not to lodge an appeal, this must be an informed decision based upon communication with counsel of his own choosing, as well as the likelihood of having adequate time and facilities for the preparation of his appeal. The Working Group therefore considers that the right of Mr. Bin Ghaith to have his conviction and sentence reviewed by a higher tribunal according to law appears to have been violated, contrary to articles 10 and 11 of the Universal Declaration of Human Rights, as well as peremptory norms (*jus cogens*) of customary international law.⁴⁴

82. The Working Group recalls the judgment of the International Criminal Court, according to which "where the breaches of the rights of the accused are such as to make it

³⁹ See A/HRC/29/26/Add.2, para. 42.

⁴⁰ *Ibid.*, para. 43.

⁴¹ See also article 13 (1) of the Arab Charter on Human Rights.

⁴² *Ibid.*, art. 13 (2).

⁴³ International Campaign for Freedom in the United Arab Emirates, "UAE authorities continue to violate Dr. Nasser Bin Ghaith's right to a lawyer visit", 24 June 2017. Available at www.icfuae.org.uk/news/uae-authorities-continue-violate-dr-nasser-bin-ghaith%E2%80%99s-right-lawyer-visit.

⁴⁴ See also articles 12 and 13 of the Arab Charter on Human Rights.

impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place ... Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial".⁴⁵

83. The Working Group thus concludes that the violations of Mr. Bin Ghaith's right to a fair trial are of such gravity as to render his deprivation of liberty arbitrary, thus falling within category III.

Ratification of the International Covenant on Civil and Political Rights

84. The Working Group avails itself of this opportunity to invite the Government of the United Arab Emirates to ratify the International Covenant on Civil and Political Rights as a sign of its commitment to defend the liberty of persons and eliminate instances of arbitrary deprivation of liberty. The Working Group refers to its statement in an annual report (see A/HRC/19/57, para. 69) indicating that arbitrary deprivations of liberty constitute a violation of peremptory norms (*jus cogens*) of international law, a position that echoes that of the Human Rights Committee in paragraph 11 of its general comment No. 29 (2001) on derogation during a state of emergency.⁴⁶

85. The Working Group recalls that the duty to comply with international human rights standards that are peremptory and *erga omnes* norms, such as the prohibition of arbitrary detention, rests on all bodies and representatives of the State, all officials, including judges, prosecutors, police and security officers, and prison officers with relevant responsibilities, and all other natural and legal persons.⁴⁷

Disposition

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

The deprivation of liberty of Nasser Bin Ghaith, being in contravention of articles 3, 6, 9, 10, 11 and 19 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II and III.

87. The Working Group requests the Government of the United Arab Emirates to take the steps necessary to remedy the situation of Mr. Bin Ghaith without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights.

88. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Bin Ghaith immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

89. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case to the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

90. The Working Group encourages the Government to ratify the International Covenant on Civil and Political Rights.

⁴⁵ See International Criminal Court, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Case No. ICC-01/04-01/06 (OA4), 14 December 2006, para. 39. See also opinion No. 35/2015, para. 42.

⁴⁶ See opinion No. 59/2016, para. 69.

⁴⁷ See opinions Nos. 22/2014, para. 25; 48/2013, para. 14; 36/2013, paras. 34 and 36; 35/2013, paras. 35 and 37; 34/2013, paras. 33 and 35; 9/2013, para. 40; 60/2012, para. 21; 50/2012, para. 27; and 47/2012, paras. 19 and 22.

Follow-up procedure

91. 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. Bin Ghaith has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Bin Ghaith;
- (c) Whether an investigation has been conducted into the violation of Mr. Bin Ghaith's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United Arab Emirates with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

92. 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.

93. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the 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.

94. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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.⁴⁸

[Adopted on 21 November 2017]

⁴⁸ See Human Rights Council resolution 33/30, paras. 3 and 7.