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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its seventy-ninth session, 21-25 August 2017

#### Opinion No. 63/2017 concerning Jaber bin Saleh Hamdan Aal Suleiman al-Amri (Saudi Arabia)

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 that mandate and most recently extended it for a three-year period in its resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 5 May 2017, the Working Group transmitted a communication to the Government of Saudi Arabia concerning Jaber bin Saleh Hamdan Aal Suleiman al-Amri. The Government replied to the communication on 29 June 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. Jaber bin Saleh Hamdan Aal Suleiman al-Amri is a Saudi citizen who usually resides in Riyadh.

5. The source reports that, on 5 April 2014, Mr. Al-Amri published a Youtube video under his own name, in which he criticized the Saudi Government and accused it of prosecuting Saudis for the exercise of their right to freedom of expression under the guise of terrorism. In the video, he called for the release of his brother Ali al-Amri, who was sentenced in 2002 to three years' imprisonment and who was reportedly still detained by the Saudi authorities at the time of the publication of the video, that is, almost ten years after the expiration of his sentence.

### Arrest and detention

6. According to the source, Jaber al-Amri was arrested on 12 April 2014 in front of his house in Riyadh by officers of the Directorate of General Investigation (*al-Mabahith al-Amma*), wearing both uniforms and civilian clothing, who did not present him with a warrant. They handcuffed him and took him back into the house in order to carry out a search before taking him to the general security prison in Riyadh for interrogation.

7. Mr. Al-Amri was reportedly detained incommunicado for three months, having been denied communication with his family and his lawyer. Three months after his arrest, Mr. Al-Amri received his first visit from his family, but he was not allowed access to legal counsel throughout his detention. In April 2015, he was charged on the basis of the 2014 Anti-Terrorism Law with "inciting rebellion against the ruler; stirring up dissent; and turning people against the State, rejecting its authority and calling it repressive"; as well as "producing, storing and sending a video clip prejudicial to public order". The source reports that Mr. Al-Amri was not presented before a judge before the start of his trial, one year after his arrest, and he could therefore not challenge the legality of his detention.

8. In May 2015, after a secret trial, during which he was reportedly denied access to legal counsel, Mr. Al-Amri was sentenced by the Specialized Criminal Court to seven years' imprisonment followed by a seven-year travel ban and a fine of 50,000 riyals. According to the source, the Specialized Criminal Court is an exceptional jurisdiction that was created in 2008 to try cases of terrorism. The jurisdiction is not composed of independent judges, but of a panel named by the Ministry of the Interior. The source reports that Mr. Al-Amri is currently detained in Al-Hayer prison.

### Arbitrary nature of the detention

9. In the light of the above information, the source submits that the detention of Mr. Al-Amri is arbitrary and falls under categories I, II and III.

### Category I — absence of legal basis justifying deprivation of liberty

10. The source submits that the arrest and detention of Mr. Al-Amri is arbitrary and lacks a legal basis, as he was held incommunicado for the first three months of his detention and was not presented before a judge before the start of his trial in April 2015, one year after his arrest.

11. According to the source, Mr. Al-Amri was arrested without a warrant and was not presented with justification for his arrest. He was subsequently detained incommunicado for a period of three months prior to receiving a visit from his family. As such, he was placed outside the protection of the law and deprived of his legal safeguards as a detainee. The source thus submits that the detention of Mr. Al-Amri is in violation of article 9 of the Universal Declaration of Human Rights and falls within category I.

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

12. The source reports that Mr. Al-Amri was arrested a week after he posted a video criticizing the authorities and was explicitly charged with “producing, storing and sending a video clip prejudicial to public order”. In that respect, the source alleges that the Saudi authorities systematically undermine freedom of expression by prosecuting individuals who are publicly critical of the Government or those calling for reforms. The source refers to opinion No. 42/2011, in which the Working Group noted with concern a consistent pattern of arrest and detention of persons exercising their basic human rights, in particular their right to freedom of opinion, expression and association.<sup>1</sup> The source also refers to the concerns expressed by the Committee against Torture that “the Penal Law for Crimes of Terrorism and its Financing adopted in 2014 contains an extremely broad definition of terrorism that [enables] the criminalization of acts of peaceful expression”.<sup>2</sup>

13. The source also recalls that the Human Rights Committee explicitly stated that “all public figures, including those exercising the highest political authority such as heads of State and government, are legitimately subject to criticism and political opposition” and that “States should not prohibit criticism of institutions”.<sup>3</sup> In that respect, the source underlines that the charges of “inciting rebellion against the ruler” and “calling the authority repressive” are in direct violation of the international understanding of freedom of expression.

14. The source thus submits that Mr. Al-Amri’s detention results from the exercise of his right to freedom of speech and expression, as guaranteed by article 19 of the Universal Declaration of Human Rights, and it falls within category II.

Category III — non-observance of international fair trial norms

15. The source submits that Mr. Al-Amri’s detention is arbitrary due to the severe violations of fair trial rights to which he has been subjected from the onset of his detention.

Arbitrary arrest and incommunicado detention

16. According to the source, Mr. Al-Amri was arrested by men wearing uniforms and civilian clothing (see para. 6 above) without being presented with a warrant for his arrest or the search of his house, contrary to principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>4</sup>

17. Furthermore, Mr. Al-Amri was reportedly detained incommunicado for three months and denied all contact with his lawyer and family. The source asserts that, by putting victims outside the protection of the law, incommunicado detention is a *prima facie* form of arbitrary detention and constitutes a violation of the right of the detainee to be recognized as a person before the law pursuant to article 6 of the Universal Declaration of Human Rights.

Violation of the right to be brought promptly before a judge

18. According to the source, Mr. Al-Amri was only brought before a judge when his trial began, that is, one year after his arrest. He was thus denied the right to challenge the legality of his detention before a competent judicial authority, in violation of principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

<sup>1</sup> See opinion No. 42/2011, para. 20.

<sup>2</sup> See CAT/C/SAU/CO/2, para. 16.

<sup>3</sup> See Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 38.

<sup>4</sup> See General Assembly resolution 43/173, annex.

#### Torture and conduct of interrogation in the absence of legal counsel

19. As stated above, the source alleges that Mr. Al-Amri was held in incommunicado detention for three months, which can, in itself, constitute torture as per General Assembly resolution 60/148.

20. Furthermore, during the conduct of interrogations and over the entire duration of his pretrial detention, Mr. Al-Amri was reportedly denied access to legal counsel in violation of principles 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

#### Secret trial before a court of exception

21. According to the source, Mr. Al-Amri was prosecuted before the Specialized Criminal Court which is not composed of independent judges but of a panel named by the Ministry of the Interior and therefore cannot be considered as independent. The source notes that, in 2016, the Committee against Torture expressed concern that the Specialized Criminal Court, which was established in 2008 to try cases of terrorism, was insufficiently independent of the Ministry of the Interior.<sup>5</sup> Furthermore, Mr. Al-Amri's hearings were reportedly held in secret. The source submits that the conduct of his trial is thus in clear violation of article 10 of the Universal Declaration of Human Rights, which states that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

22. During his trial, Mr. Al-Amri was reportedly also denied access to a lawyer, in violation of article 11 of the Universal Declaration of Human Rights, which provides that everyone charged with a penal offence must have "all the guarantees necessary for his defence".

23. In the light of the foregoing, 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. Al-Amri an arbitrary character and it falls under category III.

#### *Response from the Government*

24. On 5 May 2017, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide detailed information by 4 July 2017 about the current situation of Mr. Al-Amri and any comments on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Mr. Al-Amri's continued detention and to provide details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular the norms of international human rights law which bind Saudi Arabia. Moreover, the Working Group called upon the Government to ensure Mr. Al-Amri's physical and mental integrity.

25. In its response dated 29 June 2017, the Government informed the Working Group that Mr. Al-Amri had been arrested upon an order issued by the competent authority in accordance with article 35 of the Code of Criminal Procedure, because he was accused of producing, storing and communicating information that would prejudice public order, which is criminalized and punishable under the Anti-Cyber Crime Law. He was also accused of using narcotic substances that are criminalized and punishable under the Narcotics and Psychotropic Substances Control Act.

26. The Government states that Mr. Al-Amri was interrogated by the Bureau of Investigation and Public Prosecution in accordance with article 3 of its statute (Investigation and Public Prosecution) and article 13 of the Code of Criminal Procedure. He was arrested on charges of committing serious crimes warranting arrest pursuant to articles 112, 113 and 114 of the Code, and was subsequently charged with a general indictment, which included the mentioned crimes. His case file was then referred by the Bureau of

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<sup>5</sup> See CAT/C/SAU/CO/2, para. 16.

Investigation and Public Prosecution to the competent court, in accordance with articles 15 and 126 of the Code of Criminal Procedure.

27. According to the Government, when Mr. Al-Amri appeared before the court, he was informed of the charges against him and was handed a copy of the list of charges against him, in accordance with article 160 of the Code of Criminal Procedure. He requested time to prepare his answers for the next hearing and his request was accepted. The Court took its decision only after considering the statements by all parties as well as oral and written pleadings, after they had declared that they had nothing to add, and after reviewing the records of evidence and the final report of the sample from the person who tested positive for narcotic substances. After examining the case documents in accordance with articles 172 and 173 of the Code of Criminal Procedure, the Court sentenced Mr. Al-Amri to seven years' imprisonment and a fine of 50,000 riyals, and prohibited him from travelling for a similar period after his release. After being informed of the Court's decision, Mr. Al-Amri decided to appeal it and was handed a copy of the decision, in accordance with article 192 of the Code of Criminal Procedure.

28. After reviewing Mr. Al-Amri's appeal, the judge of the first instance court reportedly confirmed his decision and the case file was transferred to the Court of Appeal, in accordance with article 196 of the Code of Criminal Procedure. The Court of Appeal unanimously upheld the sentence and issued its decision, thus completing all stages of the judicial process, and the sentence became final and enforceable in accordance with article 216 of the Code of Criminal Procedure.

29. The Government denies the allegation that Mr. Al-Amri was not allowed to challenge the legality of his detention. The law gives the accused the right to challenge the decision of his detention in accordance with article 115 of the Code of Criminal Procedure and article 25 of the Law on Crimes of Terrorism and its Financing.

30. The Government also denies the allegation about the secrecy of the trial. The trial hearings were not confidential in accordance with article 154 of the Code of Criminal Procedure and article 64 of the Sharia Pleading Law. As mentioned in paragraph 27 above, at the first hearing, Mr. Al-Amri was informed of and provided with the list of charges against him so that he could prepare his answers. Moreover, the sentence was pronounced in a public hearing in accordance with article 181 (1) of the Code of Criminal Procedure and article 164 of the Sharia Pleading Law in the presence of all parties in the case.

31. With regard to the allegation from the source that Mr. Al-Amri was prevented from contacting his lawyer, the Government claims that he was allowed to appoint a lawyer or a representative to plead for him in court in accordance with article 65 (4) of the Code of Criminal Procedure, and he received a visit from a representative of the Human Rights Commission, who noted that Mr. Al-Amri received full health care and was allowed to receive such visits and communicate with other prisoners and detainees. The Government notes that, in all cases, the investigator may issue orders that the accused cannot communicate with other prisoners or detainees or receive visits as required by the interest of the investigation, without prejudice to the right of the accused to contact his lawyer.

32. With regard to the allegations that the Specialized Criminal Court is not composed of independent judges but by a panel appointed by the Ministry of Interior, the Government underlines that the Court was established by a decision of the Supreme Judicial Council, which is vested with the authority under article 6 of the Judiciary Law to establish courts, define their powers, types, jurisdictions, integration or abolition. The establishment of this Court is part of the measures taken to reinforce justice and it is part of the public judicial system in the kingdom. The judges are independent and are not subject to anyone's authority but the Sharia Law and regulations in force. No one can interfere with justice in accordance with article 46 of the Basic Law of Governance and article 1 of the Judiciary Law. The judges are appointed by royal decree on the basis of a decision of the Supreme Judicial Council in accordance with article 47 of the Judiciary Law. They are appointed only if they hold a scientific degree or a degree in Sharia Law from different universities and meet certain specific conditions, and they are integrated into the judicial system in accordance with articles 31 to 39 and 41 and 42 of the Judiciary Law.

33. In conclusion, the Government noted that all proceedings against Mr. Al-Amri were in accordance with international human rights standards.

*Further comments from the source*

34. On 26 July 2017, the response from the Government was transmitted to the source for further comments. In its response of 7 August 2017, the source observes that the Government mainly referred to national legal provisions to counter the allegations but failed to counter them factually and did not provide any dates to the events, thus confirming the chronology as presented in the original submission by the source.

35. The source refutes the Government's claim that Mr. Al-Amri was arrested after an "order for arrest was issued by the competent authority" in accordance with article 35 of the Saudi Code of Criminal Procedure. The source notes that article 35 does not mention a written warrant and does not provide for the detainee to be presented with such a warrant. Article 35 only mentions an "order by a competent authority" and does not insist that such an order must be put in writing. The source therefore maintains that Mr. Al-Amri was arbitrarily arrested.

36. The source notes the confirmation by the Government that Mr. Al-Amri was only informed of the charges against him when he was first presented before the court. The source reiterates that Mr. Al-Amri's right to be promptly informed of the charges against him was therefore violated and his detention, from the onset of his arrest until his first hearing, was lacking legal basis.

37. With regard to the Government's reference to article 115 of the Code of Criminal Procedure in order to deny the violation of Mr. Al-Amri's right to challenge the legality of his detention, the source notes that article 115 states that "a defendant may appeal his detention or extension thereof to the head of the investigation department or head of the branch of the Bureau of Investigation and Public Prosecution". This indicates that the detainee is not automatically presented before a judicial authority so that he could challenge the legality of his detention. Therefore, the source maintains that Mr. Al-Amri's right to habeas corpus was violated.

38. The source also rebuts the Government's reference to article 154 of the Code of Criminal Procedure, which states that "trial hearings are public and the tribunal is allowed exceptionally to entirely or fully consider the case in closed sessions, or to prohibit a category of individuals to attend the hearings, for security reasons, observance of public morality or if it is necessary for determining the case" to claim that the trial hearings were not held in secret. The source also notes that the Government stressed that Mr. Al-Amri was present in court and that he was presented with the relevant documents, however, it only stated that the sentencing hearing was held publicly. Therefore, according to the source, Mr. Al-Amri's right to a fair and public trial appears to have been violated as well.

39. With regard to the allegation that Mr. Al-Amri was denied his right of access to legal counsel, the source notes the statement by the Government that he was allowed to mandate a lawyer to represent him in court, but does not address the allegation that he was not allowed to consult his lawyer during his pretrial detention or that he was interrogated in the absence of his legal representative. The source therefore maintains that Mr. Al-Amri's right to legal counsel was violated.

40. Lastly, regarding the Government's denial that the Specialized Criminal Court is composed of a panel of judges nominated by the Ministry of the Interior, the source states that the Government made reference to the Judiciary Law and the Basic Law of Governance but not the statutes of the Court that was established in 2008, which have never been made public.

41. In the light of the additional information provided by the Government, the source maintains that the detention of Mr. Al-Amri is arbitrary and falls under categories I, II and III.

## Discussion

42. The Working Group thanks the source and the Government for their extensive engagement and for their submissions in relation to Mr. Al-Amri's arrest, conviction and imprisonment.

43. 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).

44. 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, which is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.<sup>6</sup>

45. 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.<sup>7</sup> 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 judiciary's application of national laws.<sup>8</sup>

46. The Working Group notes with concern the consistent pattern of arbitrary arrests and arbitrary detention in Saudi Arabia.<sup>9</sup> The present case raises grave concerns, as it is yet another example of the existence of that pattern.

47. In particular, the Working Group has heard numerous complaints about prolonged incommunicado detention for months, if not years, as well as torture of citizens and foreign nationals by the Directorate of General Investigation (*al-Mabahith al-Amma*), the domestic intelligence service of the Ministry of the Interior that doubles as secret police, which has been practically ubiquitous in the cases referred to the Working Group concerning Saudi Arabia over the past 20 years since the first decision taken by the Working Group concerning that State at its eighth session in 1993.<sup>10</sup> The Working Group underlines that practices of incommunicado detention effectively place the victims outside the protection of the law and deprive them of any legal safeguards.

48. The Working Group also notes its past findings in respect of the practice of secret trials by the Specialized Criminal Court that was established by a decision of the Supreme Judicial Council in 2008, with a panel of judges nominated by the Ministry of the Interior and a statute that has never been made public.<sup>11</sup> The Working Group notes that the

<sup>6</sup> See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, I.C.J. Reports 2010, p. 660, para. 55; also Working Group on Arbitrary Detention, opinions No. 41/2013, para. 27; and No. 59/2016, para. 61.

<sup>7</sup> See opinion No. 33/2015, para. 80.

<sup>8</sup> See opinions No. 59/2016, para. 60; No. 12/2007, para. 18; No. 40/2005, para. 22; and No. 10/2002, para. 18.

<sup>9</sup> The Working Group found the deprivation of liberty of the person concerned to be arbitrary in its decisions No. 40/1992, No. 60/1993, No. 19/1995 and No. 48/1995; and in its opinions No. 8/2002, No. 25/2004, No. 34/2005, No. 35/2005, No. 9/2006, No. 12/2006, No. 36/2006, No. 37/2006, No. 4/2007, No. 9/2007, No. 19/2007, No. 27/2007, No. 6/2008, No. 11/2008, No. 13/2008, No. 22/2008, No. 31/2008, No. 36/2008, No. 37/2008, No. 21/2009, No. 2/2011, No. 10/2011, No. 11/2011, No. 17/2011, No. 18/2011, No. 19/2011, No. 30/2011, No. 31/2011, No. 33/2011, No. 41/2011, No. 42/2011, No. 43/2011, No. 44/2011, No. 45/2011, No. 8/2012, No. 22/2012, No. 52/2012, No. 53/2012, No. 32/2013, No. 44/2013, No. 45/2013, No. 46/2013, No. 14/2014, No. 32/2014, No. 13/2015, No. 38/2015, No. 52/2016, No. 61/2016 and No. 10/2017. The Working Group did not find the detention of the person concerned to be arbitrary in opinion No. 44/2006; and it filed the case after the release of the detainee(s) in decision No. 37/1993, opinions No. 22/2005 and No. 18/2014.

<sup>10</sup> See decision No. 60/1993.

<sup>11</sup> See opinions No. 32/2013, No. 44/2013, No. 45/2013, No. 38/2015 and No. 61/2016.

proceedings conducted by such a court of exception, without the minimum legal safeguards, constitute a blatant violation of fair trial and due process rights.

#### *Category I*

49. The Working Group will first determine whether it is clearly impossible to invoke any legal basis to justify Mr. Al-Amri's arrest and detention between 12 April 2014 and April 2015 that would render it arbitrary in terms of category I.

50. While the Government states that Mr. Al-Amri was arrested upon an order issued by the competent authority in accordance with article 35 of the Code of Criminal Procedure (Royal Decree No. M/39 of 16 October 2001), it failed to substantiate this statement in order to refute the *prima facie* allegations put forward by the source. The Government offered no documentary evidence, such as a copy of the arrest warrant, and it confirmed in its response that Mr. Al-Amri was informed of the charges against him only upon his appearance before the court in April 2015.

51. Article 9 of the Universal Declaration of Human Rights, which prohibits arbitrary arrest and detention, is a deeply entrenched human rights norm, reflected in both State practice and *opinio juris*.<sup>12</sup> 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.<sup>13</sup> 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 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".<sup>14</sup>

52. 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 of the Universal Declaration of Human Rights, which prohibits arbitrary detention. 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.<sup>15</sup> However, 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.

53. The Working Group therefore considers that the arrest and prolonged detention of Mr. Al-Amri by the Directorate of General Investigation (*al-Mabahith al-Amma*), lack any legal basis, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group thus concludes that his detention is arbitrary, falling under category I.<sup>16</sup>

<sup>12</sup> See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits*, *Judgment*, *I.C.J. Reports 2010*, p. 663, para. 65; and *ibid.*, Separate Opinion of Judge Cançado Trindade, pp. 763-777, paras. 107-142. See also Working Group on Arbitrary Detention, opinions No. 30/2011, para. 18; No. 31/2011, para. 16; No. 33/2011, para. 16; No. 41/2011, para. 15; No. 42/2011, para. 21; No. 43/2011, para. 16; No. 44/2011, para. 18; No. 45/2011, para. 21, No. 22/2012, para. 44, No. 53/2012, para. 20 and No. 14/2014, para. 18.

<sup>13</sup> See Working Group on Arbitrary Detention, deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law (A/HRC/22/44, paras. 37-75), paras. 42-51; also A/HRC/30/37, para. 11; as well as opinions No. 15/2011, para. 20 and No. 16/2011, para. 12.

<sup>14</sup> See *United States Diplomatic and Consular Staff in Tehran (United States of America v. the Islamic Republic of Iran)*, *Judgment*, *I.C.J. Reports 1980*, p. 42, para. 91.

<sup>15</sup> See A/HRC/30/37, para. 12.

<sup>16</sup> See opinions No. 21/2017, para. 37; No. 17/2017, para. 37; and No. 39/2016, para. 45.



## Category II

54. The source argues that Mr. Al-Amri's arrest, trial and imprisonment for violating the Penal Law for Crimes of Terrorism and its Financing (Royal Decree No. M/16 of 27 December 2013) and the Anti-Cyber Crime Law (Royal Decree No. M/17 of 26 March 2007) are arbitrary, falling within category II, as they resulted from the legitimate exercise of his rights and freedoms.

55. According to the established practice of the Working Group, restrictions placed on freedom of expression by way of deprivation of liberty can only be justified when it is shown that the deprivation of liberty has a legal basis in national law, does not violate international law and is necessary to ensure respect for the rights or reputation of others, or for the protection of national security, public order, public health or morals, and is proportionate to the pursued legitimate aims.<sup>17</sup>

56. 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.

57. 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".<sup>18</sup> 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)).

58. In the present case, the Government does not refute the allegation that Mr. Al-Amri was charged and convicted for his peaceful online criticism of the Government's prosecution of its citizens for exercising their right to freedom of expression under the guise of fighting terrorism, and his call for the release of his brother Ali al-Amri, who continued to be detained by the Government, despite the expiration of the three-year sentence passed in 2002.

59. The Working Group is of the view that Mr. Al-Amri's online criticism of the Government's policy falls 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 the general welfare in a democratic society.<sup>19</sup>

60. While the suppression of incitement to violence for the preservation of public order may require legitimate limitations to fundamental rights and freedoms, it must not be arbitrary. 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 para. 61).

61. The Working Group also notes that, the Committee against Torture, in its concluding observations on the second periodic report of Saudi Arabia, expressed concern about the extremely broad definition of terrorism contained in the 2014 Penal Law for Crimes of Terrorism and its Financing that would enable the criminalization of acts of peaceful expression considered as endangering "national unity" or undermining "the reputation or position of the State". In that respect, the Committee recommended that the Government consider revising the definition of terrorism in the Penal Law for Crimes of Terrorism and its Financing so that its criminalization provisions are as narrow as possible

<sup>17</sup> See Working Group on Arbitrary Detention, deliberation No. 8 on deprivation of liberty linked to/resulting from the use of the Internet (E/CN.4/2006/7, paras. 32-52), para. 43. See also opinion No. 21/2017, para. 40.

<sup>18</sup> See A/HRC/17/27, para. 37.

<sup>19</sup> See opinion No. 48/2016, para. 44.

and cannot serve as a basis for prosecuting individuals engaged in non-violent expression and advocacy, especially in defence of human rights.<sup>20</sup>

62. The Working Group concurs with the observation of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism that the definition of terrorism in the 2014 Law on countering terrorism and its financing fails to comply with international human rights standards of legal certainty, as any definition of terrorism should be confined to acts or threats of violence that are committed for religious, political or ideological motives, and that are aimed at putting the public or section of the public in fear or to coerce a Government or international organization to take or refrain from taking any action. The Working Group also agrees with the Special Rapporteur's statement that, contrary to the basic international human rights standards, article 1 of the Law has enabled the criminalization of a wide spectrum of acts of peaceful expression, which are viewed by the authorities as endangering "national unity" or undermining "the reputation or position of the State".<sup>21</sup>

63. Given the above-mentioned observations, the Working Group considers that the deprivation of liberty of Mr. Al-Amri is arbitrary, as it resulted from his exercise of the rights or freedoms guaranteed under article 19 of the Universal Declaration of Human Rights. His deprivation of liberty therefore falls within category II.

### *Category III*

64. The Working Group will now consider whether the violations of the right to a fair trial and due process suffered by Mr. Al-Amri were grave enough to give his deprivation of liberty an arbitrary character, so that it falls within category III.

65. In particular, the Working Group will examine the allegations that Mr. Al-Amri was subject to arbitrary arrest and incommunicado detention; that he was not promptly brought before a judge; that the three months of incommunicado detention amounts to torture; that he was denied access to legal counsel during his interrogation; and that he was prosecuted in a secret trial by the Specialized Criminal Court, a court of exception that does not meet the minimum standard of justice.

66. According to the information provided by the source, which the Government has failed to rebut with credible evidence, Mr. Al-Amri was arrested without a warrant and was not promptly informed of neither the reasons for his arrest nor of any charges against him. Such arrest is arbitrary and in violation of article 9 of the Universal Declaration of Human Rights as well as principles 2 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>22</sup>

67. The source alleged that Mr. Al-Amri was subsequently detained incommunicado by the Directorate of General Investigation for three months, which placed him outside the protection of the law. Furthermore, the incommunicado detention 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 for the Protection of All Persons under Any Form of Detention or Imprisonment. Such treatment negated his recognition as a person before the law. All in all, the source alleged that his incommunicado detention resulted in the cumulative violation of articles 6, 8, 9, 10 and 12 of the Universal Declaration of Human Rights.

68. The Working Group expresses its concern about the fact that Mr. Al-Amri was held in incommunicado detention for a period of three months. The Working Group, in its practice, has consistently argued that holding a person incommunicado breaches the right to

<sup>20</sup> See CAT/C/SAU/CO/2 and Corr.1, paras. 16 and 18.

<sup>21</sup> See the preliminary findings of the visit to Saudi Arabia by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 4 May 2017. Available at [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21584&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21584&LangID=E).

<sup>22</sup> See opinions No. 21/2017, para. 46; and No. 48/2016, para. 48.

challenge the lawfulness of detention before a judge.<sup>23</sup> Articles 10 and 11 of the Universal Declaration of Human Rights also confirm the impermissibility of incommunicado detention. Furthermore, the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>24</sup>

69. 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.<sup>25</sup> The Special Rapporteur has defined solitary confinement in excess of 15 days as “prolonged”, at which point some of the harmful psychological effects of isolation can become irreversible.<sup>26</sup> Such prolonged solitary confinement may amount to cruel, inhuman or degrading treatment or punishment and, in certain instances, may amount to torture<sup>27</sup> and prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture.<sup>28</sup> The Working Group reminds the Government of Saudi Arabia of the legal obligations undertaken by it as a State party to the Convention against Torture.<sup>29</sup>

70. Furthermore, the Working Group finds that the denial of assistance by a lawyer in the case of Mr. Al-Amri constitutes a violation of principle 17.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and of principle 9 of the Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

71. With regard to the Specialized Criminal Court, the Working Group shares the concerns expressed by the Committee against Torture in its concluding observations on the second periodic report of Saudi Arabia that the Court is insufficiently independent of the Ministry of the Interior. In that regard, the Committee recommended that the Government strengthen the independence of the Specialized Criminal Court from the Ministry of the Interior and ensure that judges are made aware of their obligation to consider defendants’ allegations regarding torture or ill-treatment by investigators for the purpose of obtaining confessions; and to consider as inadmissible as evidence confessions found to have been obtained through torture or ill-treatment, except when such confessions are evidence in a case against the alleged perpetrator of the torture or ill-treatment.<sup>30</sup>

72. In the light of the above observations, the Working Group concludes that the violations of Mr. Al-Amri’s right to a fair trial are of such gravity as to give his deprivation of liberty an arbitrary character. His deprivation of liberty therefore falls within category III.

73. The Working Group avails itself of this opportunity to invite the Government of Saudi Arabia to ratify the International Covenant on Civil and Political Rights.

### **Disposition**

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

The deprivation of liberty of Jaber bin Saleh Hamdan Aal Suleiman al-Amri, being in contravention of articles 3, 8, 9, 10, 11, 12 and 19 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II and III.

75. Consequent upon the opinion rendered, the Working Group requests the Government of Saudi Arabia to take the steps necessary to remedy the situation of Mr. Al-

<sup>23</sup> See, for example, opinions No. 56/2016 and No. 53/2016.

<sup>24</sup> See, for example, A/54/44, para. 182 (a).

<sup>25</sup> See, for example, A/54/426, para. 42; and A/HRC/13/39/Add.5, para. 156.

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

<sup>27</sup> See A/63/175, paras. 56 and 77.

<sup>28</sup> See A/56/156, para. 14.

<sup>29</sup> See opinions No. 10/2011, para. 19; No. 11/2011, para. 15; and No. 17/2011, para. 18.

<sup>30</sup> See CAT/C/SAU/CO/2, paras. 17 and 18.

Amri without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights.

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

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

#### **Follow-up procedure**

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

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

79. 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.

80. 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.

81. 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.<sup>31</sup>

*[Adopted on 25 August 2017]*

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<sup>31</sup> See Human Rights Council resolution 24/7, paras. 3 and 7.