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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-sixth session, 18–22 November 2019

Opinion No. 82/2019 concerning Waleed Antoine Moubarak (Kuwait)

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 22 February 2019 the Working Group transmitted to the Government of Kuwait a communication concerning Waleed Antoine Moubarak. The Government replied to the communication on 21 May 2019. 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

(a) Context

4. Waleed Antoine Moubarak is a dual national of Canada and Lebanon who was born on 26 April 1970. Mr. Moubarak usually resides in Salmiya, Kuwait. He has passports issued by Canada and Lebanon.

5. From April 2006, Mr. Moubarak served as Chief Legal Officer of a large private conglomerate (the “company”). A disagreement with the owner’s son reportedly led to Mr. Moubarak’s dismissal in December 2017 and he left Kuwait, returning on 3 April 2018 at approximately 1 p.m. He entered Kuwait without any problems and was collected by a company driver, who took him to his apartment, itself provided by the company, and was asked to turn in his Canadian passport so the company could, as a courtesy, renew his residency. He handed his Canadian passport to the company representative, and it was reportedly never returned.

(b) Arrest

6. According to the source, on 3 April 2018, Mr. Moubarak entered his apartment and subsequently went outside at approximately 3.30 p.m., at which point he was arrested in the street, directly in front of his residence, by a number of officers from the Criminal Investigation Department. They forcibly placed him in handcuffs and took him to Shuwaikh police station, without informing him at any stage as to why he was being arrested. They confiscated his three mobile telephones and his wallet, credit cards and identity documents. At the time of the submission by the source, none of these items had been returned, nor, contrary to article 91 of the Code of Criminal Procedure (Act No. 17 of 1960), had any record been made of the items seized.

7. The source reports that a few hours later, Mr. Moubarak was taken back, in handcuffs, to his apartment by approximately 10 officers from the Criminal Investigation Department. They had no warrant, as far as he was aware, and rather than requesting his permission to enter, they did so by force. They seized personal electronic items, such as laptops (for which they forced him to provide passwords) and folders of personal papers. They made no list of the items that they were seizing, and provided no receipt for the items that they were removing. No search warrant was ever shown to Mr. Moubarak.

8. According to the source, Mr. Moubarak was then taken back to Shuwaikh police station, where he was shown two cigarettes containing cannabis that the police claimed to have found in his apartment. He was also shown alcohol that they claimed to have found in a storage room in his apartment. They allegedly threatened him with personal violence, denied him his right to a lawyer and demanded that he admit possession of the alcohol and cannabis.

9. The source reports that these are misdemeanour charges. However, the police later asked questions about allegations of embezzlement, apparently made against him by the company. Mr. Moubarak explained that his employment with the company had always been honest and faithful and he refused to confess to what the police were calling “a breach of trust”.

10. Mr. Moubarak was reportedly refused food and water for 48 hours and was repeatedly interrogated over three days and two nights in the custody of the Criminal Investigation Department at Shuwaikh police station. He was not at any time allowed a phone call, despite his request, and was denied private interviews with his lawyer. He was only allowed telephone calls and visitors as from 9 April 2018, after having spent six days in solitary confinement and incommunicado detention. The source submits that this is contrary to article 60 bis of the Code of Criminal Procedure, which provides that during police detention the accused must be permitted to contact their lawyer and to inform another person of their whereabouts.

(c) Detention

11. The source indicates that on 5 April 2018, Mr. Moubarak was transferred to prison, where he was properly and humanely treated except on the days when he was taken to court.

12. The source reports that Mr. Moubarak had his head forcibly shaved so that he would look like a common criminal. Whenever he was transported out of the prison and transferred to court hearings, he was shackled by his wrists and ankles to other prisoners, transported to the court in an overcrowded bus and denied sustenance throughout the day.

13. The source describes how Mr. Moubarak's lawyer was not notified of his court appearances, except for a hearing held on 9 May 2018. On that occasion, his lawyer was not allowed to speak to the judge to apply for bail. However, the arguments of the prosecution and the company's lawyer against bail were heard. Mr. Moubarak was not allowed to communicate with his lawyer at the court, and consular visits from Canadian and Lebanese diplomats were reportedly not permitted because this was part of the "investigative stage".

14. According to the source, one of the two cases against Mr. Moubarak is related to the allegations made against him by the company. The source contends that the company was influencing, if not directing, the behaviour of the police and the courts. The source adds that the company informed the police of Mr. Moubarak's whereabouts, so he could be arrested. On the second day of Mr. Moubarak's police custody, on 4 April 2018, a lawyer hired by the company attended the police station to give instructions to the arresting officers from the Criminal Investigation Department.

15. The source reports that a second lawyer representing the company gained entrance to the prison and asked to speak to Mr. Moubarak without his lawyer being present, which Mr. Moubarak refused. The second lawyer representing the company also appeared and was permitted to make pleadings against bail, which were successful. He was reportedly seen by Mr. Moubarak to be meeting with police officers and sharing documents about the case. The second lawyer also successfully objected to Mr. Moubarak and his lawyer speaking privately.

16. According to the source, it is apparent that the company, having an employment dispute pending with Mr. Moubarak, had a conflict of interest in the case and was nevertheless allowed by the authorities to play a privileged role in his prosecution, including standing in court during the bail hearing. The source submits that the company is entitled to bring a breach of trust claim in a civil action under Kuwaiti law, but it is not entitled to have its disagreements with Mr. Moubarak transformed into a criminal action brought by the State. The source notes that the allegation of "breach of trust" was apparently made by the company orally to the police on 3 April 2018, and that at the same time a civil claim was filed by the company alleging that in 2012, Mr. Moubarak, as its Chief Legal Officer, had signed a contract to the benefit of a foreign company in which he had an interest. This is an allegation that Mr. Moubarak denies.

17. The second of the two cases against Mr. Moubarak is related to the possession of alcohol and cannabis, found in his house by the Criminal Investigation Department on 3 April 2018. Under Kuwaiti law, this amounts to a *junha* crime, a misdemeanour, and could not justify the refusal of bail and months of pretrial detention for a person with no previous convictions.

(d) Court hearings

18. According to the source, the two charges against Mr. Moubarak were dealt with separately. The breach of trust case was brought before a judge on 24 June 2018, and he was granted bail in the sum of 5,000 Kuwaiti dinars despite the objections of the company's counsel. This did not secure his release from prison, however, as he continued to be held on the cannabis charge. He was not granted bail on this charge until 5 July 2018. The source adds that by the time of his release from prison, he had been arbitrarily detained for 93 days.

19. The source reports that the next hearing on the breach of trust case was scheduled for 22 July 2018. It was a procedural formal pretrial hearing that Mr. Moubarak was not

required to attend. Lawyers for both parties – Mr. Moubarak and the company – presented documents and made requests for disclosure. In order to prepare his defence, including against a complicated allegation that he had funnelled money through a foreign company, his lawyers sought access to his laptop and the personal papers seized by the police and to the documents in the prosecution file, which had not been released to the defence. They also asked that the prosecution make available for cross-examination at trial a police officer who had claimed that Mr. Moubarak had immediately admitted the offence. They further asked for leave for a forensic expert to examine the defendant's laptops and cell phones.

20. The source reports that the hearing began at 10.30 a.m. on 22 July 2018 and lasted only 45 minutes, as the defence made their applications and the prosecution made several of their own, producing some new evidence. Neither side had thought that the hearing would be on the substance of the case. Mr. Moubarak's lawyers were not called upon to mount a defence, and did not do so. The judge retired for a short time, giving the impression that he was going to rule on the interim applications. He returned with a guilty verdict and sentenced Mr. Moubarak to the maximum prison sentence of two years, with hard labour, for breach of trust. The judge said that the sentence was to be executed immediately, without bail pending appeal. In this respect, the judge reportedly referred to a decision by the Court of Cassation which, according to him, had set a precedent for a trial court to proceed to a conviction without any obligation to examine the defence arguments if the judge was satisfied by the prosecution case.

21. According to the source, the hearing did not meet the standard for a fair trial as provided for in articles 9 and 14 of the Covenant. The source asserts that the fact that Mr. Moubarak was convicted of a jail sentence for a serious offence in his absence, and without his lawyers being given any opportunity to present a defence or to prepare a defence with Mr. Moubarak, means that the subsequent detention was automatically arbitrary.

22. In this respect, the source highlights that Kuwaiti law is silent on how the judge should proceed once in charge of the investigation. There are, as far as the source understands, no procedural rules actually requiring the judge to hear the defence before convicting; this is simply always done, as an obvious matter of fairness. Whether or not he acted contrary to Kuwaiti procedural rules, he certainly breached the provisions of the Covenant in relation to a fair trial.

23. The source reports that Mr. Moubarak's appeal was heard in the Court of Appeal on 13 August 2018. His counsel reportedly sought to cross-examine prosecution witnesses, including its expert witness and its investigating officer, and sought disclosure of the relevant documents necessary to establish Mr. Moubarak's innocence. The Court postponed its judgment until 27 August 2018, on which date it confirmed the decision of the lower court.

24. The source adds that, on 11 December 2018, the Court of Cassation dismissed Mr. Moubarak's appeal and confirmed the verdict and the sentence of two years' imprisonment with hard labour. According to the source, the Court of Cassation refused to engage with any of the arguments made by Mr. Moubarak's lawyers, in particular about the fair trial issues during the hearing at the lower court. There was no examination of the arguments that he had not been allowed to access documents, to cross-examine the police witness, to testify on his own behalf or to call witnesses and produce documents to establish his innocence. The Court merely applied a rule that because Mr. Moubarak did not appear on the day of the hearing, his challenges to the verdict could not be heard.

25. In relation to the second case, regarding the two cigarettes containing cannabis that had been found in Mr. Moubarak's apartment, the verdict was issued on 6 December 2018 and he was sentenced to four years' imprisonment. The source adds that the two cigarettes were found in the premises that Mr. Moubarak had not occupied for four months, and a blood test at the time of his arrest proved negative for narcotics and alcohol. Although the alcohol allegedly found in the flat was not entered into evidence, the small amount of cannabis (4.6 grams) was.

26. The source adds that the usual sentence for this class of offence, when there is no suggestion of trafficking and the defendant is of good character, is a community order or a fine. The source submits that a sentence of four years' imprisonment is disproportionate to

the actual offence, meaning that the subsequent deprivation of liberty was arbitrary. There was no proof that the cannabis was his, and there was evidence that he was not a recent consumer of narcotics. The source concludes that the decision was not substantiated and was disproportionate considering the small amount involved and the usual sentence imposed in similar cases.

27. According to the source, in September 2019, Mr. Moubarak managed to extricate himself from Kuwait and was permitted to enter another country, although he is still subject to the prison sentences in Kuwait and an extradition request may be made by Kuwait. The source states that Kuwait has already sought his arrest through the International Criminal Police Organization and has pursued new criminal cases against him.

(e) Legal analysis

(i) General considerations

28. The source submits that the facts of the present case amount to breaches of various provisions of the Universal Declaration of Human Rights, notably articles 7, 9, 10 and 11, and breaches of articles 9 and 14 of the Covenant. These breaches are of sufficient gravity to give the deprivation of liberty of Mr. Moubarak an arbitrary character. In addition, there were serious breaches of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, notably principles 1, 2, 4, 6, 8, 9, 10, 11, 12, 13, 16 (2), 17, 18 and 21.

29. The source submits that the equality of arms principle is undermined by article 111 of Code of the Criminal Procedure, which allows third-party civil plaintiffs, also called victims, to become “joint plaintiffs”: in effect, the civil plaintiff becomes a party to the investigation in support of the prosecutor. The source adds that this results in unfairness, since the company, who has an interest in the case, is permitted to start and then join in on the police investigation, to share information to which Mr. Moubarak was not permitted access and to speak to the court to discuss his bail application, thus manipulating the criminal proceedings.

30. The source adds that articles 111 and 112 of the Code of Criminal Procedure, in allowing those making allegations to become part of the prosecution, are gravely unjust. The source also adds that the State has in effect allowed its criminal process to be taken over for the purposes of advancing a civil claim, or at least resolving a case of unfair dismissal in favour of the employer. The source notes that Mr. Moubarak’s relationship with his employer, including a provision that all disputes should be decided by English law, is set out in detail in his employment contract.

31. The source submits that Mr. Moubarak’s conviction and appeal amounted to an obvious and flagrant denial of his right to a fair trial. He was unequivocally denied the opportunity to challenge the prosecution’s evidence and to put forward his defence. The source adds that there was also a clear issue with the equality of arms between Mr. Moubarak and the civil complainant, who was effectively prosecuting the case.

32. The source notes that the right to a fair trial and its essential components can be found in the Constitution of Kuwait, which guarantees equal treatment before the law, the presumption of innocence and the protection of the necessary guarantees to exercise the right of defence (arts. 29 and 34). In addition, the Code of Criminal Procedure reinforces those provisions by affording specific rights to the defence to cross-examine prosecution witnesses, call witnesses of their own and make closing submissions and submissions on sentencing. However, according to the source, all these procedural protections were flouted in the present case.

33. The source also notes that the core protections of the right to a fair trial in international law are enshrined in article 14 (1), (2) and (3) of the Covenant, to which Kuwait acceded in 1996. In this respect, the source submits that if the core elements of the right to a fair trial are denied – such as the right to challenge the prosecution case and put forward a defence, or the right to call and examine witnesses – the fact that other elements of the right were respected is not relevant. Hence, the fact that Mr. Moubarak had counsel

appearing on his behalf provided no remedy for the serious fair trial violations established in this case.

(ii) In relation to the charges of breach of trust

34. The source recalls that there were two hearings in the first-instance court. At the first, very short, hearing on 24 June 2018, the breach of trust allegation was put forward, Mr. Moubarak denied it, and the court dealt with bail. Apart from bail, no other issues were dealt with at the first hearing, and the case was adjourned. The hearing lasted no more than three to four minutes.

35. The source also notes that criminal procedure law in Kuwait mandates an “investigatory stage” of no fixed time period, during which the prosecution is not required to show the evidence in its file to the defence and there is no presumption of any entitlement to bail. Moreover, under Kuwaiti law, there is no provision for sureties: Mr. Moubarak cannot propose friends or pledge sums of money to serve as evidence that he will present himself at trial. This is a serious defect, which results in most suspects being denied bail during the investigatory stage.

36. The source adds that the only hearing that could amount to a trial in the case of Mr. Moubarak was the second and final hearing in the first-instance court, on 22 July 2018. According to the source, it was obvious by this point that the breach of trust allegation was serious and complex. As the prosecution had not served the evidence on which it sought to rely to convict Mr. Moubarak, it was anticipated that this would be in effect a preliminary hearing for procedural instructions. Mr. Moubarak was not required to attend, so he did not do so.

37. The source reports that at this hearing, two lawyers appeared for the company and effectively took over the prosecution. It was they, not the prosecutor, who spoke against Mr. Moubarak, calling on the court to convict him with “the strictest verdict”. Each lawyer presented a portfolio of evidence against Mr. Moubarak. It was reportedly this evidence, comprising hundreds of pages of documents that the defence had not seen, that the court would use to convict Mr. Moubarak.

38. According to the source, Mr. Moubarak’s lawyers then made submissions, merely procedural applications, which would allow the lawyers to challenge the prosecution case and put forward Mr. Moubarak’s defence. They applied to call key prosecution witnesses for cross-examination, they sought disclosure of the evidence on which the prosecution were relying to prove Mr. Moubarak’s guilt, and they sought disclosure of exculpatory evidence held by the complainant. They also needed an opportunity to consider the evidence that had only just been served on them.

39. The source adds that with that, the hearing ended. No witnesses had been called, no rulings had been made on the defence applications, and there had been no opportunity to challenge the prosecution testimony nor to challenge the documents on which it was based. The judge continued to hear the other cases in his list and he then left the court. Shortly thereafter, the judge sent back an annotated list of all the cases with which he had dealt that day, marking against each case the outcome of that day’s proceedings. In the case of Mr. Moubarak, the outcome was that he had been sentenced to two years’ imprisonment with hard labour, with immediate effect.

40. According to the source, the judge later issued a written judgment. It contained nothing related to the fact that Mr. Moubarak had been denied his right to challenge the prosecution case and establish his defence. As for the defence applications made during the hearing, the judge merely said that “the defendant’s attorney [had] submitted several requests that were perused and taken into consideration by the court”. However, the judge made no attempt to explain why he had decided to convict and sentence Mr. Moubarak without proceeding to a trial on the substance of the case.

41. The source notes that the judge wrote at the end of the written judgment that his ruling had been given in the presence of “both litigants”. However, as noted above, Mr. Moubarak was not required to attend court on 22 July 2018 and he did not do so, although he was represented by counsel.

42. The source reports that before the Court of Appeal, Mr. Moubarak's lawyers challenged the conviction on the grounds of denial of his right to a fair trial and other grounds, all of which were rejected. The Court of Appeal referred to the principle that "the trial court must hear the testimonies of witnesses and consider all elements presented". However, the Court of Appeal concluded that the first-instance court had deliberated over the case "with due insight and contemplation". The Court of Appeal argued that the conviction was justified since Mr. Moubarak had admitted the crime. However, the trial court itself had previously acknowledged that Mr. Moubarak had denied that allegation.

43. According to the source, on 11 December 2018, the Court of Cassation dismissed Mr. Moubarak's application without considering its merits, on the grounds that he was not present for the hearing.

44. The source submits that the court documents in this case reveal a flagrant denial of Mr. Moubarak's right to a fair trial in domestic and international law. The source adds that the arbitrary rejection of the defence applications and the decision to proceed to conviction and sentencing deprived Mr. Moubarak of the presumption of innocence and prevented him from examining and challenging the case against him.

45. The source further submits that, in addition to the breach of Mr. Moubarak's right to a fair trial, his right not to be unlawfully deprived of his liberty was consistently ignored. Indeed, clear violations of provisions of the Code of Criminal Procedure may be demonstrated as follows: the investigator's order for Mr. Moubarak's arrest without solid evidence (art. 62); failure to provide written reasons for his arrest (art. 74 bis); failure by the police to record items seized in their search of his apartment (art. 91); failure to provide him with a copy of the search record (art. 91); denial of his right of access to a lawyer in private at the police station (art. 74 bis); failure of the investigator to provide reasons for holding him in preventive custody (art. 74 bis); breach of the 10-day limit on detention in misdemeanour cases (art. 69); denial of the opportunity for him to speak to his lawyers in private at hearings before the renewal judge (art. 74 bis); failure to release him before the 10-day extension of his custody expired (art. 69); failure to release him before the 30-day extension of his custody expired (art. 70); failure to limit the preventive custody to such period as was necessary for the purposes of the investigation (arts. 69 and 70); failure to hear witnesses and experts and to examine evidence following a plea of not guilty (arts. 162 to 171); and failure to consider submissions on punishment before passing judgment (art. 172).

(iii) In relation to the narcotics-related charges

46. The source recalls that there were separate but connected proceedings against Mr. Moubarak for possession of a very small quantity of cannabis (less than 5 grams), in which there were further clear violations of his right to a fair trial. On 6 December 2018, Mr. Moubarak was sentenced to four years' imprisonment for this offence, which was grossly disproportionate by Kuwaiti standards.

47. With reference to the court judgment, the source indicates that Mr. Moubarak's conviction relied on the testimony of a police officer to whom he had allegedly admitted possession, although the actual statement was not shared. This admission was denied by Mr. Moubarak, and the judgment confirmed that as soon as he was able to obtain an attorney, he specifically denied the charge. His defence was that he had not been present in the premises in which the cigarettes had been found for four months, and that drug tests taken upon his arrest, which was the same day that he returned to Kuwait, showed no traces of narcotics.

48. The source adds that in rejecting Mr. Moubarak's defence, the court relied on an uncorroborated statement by a police officer that had not been independently recorded at the time, and it ignored the evidence supporting Mr. Moubarak's defence, which it dismissed as "an attempt to wriggle out of punishment". In other words, the court reportedly applied no burden of proof and merely relied on the police statement. The source submits that this was an unfair conviction and that the principle of equality of arms and the need to give fair consideration to the defence case were ignored, and that the situation was exacerbated by a disproportionate sentence.

Response from the Government

49. On 22 February 2019, the Working Group transmitted the allegations made by the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 23 April 2019, detailed information about the current situation of Mr. Moubarak and any comments on the source's allegations. Moreover, the Working Group called upon the Government to ensure Mr. Moubarak's physical and mental integrity.

50. On 25 February 2019, the Government sought an extension of the deadline to submit its response. In conformity with paragraph 16 of its methods of work, the Working Group granted an extension of one month, for the Government to submit its response by 23 May 2019. The Government submitted its response to the regular communication on 16 and 21 May 2019.

51. The Government claims that Kuwait is a leading State in the region when it comes to freedom of expression, diverse liberties, and the separation and independence of powers, including the judiciary, an elected parliament and free media, underscoring the status of human rights in the country. The human rights norms are reflected in the Constitution, the Criminal Code, the Code of Criminal Procedure, the Prisons Regulation Act (No. 26 of 1962) and other legislation, which are enforced by the judiciary, consisting of the criminal courts and the Public Prosecutor's Office. In particular, the Government underlines that article 34 of the Constitution provides for the right to be presumed innocent until proven guilty in a court of law and the right of defence.

52. The Government considers that the prosecution and trial for possession of narcotics and breach of trust cannot be disguised as human rights issues. The Government refers to apparent inconsistencies in the source's allegations, including the following: the welcome extended by the company to Mr. Moubarak upon his return to Kuwait on 3 April 2018 after his earlier dismissal in December 2017; the denial of drug possession followed by a statement that the narcotics charge merely constitutes a misdemeanour; the reported denial of food and water for 48 hours, which contradicts the existing law, the lack of reported consequences of that denial on his health, and the otherwise humane treatment that he received in detention; and the company's alleged influence over the prosecution and its involvement in the investigation and the proceedings, which the Government considers conjectural and unrealistic.

53. The Government reports that the company reported the theft of four electronic storage devices (hard drives) and a laptop from its office by Mr. Moubarak. The incident was referred to the first-instance court and a hearing was scheduled. The Criminal Investigation Department of Al-Asimah Governorate arrested Mr. Moubarak on 3 April 2018 in connection with two separate misdemeanour cases, of breach of trust and theft, after obtaining the requisite authorization from the Public Prosecution's Office. Mr. Moubarak admitted responsibility for the first incident and denied responsibility for the second incident, and specified the location of the stolen items. The officers who searched his residence found alcoholic beverages and two cigarettes suspected of containing narcotic substances.

54. The Government adds that Mr. Moubarak's confiscated items were placed in the Investigation Bureau at Shuwaikh police station, and his lawyer failed to pick them up when invited to do so. Mr. Moubarak's new lawyer later came to pick them up, and was also asked to collect Mr. Moubarak's Lebanese travel document in the Al-Asimah Criminal Investigation Department but failed to do so.

55. According to the Government, Mr. Moubarak faced two charges. The first charge was breach of trust. The first-instance court, in Mr. Moubarak's presence, sentenced him to two years in prison with labour and ordered his deportation after serving his sentence. Mr. Moubarak was officially released on 27 June 2018 with a financial guarantee of 5,000 Kuwaiti dinars and was prohibited from travelling until a judgment had been handed down on appeal. The Court of Appeal upheld the judgment of the first-instance court, and the Court of Cassation rejected the application.

56. The second charge was possession or acquisition of narcotic substances for the purposes of consumption. Mr. Moubarak was released with a financial guarantee of 500 Kuwaiti dinars. The first-instance court sentenced him, in absentia, to four years in prison with labour and a fine of 1,000 Kuwaiti dinars, and ordered the confiscation of the seized property as well as his deportation after serving his sentence. The Court of Appeal ruled that the appeal filed by the Public Prosecutor's Office should be suspended pending expiry of the date of opposition thereto, or determination, adjudication and expiry of the date of appeal.

57. The Government states that Mr. Moubarak illegally left Kuwait while the appeal against his conviction and sentence was pending.

58. The Government also claims that article 5 of the Prisons Regulation Act requires all prisons to keep records of prisoners' complaints and requests, but that Mr. Moubarak had submitted no complaints. He was treated properly and humanely throughout his period of detention.

59. According to the Government, the shaving of Mr. Moubarak's head for health and security reasons was authorized under article 20 of Decree No. 25 of 1979 concerning internal prison regulations. Air-conditioned and safe buses are used to transport prisoners to external locations.

60. To demonstrate that Mr. Moubarak's right to receive visits was respected, the Ministry of the Interior issued a log table recording regular visits to Mr. Moubarak between 9 April 2018 and 3 July 2018 from representatives of the Canadian embassy, his lawyer, his family and friends and representatives of the Anglican Church.

61. The Government also note that a complaint may be filed by any person with the Complaints Division of the General Department for Oversight and Inspection in the event of abusive and unlawful action by a member of the police force. The necessary investigations are conducted and, if a violation is found, appropriate legal action is taken. According to the Government, Mr. Moubarak has never filed a complaint against any members of the police force with respect to the above-mentioned allegations and observations.

62. Additional information provided by the Ministry of Justice and the Public Prosecution Service corroborates the earlier submissions by the Government. In the case of breach of trust, the company filed a complaint that Mr. Moubarak had made illegal transfers of funds as payments for legal advice to another company, which he owned. In July 2018, the first-instance court sentenced Mr. Moubarak to 2 years in prison with labour, and ordered his deportation after serving his sentence. He appealed the judgment, and the Court of Appeal suspended his sentence pending appeal on 13 August 2018, but upheld the judgment on 27 August 2018. He appealed again, but the appeal was dismissed on 11 December 2018 because Mr. Moubarak failed to appear.

63. The Ministry also contends that the evidence that led to the narcotics-related charges was seized from Mr. Moubarak's residence during the execution of a warrant, issued by the Public Prosecution Service in the above-mentioned case of breach of trust, to search his residence for computers and documents relating to the transfer of funds from the company to his own corporation. On 6 December 2018, the court sentenced Mr. Moubarak, in absentia, to four years in prison with labour and a fine of 1,000 Kuwaiti dinars, and ordered his deportation after serving his sentence. The Public Prosecutor's Office filed an appeal and, on 11 February 2019, the Court of Appeal decided to suspend the hearing of the appeal pending expiry of the date of opposition thereto, or determination, adjudication and expiry of the date of appeal.

Further comments from the source

64. On 17 May 2019, the Working Group transmitted the Government's response to the source and requested the source to provide, by no later than 3 June 2019, comments or observations to the Government's response. On 10 June 2019, the source provided further comments on the Government's response.

65. Rejecting most of both the legal and the factual contentions presented by the Government, the source comments that Mr. Moubarak suffered a total of 93 days of arbitrary detention following his arrest, since Mr. Moubarak was given no opportunity to challenge his detention before a judge for over two weeks and the judges failed to give any reasons for depriving him of his liberty.

66. The source also recalls the irregularities found in the court proceedings. The source claims that his two-year sentence was imposed during an unfair trial and appeal, at which Mr. Moubarak was not permitted to appear and give evidence, to challenge the evidence against him by way of cross-examination or by calling his own witnesses, or to have access to the evidence in the prosecution file that was available to the judges.

67. The source also contends that the four-year sentence on the narcotics-related charges is arbitrary because the trial court convicted him without taking account of evidence of his innocence. The court did not permit cross-examination of the sole witness against him, nor did it permit him to give his own testimony or call any defence witnesses. Moreover, the sentence of four years in prison was wholly disproportionate to the offence and out of alignment with non-custodial sentences passed in similar cases.

68. The source takes the view that the Government has not answered most of the complaints, other than by making general statements about Kuwaiti law. The Government claims that the Commission on Human Rights, in its resolution 1997/50, excluded from the definition of “arbitrary detention” any detention that resulted from a final decision of a national tribunal. However, this claim is incorrect. As the Working Group explained in its revised Fact Sheet No. 26, the Commission went on to state in resolution 1997/50 that deprivation of liberty resulting from the national court’s decision was considered not to be arbitrary only when that decision was (a) in accordance with domestic law, and (b) in accordance with other relevant international standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned.

69. The source believes that the convictions and sentences imposed on Mr. Moubarak were the result of trials that were unfair and unconstitutional under article 34 of the Constitution and were in breach of the Universal Declaration of Human Rights and of the Covenant. The fact that his detention resulted from a legal process does not, therefore, prevent it from being arbitrary.

Discussion

70. The Working Group thanks the source and the Government for their submissions in relation to Mr. Moubarak’s deprivation of liberty.

71. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68).

Category I

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

73. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested is not only informed at that time of the reasons for the arrest but also promptly informed of any charges against them.¹ Despite the divergence and conflict between the versions of events provided by the Government and the source, the Working Group finds that the Government has not fully substantiated its rebuttal of the allegation that Mr. Moubarak was neither shown an arrest warrant nor informed of the reasons for his arrest at the time of his arrest. The Government reports that the authorities were in

¹ See, for example, opinion No. 42/2018.

possession of a valid warrant to search Mr. Moubarak's residence, delivered by an investigating judge in the case of breach of trust. However, the Government fails to state whether Mr. Moubarak was shown this warrant at any point in the proceedings. The Working Group therefore concludes that the search and seizure in Mr. Moubarak's residence and his arrest were conducted without him being immediately informed of their legal basis through the presentation of a warrant.

74. The Working Group finds that, for it to be possible to invoke a legal basis for Mr. Moubarak's deprivation of liberty, the authorities should have informed him, at the time of arrest, of the reasons for his arrest, and should have promptly informed him of the charges against him.² Their failure to do so violates article 9 of the Universal Declaration of Human Rights and article 9 (2) of the Covenant, as well as principle 10 of the Body of Principles, and renders their arrest devoid of any legal basis. According to article 9 (1) of the Covenant, no one may be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. In the present case, Mr. Moubarak was arrested without an arrest warrant and without being informed at that time of the reasons for his arrest, in violation of article 9 (1) and (2) of the Covenant. In order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law that may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant and by following other procedures, including providing the reasons for the arrest and giving prompt notification of the charges.

75. The source further maintains, and the Government has failed to dispute in a convincing manner, that Mr. Moubarak was held incommunicado for six days from 3 to 9 April 2018 following his arrest. The visitor log for Mr. Moubarak, provided by the Government, does not show visits before 9 April 2018, and thus does not contradict the source's claim. In addition, the Government does not prove that Mr. Moubarak's relatives or the Canadian consulate were notified of his arrest and subsequent detention, nor does it put forward evidence that he was given access to a lawyer during the early stage of his detention. Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the persons concerned and to acknowledge their detention, has no valid legal basis under any circumstances, 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.

76. The Working Group notes that Mr. Moubarak was not brought promptly before a judge – that is, within 48 hours of his arrest barring absolutely exceptional circumstances, in accordance with the international standard³ – or afforded the right to take proceedings before a court so that it could decide without delay on the lawfulness of his detention, in accordance with articles 3, 8 and 9 of the Universal Declaration, articles 2 (3) and 9 (1), (3) and (4) of the Covenant and principles 11, 32 and 37 of the Body of Principles. In addition, the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court indicate that the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which constitutes a human rights violation, and is essential to preserve legality in a democratic society (A/HRC/30/37, paras. 2–3). This right, which is in fact a peremptory norm of international law, applies to all forms and situations of deprivation of liberty.⁴

77. The Working Group therefore considers that Mr. Moubarak's deprivation of liberty from 3 to 9 April 2018 lacks a legal basis and is thus arbitrary, falling under category I.

² For example, opinion No. 10/2015, para. 34. See also opinion No. 46/2019, para. 51.

³ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 33, citing *Kovsh v. Belarus* (CCPR/C/107/D/1787/2008), paras. 7.3–7.5. See also CCPR/C/SLV/CO/6, para. 14; CCPR/CO/70/GAB, para. 13; and CCPR/C/79/Add.89, para. 17.

⁴ Opinion No. 39/2018, para. 35.

Category III

78. The Working Group will now consider whether the alleged violations of the right to a fair trial and due process were of such gravity as to give the deprivation of liberty an arbitrary character, and therefore fall under category III.

79. The Working Group is of the view that Mr. Moubarak's incommunicado detention for a six-day period and the apparent denial to him of food and water for 48 hours undermined his ability to defend himself and hindered his exercise of due process and fair trial rights.

80. The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for further consideration.

81. The Working Group notes that the authorities failed to respect Mr. Moubarak's right to legal assistance at all times – which is inherent to the right to liberty and security of person – or the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 9 (1) and 14 (1) of the Covenant. He was deprived of his right to legal counsel at the critical stage of criminal proceedings during his interrogation, while being held incommunicado, without the presence of his lawyers, effectively removing procedural protection against torture and ill-treatment, as reported by the source. Indeed, the source reports a tentative intervention of the company's lawyer in the absence of Mr. Moubarak's own lawyer during this period, which shows the risk to the right to legal assistance of incommunicado detention.

82. The Working Group also concludes that the Government failed to observe its obligation under article 36 (b) of the Vienna Convention on Consular Relations, to which it is a party, to forward without delay any communication addressed to the consular post by the person arrested, in prison, custody or detention. The Government has offered no explanation for its denial of consular assistance to Mr. Moubarak in the critical period from 3 to 9 April 2018.

83. The Working Group recalls that all persons charged with a penal offence have the right to be presumed innocent until proved guilty according to law in a public trial at which they have had all the guarantees necessary for their defence, and that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in accordance with articles 10 and 11 of the Universal Declaration of Human Rights and article 14 of the Covenant.

84. The Working Group also recalls that, as the Human Rights Committee stated in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, article 14 (3) (e) of the Covenant provides for the right to have witnesses admitted that are relevant for the defence and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. The source alleges that Mr. Moubarak's request for an expert testimony in the case of breach of trust was ignored. The Government did not address these allegations directly, although it had the opportunity to do so. The Working Group thus considers that there have also been serious *prima facie* breaches of Mr. Moubarak's rights under article 14 (3) (e) of the Covenant.

85. In this case, the source claims that the trial was conducted in an expeditious manner and with no opportunity given to Mr. Moubarak's lawyer to provide a defence on the substance of the case. The same was reported with regard to the hearings at the Court of Appeal and the Court of Cassation. The source also reported that Mr. Moubarak was not aware that the hearing on 22 July 2018 would be on the substance and thus did not participate, which was later held against him by the Court of Cassation. In both cases, Mr. Moubarak's lawyers were unable to present evidence and witnesses for the defence of their client or to have access to the prosecution file and cross-examine the prosecution's witness. In its reply, the Government stated that the article 34 of the Kuwaiti Constitution, guaranteeing the presumption of innocence and the right of defence, was properly implemented by the courts. In the absence of specific information by the Government showing that Mr. Moubarak's right to a fair trial right was indeed guaranteed, the Working

Group concludes that the source's statement is credible and that the facts reported constitute violations of the right to a fair trial under article 14 (3) of the Covenant.

86. Lastly, the Working Group has considered the source's allegations of a number of evidentiary irregularities during Mr. Moubarak's trial, which affected the principle of equality of arms, shifted the burden of proof and interfered with the presumption of innocence. The Working Group emphasizes that it has not examined the substance of the evidence; it has considered only whether international human rights standards have been respected in this case. However, the Working Group has noted that the source contends that in the case of breach of trust, no witnesses were called by the first-instance court – which reportedly did not hear the case on the merits – nor by the Court of Appeal, nor by the Court of Cassation. The proceedings were reportedly expedited and only the civil complainant was allowed to present arguments. In addition, in the case related to the narcotics charges, the prosecution arguments were reportedly based solely on police testimony. The Working Group does not act as a national court or appellate body and does not assess the sufficiency of the evidence presented at trial.⁵ The Working Group considers that the alleged evidentiary irregularities raised by the source were a matter for the domestic courts, but that, in the case of breach of trust, they appear not to have been raised or fully considered in the trial and appeal. On the basis of all the information submitted by the parties, the Working Group therefore concludes that there was a violation of international human rights law, and in particular of article 14 (2) of the Covenant.

87. These combined violations are so substantial that they amount to effective breaches of the right to a fair trial. The detention of Mr. Moubarak was therefore arbitrary under category III, and any further detention based on these proceedings would also be arbitrary.

88. Given the above considerations, 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. Moubarak's deprivation of liberty an arbitrary character that falls within category III.

Disposition

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

The deprivation of liberty of Waleed Antoine Moubarak, being in contravention of articles 3, 6, 8, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 2 (3), 9 (1), (2), (3) and (4), 14 (1), (2) and (3) and 16 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

90. The Working Group requests the Government of Kuwait to take the steps necessary to remedy the situation of Mr. Moubarak 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.

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

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

93. 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, for appropriate action.

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

⁵ Opinions No. 57/2016, para. 115, and No. 10/2000, para. 9.

Follow-up procedure

95. 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. Moubarak remains at liberty;
- (b) Whether compensation or other reparations have been made to Mr. Moubarak;
- (c) Whether an investigation has been conducted into the violation of Mr. Moubarak'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 Kuwait with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

96. 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.

97. 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.

98. 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.⁶

[Adopted on 22 November 2019]

⁶ Human Rights Council resolution 42/22, paras. 3 and 7.