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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 28/2019 concerning Abdallah Sami Abedalafou Abu Baker and Yasser Sami Abedalafou Abu Baker (United Arab Emirates)

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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 22 January 2019 the Working Group transmitted to the Government of the United Arab Emirates a communication concerning Abdallah Sami Abedalafou Abu Baker and Yasser Sami Abedalafou Abu Baker. The Government replied to the communication on 14 March 2019. 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. Abdallah Sami Abedalafou Abu Baker is a Jordanian national born on 13 August 1979. He usually resides and works as an information technology professional in the United Arab Emirates. He is married.

5. Yasser Sami Abedalafou Abu Baker is a Jordanian national born on 4 November 1983. He usually resides and works as an information technology professional in the United Arab Emirates. He is married and is the brother of Abdallah Abu Baker.

(a) Arrest and detention

6. The source reports that on 30 October 2015, armed State security officers dressed in civilian clothes searched the respective homes of the two brothers in the Emirate of Ajman before proceeding to arrest them. They did not provide any reason for the arrest or show an arrest warrant.

7. According to the source, both individuals were held in secret detention from the date of their arrest until February 2016, when they were transferred to Al Wathba Prison in Abu Dhabi. While in secret detention, they were permitted to make short phone calls to their families approximately once every two to three weeks, but they were banned from revealing their location.

8. While in secret detention, they were allegedly held in solitary confinement in cells measuring 2 x 1 metres for more than three months. They were interrogated without breaks while being forced to stand up between 8 a.m. and 4 p.m. for 45 consecutive days. They were allegedly also subjected to other severe acts of torture and ill-treatment. This included being threatened with the arrest and rape of members of their families if they did not confess; being placed in extremely cold cells; being forced to sleep on the floor; being deprived of sleep; being denied the use of the lavatories; being denied food for long periods of time, resulting in severe weight loss; being tied to chairs; being beaten while blindfolded; being subjected to electric shocks; and having hallucinogens added to their food and drinks, which resulted in them having hallucinations and laughing and crying.

9. The source reports that, as a result of the torture they had endured, they were forced to sign interrogation minutes without reading them, and also to fingerprint and sign blank pieces of paper. It later emerged that the latter had been filled with “confessions”, in which they had admitted to posting material in support of Islamic State in Iraq and the Levant (ISIL) on social media, meeting up two days before their arrest to try to find a way of producing firearms, and meeting with another defendant in the case to discuss killing foreigners and members of the military forces. These confessions were reportedly admitted as evidence against the defendants during their trial.

10. The source alleges that both brothers have been denied medical treatment. In particular, Mr. Abdallah Abu Baker has been prevented from receiving treatment for a pre-existing mental health condition and severe pain in his joints.

11. In February 2016, they were reportedly transferred to Al Wathba Prison in Abu Dhabi, where they have been held since. They have been allowed to speak to their families on the phone once a week. However, following the initial visit by a family member, the authorities banned their families from the United Arab Emirates and ordered them to leave at short notice. As a result, they have not been able to have visits from any family members since.

12. The source adds that representatives of the Consulate of Jordan only were able to visit the brothers one year after their initial arrest. Since then, they have been allowed to visit them once a month.

(b) Charges and trial

13. According to the source, Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were officially informed of the charges against them for the first time on 31 May 2017, that is, one year and seven months after their arrest.

14. Both defendants were reportedly charged with sharing ISIL publications and “information on the group, for the purpose of promoting it and its ideology, improving its general image among the public, increasing its supporters and ensuring its victory” on WhatsApp, and in the case of Mr. Yasser Abu Baker, also on Telegram and Twitter. In addition, they were charged with “possessing photos, video clips and electronic documents” in support of ISIL, “with the intention that they would be viewed by others”. Furthermore, Mr. Yasser Abu Baker was charged with “promoting and favouring a terrorist group through describing it to his friends as committing jihad in order to spread Islam and create an Islamic state, as well as showing them clips intended to improve [the group’s] image”. The source adds that these charges are based on articles 1, 34 (1) and (2) (1), 45 and 46 of Decree Law No. 7 of 2014 on Combating Terrorism Offences and articles 1, 26, 28, 41 and 44 of Decree Law No. 5 of 2012 on Combating Cybercrime.

15. The source reports that Mr. Abdallah Abu Baker was also charged with “possessing ammunition used in firearms without permission from the competent authorities” on the basis of articles 1, 2, 61 (1) and (2) and 71 of Decree Law No. 5 of 2013 on Weapons, Ammunition, Explosives and Military Equipment.

16. According to the source, the brothers were allowed to appoint a lawyer for the first time on 9 August 2017, however they were only allowed to consult with him for a total of approximately 10 minutes. In addition, he was only permitted access to their case file for approximately half an hour.

17. The source reports that the trial of the two defendants before the Federal Court of Appeal commenced on 27 September 2017. An Egyptian judge was appointed to adjudicate the case. The public and representatives of the Consulate of Jordan were permitted access to some of the trial sessions, but were banned from others.

18. The source claims that when Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker attested in the court to the torture that they had been subjected to, both the judge and the head of the State security prosecution team dismissed their allegations by laughing at them.

19. On 26 December 2017, the two brothers were sentenced to 10 years in prison and a fine of 1 million dirhams (US\$ 272,238) on the basis of the above-mentioned charges. On 19 March 2018, they lodged an appeal before the Union Supreme Court. However, on 11 April 2018 the president of the court declared the case inadmissible, without providing any information as to the motives for that decision.

(c) Analysis of violations

20. In the light of the above, the source submits that the detention of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker is arbitrary according to categories I and III of the categories of the Working Group.

(i) Category I

21. The source submits that the detention of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker falls under category I, as they were arrested without a warrant and were not given any reason for their arrest. The circumstances of their arrest did not give any reasonable cause for flagrante delicto, and they were only informed of the charges against them on 31 May 2017, that is, one year and seven months after their arrest. As such, the source argues that their detention was not grounded in law from 30 October 2015 to 31 May 2017, in violation of article 9 of the Universal Declaration of Human Rights and articles 14 (2) and (3) and 16 (1) of the Arab Charter on Human Rights.

22. The source also submits that the two brothers were secretly detained between 30 October 2015 and February 2016. As a consequence, both were placed outside the protection of the law and deprived of their legal safeguards as detainees, including their

right to challenge the legality of their detention before an independent judicial authority and to be recognized as persons before the law. This is in violation of articles 14 (6) and 22 of the Arab Charter on Human Rights.

23. In the light of the above, the source submits that the detention of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker from 30 October 2015 to 31 May 2017 is arbitrary and falls under category I.

(ii) Category III

24. The source further submits that the detention of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker is arbitrary due to the severe violations of fair trial rights that they suffered from the time they were initially arrested through to their sentencing and appeal.

(d) Arbitrary arrest and secret detention

25. According to the source, the two brothers were not presented with a warrant upon their arrest, nor were they given reasons for their arrest. As such, their detention violates principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and article 14 (1) of the Arab Charter on Human Rights.

26. Both brothers were also reportedly secretly detained from the date of their arrest on 30 October 2015 to February 2016. In this regard, the source recalls that secret detention is a form of arbitrary detention per se,¹ and constitutes a violation of a detainee's right to be considered a person before the law in contravention of article 6 of the Universal Declaration of Human Rights.²

27. The source also recalls that secret detention enables torture and can constitute a form of torture in itself in relation to both the disappeared person and his or her relatives. As such, the source submits that by holding the two brothers in secret detention, the authorities of the United Arab Emirates violated their obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(e) Denial of access to consular assistance

28. According to the source, the two brothers were not permitted access to consular assistance until a year after their arrest. The source submits that this violates article 36 of the Vienna Convention on Consular Relations; guideline 3, article 43 (c) of the United Nations Principles and Guidelines on Access to Legal Aid; and article 16 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

(f) Violations of the right to habeas corpus and the right to be brought promptly before a judicial authority

29. According to the source, Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were only brought before a judicial authority for the first time during their trial, nearly two years after their arrest. The source submits that this is in violation of principles 11 and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and article 14 (5) of the Arab Charter on Human Rights. Both stipulate that an individual detained on a criminal charge is to be brought before a judicial authority "promptly after his arrest" – generally interpreted to mean 48 hours after the arrest.

30. As a result of the above, they were also unable to challenge the lawfulness of their detention, as set forth in principle 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, in violation of their right to habeas corpus. The source notes that the Working Group on Arbitrary Detention has further asserted that habeas corpus is in itself a "self-standing human right" that can be inferred from articles 8, 9 and 10 of the Universal Declaration of Human Rights.³

¹ A/HRC/13/42, para. 20.

² A/HRC/29/26/Add.2, para. 51.

³ A/HRC/19/57, paras. 59 and 77.

(g) Torture and coerced confessions

31. The source alleges that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were held in solitary confinement for over three months. In addition, they were interrogated without breaks between 8 a.m. and 4 p.m. while being forced to stand for a period of 45 consecutive days. They were allegedly also subjected to other severe acts of torture and ill-treatment for the purpose of coercing them into signing interrogation minutes without being allowed to read them beforehand, and into fingerprinting and signing blank pieces of paper. This included being threatened with the arrest and rape of members of their families if they did not confess, being placed in extremely cold cells, being forced to sleep on the floor, being deprived of sleep, being denied the use of the lavatories, being denied food for long periods of time, being tied to chairs, being beaten while blindfolded, being subjected to electric shocks, and having hallucinogens added to their food and drink.⁴ The source submits that this clearly contravenes the absolute prohibition of torture enshrined in articles 2 and 16 of the Convention against Torture, article 5 of the Universal Declaration of Human Rights, and principle 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. It also violates article 8 of the Arab Charter on Human Rights, and article 26 of the Constitution of the United Arab Emirates.

32. In relation to the fact that both brothers were held in solitary confinement, the source refers to General Assembly resolution 60/148, whereby this not only may facilitate the perpetration of torture and other cruel, inhuman or degrading punishment but can also in itself constitute a form of such treatment.⁵ Similarly, rule 43 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) outlaws disciplinary sanctions that amount to torture or other cruel, inhuman or degrading treatment or punishment, including “prolonged solitary confinement” (exceeding 15 days).

33. With regard to the alleged interrogation of the two brothers without breaks between 8 a.m. and 4 p.m. while being forced to stand for eight hours a day for a period of 45 consecutive days, the source notes that this not only violates principle 21 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment but it is also contrary to paragraph 12 of Human Rights Council resolution 31/31. In addition, the source recalls that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has raised concern about “manipulative techniques” used to compel suspects into confessing through impairment of “the free will, judgment and memory of interviewees”, including threats, protracted questioning and the use of drugs.⁶ The Special Rapporteur further noted that such methods produced “a desire to admit anything in order to bring the questioning to an end”.⁷

(h) Denial of right to access medical treatment

34. According to the source, both brothers have been denied access to medical care. This is in violation of the obligations of the authorities of the United Arab Emirates under principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 30 of the Nelson Mandela Rules.

(i) Violation of the exclusionary rule

35. The source asserts that as a result of the torture they endured, Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were forced to sign interrogation minutes without reading them, as well as to fingerprint and sign blank pieces of paper. It later emerged that the latter had been filled with “confessions” which were admitted as evidence against them during their trials. As such, the source submits that the authorities of the United Arab Emirates violated their obligations under article 15 of the Convention against Torture and principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁴ See also A/HRC/29/26/Add.2, para. 52.

⁵ See para. 11.

⁶ A/71/298, para. 39.

⁷ Ibid., para. 41.

36. In addition, instead of launching an investigation into the allegations of torture, the judge and the head of the State security prosecution team reportedly dismissed these allegations by laughing at them. The source submits that this contravenes articles 12 and 13 of the Convention against Torture, principle 33 (4) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 57 (2) and (3) of the Nelson Mandela Rules.⁸ The source also recalls that following her country visit to the United Arab Emirates, the Special Rapporteur on the independence of judges and lawyers was told that “over the past few years, more than 200 complaints relating to torture and/or ill-treatment had been presented before judges and/or prosecutors, but that those complaints had not been received or registered, and consequently not been taken into account in judicial proceedings”.⁹

(j) Violation of the principle of legality

37. The source submits that the Decree Law on Combating Terrorism Offences and the Decree Law on Combating Cybercrime, upon which Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker’s sentences are based, do not meet the standard of legal certainty. Article 1 of the Decree Law on Combating Terrorism Offences defines a “terrorist result” in vague terms, stipulating that it includes “opposing the country” and “influencing the public authorities of the country”. Article 26 of the Decree Law on Combating Cybercrime punishes with “at least five years” in prison, without specifying a maximum penalty, anyone who “establishes, manages or runs a website or publishes information” online “for the interests of a terrorist group or any unauthorized group, association, organization or body”. Similarly, article 28 punishes with “temporary imprisonment” and a fine of up to 1 million dirhams anyone who “establishes, manages or runs a website or uses information on the computer network or information technology means with intent to incite acts or publishes or transmits information ... which may endanger the national security and the higher interests of the State or afflicts its public order”. The source adds that such vague provisions allow for arbitrary interpretation and make it impossible for individuals to ascertain how they should act in order to be in compliance with United Arab Emirates law.¹⁰

(k) Trial before a court of exception that lacks independence

38. The source notes that the Federal Court of Appeal – assigned primary jurisdiction to try cases of national security – is composed of judges directly appointed by the Ministry of Interior. As such, it is under the de facto control of the executive branch of the Government and cannot be considered as independent or impartial.¹¹

39. In addition, the presiding judge in the case of the two brothers was an Egyptian national. In this regard, the source notes the concern expressed by the Special Rapporteur on the independence of judges and lawyers about the independence of judges who are not from the United Arab Emirates, who are recruited on temporary contracts that have to be renewed annually.¹² As a consequence, they “can be dismissed at any time, which renders them particularly vulnerable to pressure from any quarter, including from the public prosecution and members of the executive branch”.¹³

40. The source therefore submits that the trial of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker before an Egyptian judge at the Federal Court of Appeal violated article 10 of the Universal Declaration of Human Rights and articles 12 and 13 of the Arab Charter on Human Rights.

⁸ See also General Assembly resolution 60/148, para. 4.

⁹ A/HRC/29/26/Add.2, para. 53.

¹⁰ Ibid., para. 29 (for more details).

¹¹ Ibid., para. 33.

¹² Ibid., paras. 42 and 44.

¹³ Ibid., para. 43.

(l) Denial of the right to legal counsel and trial in-camera

41. According to the source, the two brothers were allowed to appoint a lawyer for the first time on 9 August 2017 – nearly two years after their arrest – and they were only permitted to consult with him for a total of approximately 10 minutes.¹⁴ As such, they were denied access to legal counsel during interrogation, while in custody and for the majority of the time that they spent in pretrial detention. The source submits that this is in clear violation of principle 18 (3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rule 61 (1) of the Nelson Mandela Rules, both of which stipulate that defendants must have access to legal counsel “without delay”. As a consequence, both victims were also denied the time and facilities necessary to prepare their defence, violating article 11 of the Universal Declaration of Human Rights and principle 18 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

42. In addition, the public and representatives of the Consulate of Jordan were reportedly permitted access to some of the trial sessions, while they were banned from others. The source submits that this is a violation of article 10 of the Universal Declaration of Human Rights and principle 36 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

(m) Violation of the right to appeal

43. The source further submits that the two brothers were denied their right to appeal their conviction in violation of the obligations of the authorities of the United Arab Emirates under article 8 of the Universal Declaration of Human Rights and article 16 (7) of the Arab Charter on Human Rights.

Response from the Government

44. On 22 January 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 25 March 2019, detailed information about the current situation of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker and any comments on the source’s allegations. Moreover, the Working Group called upon the Government to ensure Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker’s physical and mental integrity.

45. According to the Government’s response of 14 March 2019, Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were presented with a warrant and a reason for their arrest, and were transferred to the prosecution and officially informed of the charges against them, including “planning to carry out terrorist operations” and “promoting and endorsing the terrorist group” ISIL, on 29 December 2015.

46. The Government has also provided Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker’s visitation logs and medical notes to back their claim that they have been afforded their visitation rights and the necessary medical care on a routine basis. The Government adds that they both suffer from gout and high levels of cholesterol, for which they are receiving required medication.

Further comments from the source

47. The response from the Government was transmitted to the source on 29 March 2019 for further comments. In its response of 16 April 2019, the source states that the Government did not address the allegation of the violation of the right to consular protection and of the principle of legality, and that it failed to provide evidence against the allegation of torture and coerced confession.

48. The source mentions that the Government has failed to provide evidence to authenticate its claim that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were shown

¹⁴ Ibid., para. 56 (for similar testimonies).

a warrant and given a reason for their arrest. It refers to the finding of the Special Rapporteur on the independence of judges and lawyers after her country visit in 2014 that she “received many reports of people being arrested without a warrant. Such cases very often concern persons who were later accused of State security crimes”.¹⁵

49. The source also adds that the Government failed to provide any material evidence to support its claim that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker had been informed of the charges against them on 29 December 2015. Even if this were true, it would mean that, even by the Government’s own admission, Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were brought before judicial authorities, assuming that the prosecutors qualify as such for the purpose, long past the 48-hour limit prescribed under international law. The Government also failed to provide any details on certain rights provided to the two defendants, including their right to habeas corpus. Furthermore, the Government failed to specify which specific terrorist acts they were accused of having committed.

50. Regarding the Government’s presentation of the visitation logs, the source notes that according to the logs, the first visit occurred on 28 January 2016, which does not conflict with its original contention that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were held in secret detention for approximately three months, and the last recorded visit was on 19 April 2018 – that is, nearly a year before the source provided the further comments. The source also notes that this does not change the fact that following an initial visit by a family member, the immediate family members could not visit as they had been expelled by the Government.

51. The source also refers to the finding by the Special Rapporteur on the independence of judges and lawyers, that: “After being arrested by State security agents, most of those individuals were taken to secret detention facilities and kept incommunicado for days, weeks or even months, sometimes in solitary confinement. Such detentions may sometimes amount to enforced disappearances, as the authorities refuse to acknowledge that they have detained the person and/or refuse to confirm their fate and whereabouts.”¹⁶

52. Furthermore, Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were tried in a group of individuals, including those whom the Working Group in its opinion No. 30/2018 found to have been held incommunicado in a secret location, which had denied them their right to be promptly brought before a judicial authority, and to challenge the lawfulness of their detention.¹⁷

53. The source also contends that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker’s alleged medical notes are virtually identical and fail to mention Mr. Abdallah Abu Baker’s depression, a chronic skin allergy related to his mental health issues, and a colon problem, which are mentioned in the medical examination papers from March 2015 that were provided for submission to the Working Group.

Discussion

54. The Working Group thanks the source and the Government for their submissions in relation to Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker’s arrest and detention.

55. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has presented 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source’s allegations (A/HRC/19/57, para. 68).¹⁸

¹⁵ Ibid., para. 51.

¹⁶ Ibid.

¹⁷ Opinion No. 30/2018, para. 43.

¹⁸ See, for example, opinions No. 50/2017, para. 54; No. 61/2017, para. 26; No. 62/2017, para. 45; No. 69/2017, para. 24; No. 70/2017, para. 48; No. 75/2017, para. 34; No. 79/2017, para. 47; No. 11/2018,

56. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international and regional instruments.¹⁹ Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group is entitled and obliged to assess the judicial proceedings and the law itself to determine whether such detention is also consistent with the relevant provisions of international human rights law.²⁰

Category I

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

58. As the source alleges, and the Government refutes and yet has not substantiated its rebuttal with credible evidence, the Working Group finds that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were not presented with arrest warrants or informed of the reasons for their arrest at the time of their arrest on 30 October 2015, and that they were not promptly informed of any charges against them.

59. The Working Group notes that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were arrested without an arrest warrant and without being informed at that time of the reasons for their arrest, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.²¹

60. The Working Group also finds that the authorities should have informed Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker of the reasons for their arrest, at the time of arrest, and of the charges against them promptly. It is evident that they were not promptly informed of the charges against them, in violation of article 9 of the Universal Declaration of Human Rights.²² In fact, as they were not informed of the charges against them until 31 May 2017, their detention for the first 1 year and 7 months is without any legal basis.

61. The source further maintains, and the Government's material evidence does not contradict, that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were held incommunicado from 30 October 2015 to February 2016. Such deprivation of liberty, entailing a refusal to disclose the fate or whereabouts of the person or persons concerned or to acknowledge their detention, lacks any valid legal basis under any circumstance and is inherently arbitrary, as it places the person or persons outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights.²³

para. 41; No. 19/2018, para. 25; No. 35/2018, para. 24; No. 36/2018, para. 37; No. 37/2018, para. 27; No. 40/2018, para. 42; No. 43/2018, para. 71; No. 44/2018, para. 78; No. 45/2018, para. 39; No. 46/2018, para. 45; No. 52/2018, para. 68; No. 67/2018, para. 69; No. 70/2018, para. 31; No. 75/2018, para. 57; No. 78/2018, para. 67; No. 79/2018, para. 68; and No. 90/2018, para. 29.

¹⁹ See General Assembly resolution 72/180, preambular para. 5; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; Human Rights Council resolutions 6/4, para. 1 (a), and 10/9, para. 4 (b); and opinions No. 41/2014, para. 24; No. 28/2015, para. 41; No. 76/2017, para. 62; No. 83/2017, paras. 51 and 70; No. 88/2017, para. 32; No. 94/2017, para. 59; No. 38/2018, para. 60; No. 68/2018, para. 37; No. 82/2018, para. 25; and No. 87/2018, para. 51.

²⁰ See, for example, opinions No. 1/1998, para. 13; No. 5/1999, para. 15; No. 1/2003, para. 17; No. 33/2015, para. 80; No. 94/2017, paras. 47–48; No. 38/2018, para. 60; No. 68/2018, para. 37; No. 82/2018, para. 25; and No. 87/2018, para. 51.

²¹ Opinions No. 76/2017, para. 55; No. 83/2017, para. 65; No. 88/2017, para. 27; No. 93/2017, para. 44; No. 3/2018, para. 43; No. 10/2018, para. 46; No. 26/2018, para. 54; No. 30/2018, para. 39; No. 38/2018, para. 63; No. 47/2018, para. 56; No. 51/2018, para. 80; No. 63/2018, para. 27; No. 68/2018, para. 39; and No. 82/2018, para. 29. See also article 6 of the African Charter on Human and Peoples' Rights and article 14 (1) of the Arab Charter on Human Rights.

²² See also article 14 (3) of the Arab Charter on Human Rights.

²³ General Assembly resolution 47/133. See also opinion No. 82/2018, para. 28; as well as article 22 of the Arab Charter on Human Rights.

62. The Working Group notes that thereupon Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker were not brought promptly before a judge or afforded the right to take proceedings before a court so that it might decide without delay on the lawfulness of their detention in accordance with articles 3, 8 and 9 of the Universal Declaration of Human Rights. This also deprived them of an effective judicial remedy for the violation of their rights and freedoms provided in articles 8 and 10 of the Universal Declaration of Human Rights.²⁴ 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 (A/HRC/30/37, annex) indicates 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 (paras. 2–3). This right applies to all forms and situations of deprivation of liberty.²⁵

63. The Working Group therefore considers that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker's arrest and detention lack a legal basis and are thus arbitrary, falling under category I.

Category III

64. The Working Group will now consider whether the alleged violations of the right to a fair trial and due process were grave enough to give Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker's deprivation of liberty an arbitrary character, so that it falls within category III.

65. In the Working Group's view, the Decree Law on Combating Terrorism Offences and the Decree Law on Combating Cybercrime fail to meet the standard of legality under article 11 (2) of the Universal Declaration of Human Rights and article 15 of the Arab Charter on Human Rights. One of the fundamental guarantees of due process is the principle of legality, which includes: (a) the principle of non-retroactivity; (b) the prohibition against analogy; (c) the principle of certainty; and (d) the prohibition against uncodified, that is, unwritten, or judge-made, criminal provisions. This means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.²⁶ The use of vague definitions for terms such as "terrorist result" fails to meet the requirement of legal certainty and enables guilt by analogy.

66. The Government failed to respect Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker's right to legal assistance at all times, which is inherent in the right to liberty and security of person, and their right to a fair and public hearing by a competent, independent and impartial tribunal established by law with all the guarantees necessary for defence in a criminal case, in accordance with articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights. The interrogations without the presence of their lawyers following their initial arrest deprived them of their right to legal counsel at a critical stage of the criminal proceedings.

67. The incommunicado detention also negates the essence of the right to legal assistance, preparation for defence and free communication with legal counsel under article 11 (1) of the Universal Declaration of Human Rights.²⁷

68. The Working Group notes that Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker's trial and conviction by an Egyptian judge, contracted annually, also casts serious doubt on the independence and impartiality of the Federal Court of Appeal. As the Special Rapporteur on the independence of judges and lawyers noted from her official visit in 2014, the tenure of non-national judges is not guaranteed in the same way as that of national

²⁴ See also articles 12, 14 (1), (5) and (6) and 23 of the Arab Charter on Human Rights.

²⁵ Opinion No. 39/2018, para. 35.

²⁶ Claus Kreß, "Nulla poena nullum crimen sine lege", *Max Planck Encyclopedia of Public International Law*, vol. 7, Rüdiger Wolfrum, ed. (2010), pp. 889–890; and Payam Akhavan, "Judicial guarantees", *The 1949 Geneva Conventions: A Commentary*, Andrew Clapham, Paola Gaeta and Marco Sassoli, eds. (2015), p. 1,227, cited in opinion No. 10/2018, para. 50.

²⁷ See also article 16 (2) and (3) of the Arab Charter on Human Rights.

judges, as they are recruited on temporary contracts that have to be renewed annually.²⁸ The Special Rapporteur thus expressed her concern that non-national judges could be dismissed at any time, which rendered them particularly vulnerable to pressure from any quarter, including from the public prosecution and members of the executive branch.²⁹ According to principle 12 of the Basic Principles on the Independence of the Judiciary, judges should have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. The lack of appeal process after their conviction further violated article 8 of the Universal Declaration of Human Rights and article 16 (7) of the Arab Charter on Human Rights.

69. The Working Group cannot fail to express its grave concern at the allegations of torture and ill-treatment, including electrocution, savage beatings, solitary confinement in cells measuring 2 x 1 metres, forced standing posture from 8 a.m. to 4 p.m. for 45 consecutive days, death threats and rape threats against family, food and sleep deprivation, denial of bathroom access, and the administration of hallucinogens in their food, in violation of articles 5 and 25 of the Universal Declaration of Human Rights. The treatment described reveals a *prima facie* breach of the absolute prohibition of torture, which is a peremptory norm of international law, of the Convention against Torture, of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (principle 6) and of the Nelson Mandela Rules (rule 1). 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.³⁰

70. In the Working Group's view, not only is torture a grave violation of human rights *per se*, but it seriously undermines the ability of persons to defend themselves and hinders their exercise of the right to a fair trial, especially in light of the right not to be compelled to testify against oneself or confess guilt under article 16 (6) of the Arab Charter on Human Rights. The use of a confession extracted through ill-treatment also constitutes a violation of article 15 of the Convention against Torture and principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.³¹

Right to consular assistance

71. The Working Group notes that the Government appears not to have fully implemented the formal procedures necessary to establish the legal basis for the arrest and detention of a foreign national under the provisions of article 36 of the Vienna Convention on Consular Relations, of 1963, to which the United Arab Emirates is a party. The Working Group regrets that this is not the first time that it is addressing the Government's practice on this matter.³²

72. Article 36 (1) (b) of the Vienna Convention on Consular Relations provides that a foreign national arrested or committed to prison or to custody pending trial or detained in any other manner should be informed without delay of his or her rights to inform consular officers about his or her detention and to have any communication addressed to them forwarded without delay. This is in addition to the right of consular officers to be informed of the detention and to maintain communication (art. 36 (1) (b)) and their right to arrange for legal representation and to visit him or her in prison (art. 36 (1) (c)).

²⁸ A/HRC/29/26/Add.2, para. 42.

²⁹ *Ibid.*, para. 43.

³⁰ Opinion No. 39/2018, para. 42. As the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment observed in its concluding observations on Canada (CAT/C/CAN/CO/6 and CAT/C/CAN/CO/7), in relation to civil actions brought against the Islamic Republic of Iran in Canadian domestic courts by victims of torture and/or sexual violence suffered at the hands of the Iranian authorities, a State must ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or the victim, including by restricting the application of sovereign immunity.

³¹ See also opinions No. 48/2016, No. 3/2017, No. 6/2017, No. 29/2017 and No. 39/2018.

³² Opinions No. 58/2017 and No. 30/2018.

73. The Working Group notes that the General Assembly has emphatically reaffirmed the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention.³³

74. Furthermore, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment recognizes in principle 16 (2) the importance of consular assistance for a detained or imprisoned foreign national by specifically mentioning his or her right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he or she is a national. The Nelson Mandela Rules also provide, in rule 62 (1), that prisoners who are foreign nationals are to be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.

75. Given the limited availability of remedies for individuals in the international sphere, consular protection is invaluable for foreign nationals, who are disadvantaged by the lack of familiarity with the local law, customs and even language. Furthermore, it should be noted that the institution of consular protection not only serves the interests of the detained foreign individual and of the State that espouses such interests, but also furthers the interests of the international community as a whole by facilitating international exchange and reducing the potential for friction between States over the treatment of their nationals.³⁴

76. In the light of the factual and legal considerations noted above, the Working Group considers that the Government's failure to respect Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker's right to consular protection under customary international law, as codified in article 36 of the Vienna Convention on Consular Relations, during their initial arrest and detention, is in violation of article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights and principle 16 (2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

77. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker's deprivation of liberty an arbitrary character that falls within category III.

78. With respect to the United Arab Emirates, the Working Group notes that the present opinion is one of several opinions in which the Working Group has found the Government in violation of its international human rights obligations.³⁵ The Working Group is concerned that this indicates a systemic problem with arbitrary detention in the United Arab Emirates, which amounts to a serious violation of international law. The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.³⁶

³³ See General Assembly resolution 72/179, para. 4 (k). See also General Assembly resolutions 72/149, para. 32, and 73/180, para. 16 (g); and Human Rights Council resolution 40/20, para. 2 (j).

³⁴ Opinions No. 58/2017, para. 64; and No. 30/2018, para. 56.

³⁵ Opinions No. 34/2011, No. 64/2011, No. 61/2012, No. 27/2013, No. 42/2013, No. 60/2013, No. 12/2014, No. 51/2015, No. 56/2014, No. 17/2016, No. 21/2017, No. 28/2017, No. 47/2017, No. 58/2017, No. 76/2017 and No. 30/2018.

³⁶ See A/HRC/13/42, para. 30; and opinions No. 1/2011, para. 21; No. 37/2011, para. 15; No. 38/2011, para. 16; No. 39/2011, para. 17; No. 4/2012, para. 26; No. 38/2012, para. 33; No. 47/2012, paras. 19 and 22; No. 50/2012, para. 27; No. 60/2012, para. 21; No. 9/2013, para. 40; No. 34/2013, paras. 31, 33 and 35; No. 35/2013, paras. 33, 35 and 37; No. 36/2013, paras. 32, 34 and 36; No. 48/2013, para. 14; No. 22/2014, para. 25; No. 27/2014, para. 32; No. 35/2014, para. 19; No. 34/2014, para. 34; No. 36/2014, para. 21; No. 44/2016, para. 37; No. 60/2016, para. 27; No. 32/2017, para. 40; No. 33/2017, para. 102; No. 36/2017, para. 110; No. 51/2017, para. 57; No. 56/2017, para. 72; No. 68/2018, para.

Disposition

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

The deprivation of liberty of Abdallah Sami Abedalafou Abu Baker and Yasser Sami Abedalafou Abu Baker, being in contravention of articles 3, 5, 6, 8, 9, 10, 11 (1) and (2) and 25 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and III.

80. The Working Group requests the Government of the United Arab Emirates to take the steps necessary to remedy the situation of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker 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.

81. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

82. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker and to take appropriate measures against those responsible for the violation of their rights.

83. The Working Group encourages the Government to ratify the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and their Optional Protocols.

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

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

86. The Working Group transmits the present opinion to the Government of Jordan for its consideration.

Follow-up procedure

87. 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. Abdallah Abu Baker and Mr. Yasser Abu Baker have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker;

(c) Whether an investigation has been conducted into the violation of Mr. Abdallah Abu Baker and Mr. Yasser Abu Baker's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the United Arab Emirates with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

88. 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

60; No. 73/2018, para. 69; No. 82/2018, para. 53; No. 83/2018, para. 68; and No. 87/2018, para. 80.

whether further technical assistance is required, for example through a visit by the Working Group.

89. 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.

90. 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.³⁷

[Adopted on 3 May 2019]

³⁷ Human Rights Council resolution 42/22, paras. 3 and 7.