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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-seventh session, 21-25 November 2016

Opinion No. 48/2016 concerning Mohammed Rashid Hassan Nasser al- Ajami (Qatar)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.
2. In accordance with its methods of work (A/HRC/30/69), on 16 March 2016 the Working Group transmitted a communication to the Government of Qatar concerning Mohammed Rashid Hassan Nasser al-Ajami. The Government has not replied to the communication. 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);

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(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. Mr. Al-Ajami, a national of Qatar, is also known as Ibn al-Dheeb. He was born on 24 December 1975 and is a well-known Qatari poet.

5. According to the information received from the source, on 24 August 2010, while in Egypt studying Arabic literature at Cairo University, Mr. Al-Ajami recited a poem (known as “The Cairo poem”) in his apartment to a group of about seven people, of whom he knew about three. He was reciting the poem in response to a poem that had been recited by another individual in the apartment. The recital was apparently recorded and uploaded to YouTube by one of the seven people present and circulated widely online.

6. On 16 November 2011, Mr. Al-Ajami was arrested in Qatar by State Security agents. The authorities alleged that Mr. Al-Ajami’s recital of “The Cairo poem” was insulting to the then Emir of Qatar, Sheikh Hamad bin Khalifa al-Thani.

7. The source submits that Mr. Al-Ajami was charged under articles 134 and 136 of the Qatari Penal Code for challenging and publicly criticizing the “exercise by the Emir of his rights or authorities” and for instigating, by public means, the overthrow of the regime of the country. On 26 March 2012, the first trial hearing was convened by the Criminal Court in Doha.

8. On 29 November 2012, Mr. Al-Ajami was sentenced to life imprisonment. On 25 February 2013, the Appeal Court in Doha reduced his sentence to 15 years’ imprisonment. On 20 October 2013, the Court of Cassation upheld the verdict. Mr. Al-Ajami began serving his 15-year sentence in the Central Prison, located south-west of Doha.

Submissions regarding arbitrary detention

9. The source submits that the arrest and detention of Mr. Al-Ajami fall under categories I, II and III.

10. With regard to categories I and II, the source asserts that Mr. Al-Ajami was arrested and tried under articles 134 and 136 of the Penal Code. Article 134 states that “the penalty of imprisonment for a period not exceeding five years shall apply to anyone who challenges by any public means the exercise by the Emir of his rights or authorities or criticizes him”. Article 136 provides for the “perpetual imprisonment ... [of] anyone who instigates by public means to overthrow the regime of the country, undertakes such propaganda or calls by public means to adopt a doctrine aiming to destroy the fundamental values of the State, to change the social or economic system prevailing in the country by use of force or through any illegal means”.

11. The source argues that article 134, which penalizes criticism of the Emir’s authority, is clearly incompatible with international human rights law, while the application of article 136 to the present case appears disproportionate and aimed at silencing a dissenting opinion or political opposition.

12. In that regard, the source claims that the reasons for the arrest and the charges brought against Mr. Al-Ajami do not constitute internationally recognizable criminal offences, in particular, because Mr. Al-Ajami was persecuted merely for reciting a poem. The source asserts that Qatar is in contravention of article 19 of the Universal Declaration of Human Rights and article 26 the Arab Charter on Human Rights, ratified by Qatar in 2009.

13. The source also claims that Mr. Al-Ajami was deprived of his liberty because he peacefully exercised his rights to freedom of expression, including artistic expression, and took part in cultural life. In that regard, the source argues that, despite the existence of a legal basis for charging, trying, sentencing and imprisoning Mr. Al-Ajami under domestic law, the provisions cited are incompatible with international human rights norms.

14. In view of the above, the source submits that the charges against Mr. Al-Ajami are unfounded and constitute an arbitrary basis for arrest, trial and conviction based solely on the peaceful exercise of his right to freedom of expression.

15. With regard to category III, the source contends that, following his arrest on 16 November 2011, Mr. Al-Ajami was held incommunicado for three months before he was allowed visits from his family and his lawyer. The source also submits that, from 24 November 2011 to 26 March 2012, Mr. Al-Ajami was held in solitary confinement in a very small cell, in which he could not lie down without pressing against the lavatory. Such conditions continued, despite the petitions made to the prosecutor and the pretrial judge about his treatment.

16. According to the source, during his incommunicado detention and while in solitary confinement, Mr. Al-Ajami was forced by interrogators to sign a document that was later used as evidence in his conviction. Specifically, he was forced to state that the poem had been recited in a public place. His lawyer, however, asserted before the court that the poem had been recited in private.

17. The trial hearings in Mr. Al-Ajami's case were conducted by the Criminal Court in Doha. The trial started on 26 March 2012 and the verdict was announced on 29 November 2012. The source claims that Mr. Al-Ajami was tried in a proceeding that lacked the most basic fair trial guarantees. Allegedly, the presiding judge, who was part of a three-judge trial panel, had also been the investigating judge, which the source asserts is a violation of the right of Mr. Al-Ajami to be tried by an impartial court and is contrary to Qatari legislation.

18. In that connection, article 232 of the Qatari Criminal Procedure Code (Law No. 23 of 2004) reads: "The Judge renders his judgment as to the action freely, however, he shall not base his judgment on any evidence that was not presented in the hearing or that was concluded illegally. Any statement given by any of the defendants or witnesses in a coercive state or under threatening shall not be relied upon."

19. In addition, article 214 of the Qatari Criminal Procedure Code reads: "A judge is precluded to participate in the trial of the case if the crime has been committed against him in person, or if he had participated in any of the investigation procedures of the action, or in the referral, accusation, defence of any of the litigants, or if he has testified in it, or assumed any act of experts."

20. During the first hearing, on 26 March 2012, Mr. Al-Ajami denied having committed any wrongdoing and rejected the charges against him on the ground that the accusation against him was unfounded. During the same hearing, the presiding judge ruled without providing any explanation or reasoning that the subsequent trial hearings would be held in camera. Reportedly, the Qatari judicial system does not provide for hearings in camera. Mr.

Al-Ajami's lawyer objected to the ruling and filed a complaint. On 16 April 2012, the complaint was dismissed.

21. On 21 May 2012, Mr. Al-Ajami's lawyer refused to take part in the trial hearings because they were being held in camera and the court was not impartial. On 18 July and on 10 and 22 October 2012, three more hearings were held behind closed doors. According to the source, five hearings took place before the court delivered its verdict. Four of the five hearings were conducted in camera.

22. The source further submits that Mr. Al-Ajami was tried unfairly on account of the court's interference regarding his right to choose his own legal representative and his right to be present during the hearings and at the announcement of the verdict.

23. In the absence of Mr. Al-Ajami's designated lawyer, who refused to attend the hearings because they were held in camera, the court appointed two other lawyers. Mr. Al-Ajami refused to be represented by any lawyer other than the one he had initially chosen. This led to the resignation of one of the two court-appointed lawyers.

24. On 10 October 2012, following the submission of a written complaint about the secrecy of the trial to the Head of the Criminal Court, Mr. Al-Ajami's lawyer attempted to attend the court hearing scheduled on that day. The presiding judge ordered him to be barred from attending the proceedings as the court had appointed another lawyer. According to the source, the court-appointed lawyer did not provide effective legal representation.

25. On 22 October 2012, during the last trial hearing, the court expelled Mr. Al-Ajami for being disruptive. In his absence, the court proceeded to schedule the announcement of the verdict.

26. On 29 November 2012, in the absence of Mr. Al-Ajami, the court delivered a guilty verdict and sentenced him to life imprisonment. The lawyer who was present during that final hearing noticed that his client was absent. He later visited Mr. Al-Ajami in prison, who informed him that he could not be present during the verdict because no one had come to transfer him to the courthouse. The prison authorities told the lawyer that they had not received an order from the court requiring the presence of Mr. Al-Ajami in court.

27. On 25 February 2013, the Court of Appeal in Doha reduced Mr. Al-Ajami's sentence from life imprisonment to 15 years' imprisonment. On 20 October 2013, the Court of Cassation upheld the 15-year sentence. The reasons for reducing the sentence were not made clear by the court.

28. According to the source, while serving his sentence, Mr. Al-Ajami continued to be held in conditions that amount to near-solitary confinement. He was not allowed to communicate or meet with his family and had limited access to his lawyer.

Joint allegation letters

29. On 21 December 2012, a joint allegation letter relating to the detention of Mr. Al-Ajami was addressed to the Government of Qatar by the Special Rapporteur in the field of cultural rights, the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

30. On 14 February 2013, in its response to that letter, the Government of Qatar stated that Mr. Al-Ajami had been sentenced on the basis of articles 6, 134 and 136 of the Penal Code. The Government also asserted that it had followed the proper procedures in the administration of justice in handling Mr. Al-Ajami's case and acted in compliance with its obligations under international conventions and standards related to human rights.

31. On 16 October 2015, a follow-up joint letter relating to the detention of Mr. Al-Ajami was addressed to the Government of Qatar by the same three Special Rapporteurs. In that follow-up letter the Special Rapporteurs mentioned, inter alia, that the detention of Mr. Al-Ajami had also been raised as a concern by the Committee against Torture in its concluding observations on the second periodic report of Qatar (see CAT/C/QAT/CO/2, para. 11). General concerns about the judicial system relevant to the present case were also raised in the report of the Special Rapporteur on the independence of judges and lawyers on her mission to Qatar in 2014 (A/HRC/29/26/Add.1).

32. On 2 December 2015, in its response to the letter from the Special Rapporteurs, the Government of Qatar referred to its response dated 14 February 2013 and reiterated that Mr. Al-Ajami had been afforded all his legal rights throughout the judicial procedures, i.e. during the prosecution, the investigation, the trial and his imprisonment. The Government added that on 28 February 2013 the Court of Appeal reduced Mr. Al-Ajami's sentence to 15 years and that that sentence was upheld by the Court of Cassation on 21 October 2015. Under the Qatari legal system, sentences issued by the Court of Cassation are final.

33. In its response, the Government of Qatar added that it was taking full account of its obligations under international human rights treaties and standards, which it strove to adhere to with all due transparency in the conviction that human rights were the cornerstone of the comprehensive reform policies that the country was pursuing.

Response from the Government

34. On 16 March 2016, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 16 May 2016, detailed information about the current situation of Mr. Al-Ajami and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Mr. Al-Ajami's detention and to provide the details regarding the conformity of the legal proceedings against him with international law, in particular the norms of international human rights law to which Qatar is bound.

35. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. While not obliged to, however, the Working Group has decided, in rendering its opinion, to take into account the information received from the Government in response to the joint allegation letters from the three Special Rapporteurs.¹

Discussion

36. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

37. 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

¹ According to paragraph 16 of its methods of work, the Working Group may render an opinion on the basis of all the information it has obtained. In the present case, in order to give the Government every opportunity to respond to the source's allegations, the Working Group has exercised its discretion to take into account the information submitted by the Government in response to the joint allegation letters.

understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).

38. While the Government has provided certain information and assurances about the proceedings in its responses of 14 February 2013 and 2 December 2015 to the joint allegation letters of 21 December 2012 and of 16 October 2015 from the three Special Rapporteurs, it has not provided specific evidence to rebut many of the prima facie reliable allegations submitted by the source. Nor did the Government plead the compatibility of the relevant criminal provisions with its obligations under international conventions and standards related to human rights. Moreover, the Government of Qatar has been the subject of multiple communications and opinions of the Working Group concerning cases of arbitrary deprivation of liberty (see, for example, opinions No. 68/2011, which cites category II, and No. 25/2010, which cites category I).

39. The Working Group will first consider whether Mr. Al-Ajami's arrest, trial and imprisonment for reciting a poem allegedly insulting to the then Emir of Qatar, Sheikh Hamad bin Khalifa al-Thani, resulted from the legitimate exercise of his rights or freedoms. Should the Working Group find that to be the case, Mr. Al-Ajami's detention would be considered arbitrary under category II.

40. The Working Group finds that Mr. Al-Ajami was deprived of his liberty owing to the mere peaceful exercise of his right to freedom of expression, including artistic expression. Furthermore, the Working Group confirms that, despite the existence of a legal basis for charging, trying, sentencing and imprisoning Mr. Al-Ajami under domestic law, the provisions providing such basis are incompatible with international human rights norms.

41. The Working Group underlines that all national laws related to arrest and detention should be made and implemented in a manner consistent with the relevant international provisions contained in the Universal Declaration of Human Rights and in the relevant international legal instruments to which the State concerned is a party. Consequently, even if the arrest and detention are in conformity with national legislation, the Working Group must ensure that such detention is also consistent with the relevant provisions of international human rights law.

42. The Working Group recalls that holding and expressing opinions, including those that are not in line with official government policy, are protected by article 19 of the Universal Declaration of Human Rights. In paragraph 38 of its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee emphasized that the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, adding 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. The Committee specifically expressed concern regarding laws on such matters as lese-majesty.

43. The Working Group notes that the issue of freedom of expression and opinion was the subject of numerous recommendations during the universal periodic review of Qatar, in May 2014.

44. Mr. Al-Ajami's recitation of "The Cairo poem" falls within the boundaries of the right to expression of opinion, which is protected under 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 purpose 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.

45. Mr. Al-Ajami's deprivation of liberty for the offence of lese-majesty under article 134 of the Penal Code, as well as the criminal provision itself, cannot be justified as a reasonable limitation in a democratic society. The purpose of article 134 is to suppress public criticism of a Head of State (a public figure), which is not a sufficiently important reason for justifying interference in the right to freedom of opinion and expression. Indeed, it is doubtful that it is a legitimate purpose at all. Therefore, the arrest, prosecution and imprisonment of Mr. Al-Ajami can only be regarded as arbitrary.

46. The application of article 136 of the Penal Code to Mr. Al-Ajami's case raises other questions as well. While the suppression of violent incitement 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 A/HRC/22/44, para. 61).

47. In that context, the application of clauses such as articles 134 and 136 of the Penal Code, coupled with the vagueness of the provisions and their overly broad application, render the law itself at odds with the relevant norms of international law on the administration of criminal justice.

48. Given the above-mentioned observations, the Working Group considers that Mr. Al-Ajami's deprivation of liberty was arbitrary, as it resulted from the exercise of the rights or freedoms guaranteed under article 19 of the Universal Declaration of Human Rights. Accordingly, his deprivation of liberty falls within category II.

49. The Working Group has also considered whether the violations of Mr. Al-Ajami's right to a fair trial were of such gravity as to give his deprivation of liberty an arbitrary character under category III.

50. Following his arrest, Mr. Al-Ajami was held incommunicado for three months before he was allowed visits from his family and his lawyer. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment restricts the denial of communication with family or counsel to very exceptional circumstances (see General Assembly resolution 43/173, annex, principles 15, 18 and 19). The Government has offered no compelling reason for such restrictions. Therefore, Mr. Al-Ajami's incommunicado detention constitutes a violation of the rights to security and liberty of person and to protection against arbitrary arrest or detention enshrined in articles 3 and 9 of the Universal Declaration of Human Rights.

51. The Committee against Torture, in its concluding observations on the second periodic report of Qatar, expressed concern about reports that detained persons are often subject to incommunicado detention or solitary confinement, as seen in the case of Mr. Al-Ajami, among others (see CAT/C/QAT/CO/2, para. 11).

52. Furthermore, Mr. Al-Ajami's forced confession during his incommunicado detention, coupled with the solitary confinement and the inhuman and degrading conditions to which he was subjected, flagrantly undermine the guarantees necessary for his defence in the criminal proceedings, in contravention of article 11 (1) of the Universal Declaration of Human Rights. The Working Group notes that the use of a confession extracted through ill-treatment that is tantamount if not equivalent to torture may also constitute a violation by Qatar of its international obligation under article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment specifically prohibits taking undue advantage of the situation of detention to compel confession or incriminating statements (see principle 21).

53. Such inhuman and degrading treatment also constitutes a breach of article 5 of the Universal Declaration of Human Rights and the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (see General Assembly resolution 70/175, annex). The Nelson Mandela Rules generally prohibit torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification (rule 1) and specifically ban the unlimited or unrequired prohibition of family contact (rule 43, para. 3), as well as prolonged or indefinite solitary confinement (rule 43, para. 1 (a) and (b)). For the purpose of the Rules, “solitary confinement” is defined as the “confinement of prisoners for 22 hours or more a day without meaningful human contact” and “prolonged solitary confinement” as “solitary confinement for a time period in excess of 15 consecutive days” (rule 44).

54. The failure by the courts and the Government to provide effective remedies despite Mr. Al-Ajami’s petitions further engages article 8 of the Universal Declaration of Human Rights and article 2 (1) of the Convention against Torture.

55. According to the source, the investigating judge subsequently served as the presiding judge in the criminal trial, in violation of domestic law and of Mr. Al-Ajami’s right to a trial by an impartial tribunal, which is guaranteed under article 10 of the Universal Declaration of Human Rights. The Working Group notes that the European Court of Human Rights viewed such a practice as a breach of a defendant’s rights not only when it breached domestic criminal procedure law (see *Pfeifer and Plankl v. Austria*) but also when it complied with national law, as it “provided grounds for some legitimate misgivings” about the impartiality of the court (see *De Cubber v. Belgium*).

56. The in camera proceedings ordered by the presiding judge, for which there is no legal basis in Qatari law, also violated the right to a public trial provided for in article 11 (1) of the Universal Declaration of Human Rights. The violation of domestic procedural law itself constitutes a breach of Mr. Al-Ajami’s right to a trial “according to law”, in line with the same article. The injustice of the presiding judge’s decision to hold the hearings in camera was compounded by his order to exclude Mr. Al-Ajami’s lawyer from proceedings and to have the court deliver the verdict and the sentence without Mr. Al-Ajami being present, in violation of article 11 of the Universal Declaration of Human Rights.

57. Given such serious violations of due process, the Working Group considers that the non-observance of Mr. Al-Ajami’s right to a fair trial was of such gravity as to give his deprivation of liberty an arbitrary character under category III.

58. The Working Group notes that Mr. Al-Ajami was released from prison on 15 March 2016 by Emiri pardon.

Disposition

59. Although Mr. Al-Ajami has been released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether or not the deprivation of liberty was arbitrary, notwithstanding the release. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mohammed Rashid Hassan Nasser al-Ajami, being in contravention of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights, was arbitrary and falls within categories II and III.

60. The Working Group requests the Government to take the steps necessary to remedy the situation of Mr. Al-Ajami without delay and to bring it into conformity with the standards and principles set out in the Universal Declaration of Human Rights.

61. Taking into account all the circumstances of the case, the Working Group considers that the adequate remedy would be to accord to Mr. Al-Ajami an enforceable right to compensation under article 8 of the Universal Declaration of Human Rights.

62. The Working Group urges the Government to bring its relevant legislation, in particular clauses such as articles 134 and 136 of the Penal Code, which have been used to restrict the right to freedom of expression, into conformity with the commitments made by Qatar under international human rights law.

63. In accordance with article 33 (a) of its methods of work, the Working Group refers Mr. Al-Ajami's case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

Follow-up procedure

64. 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 compensation or other reparations have been made to Mr. Al-Ajami;
- (b) Whether an investigation has been conducted into the violation of Mr. Al-Ajami's rights and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

65. 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.

66. 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.

67. 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.²

[Adopted on 22 November 2016]

² See Human Rights Council resolution 33/30, paras. 3 and 7.