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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 13/2018 concerning Nabeel Ahmed Abdulrasool Rajab (Bahrain)

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 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 26 January 2018 the Working Group transmitted to the Government of Bahrain a communication concerning Nabeel Ahmed Abdulrasool Rajab. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Nabeel Ahmed Abdulrasool Rajab, born in 1964, is a national of Bahrain.

5. According to the source, Mr. Rajab is a prominent human rights defender in Bahrain, who has been arrested, detained, prosecuted and released on multiple occasions since 2012 on charges relating to his human rights work.

6. The source notes that the Working Group, in its opinion No. 12/2013 (Bahrain), concluded that the detention of Mr. Rajab was arbitrary when he was arrested and detained on charges of insulting statutory bodies, of participating in illegal demonstrations and calling upon others to join, and of libel against the residents of the town of Al-Muharraq.[1]

Current arrest, detention and conviction

7. According to the source, on 13 June 2016 Mr. Rajab was arrested again by the Bahraini authorities, and he has been held in detention pending the adjudication of two separate cases, relating to allegedly:

(a) Spreading false news abroad which damages the national interest (pursuant to art. 134 of the Penal Code)[2] (in reference to television interviews that he gave in 2015 and 2016); and

(b) Spreading false rumours in wartime (pursuant to art. 133 of the Penal Code),[3] insulting governing authorities (pursuant to art. 216 of the Penal Code),[4] and insulting a foreign country (pursuant to art. 215 of the Penal Code)[5] (in reference to comments made on Twitter in March 2015 alleging torture in Bahraini prisons and criticizing the Saudi-led campaign in Yemen).

8. The source reports that on 10 July 2017, the Third Circuit Lower Criminal Court found Mr. Rajab guilty of spreading false news abroad and sentenced him to two years in prison. The court conducted multiple in absentia hearings, despite notice from Mr. Rajab's doctors that he was recovering from surgery and would be unable to attend. The source notes that he has allegedly been held in solitary confinement for long periods and subjected to ill-treatment during his periods of detention. He reportedly continues to suffer from a myriad of medical concerns and conditions, including hypertension, cardiac arrhythmia, gastritis, irritable bowel syndrome, immunodeficiency and thyroid problems. During his time in detention, he has also required surgery to remove ulcerated tissue and fatty lumps from his lower back. Despite Mr. Rajab's medical problems, the presiding judge has refused to release him on bail.

[1] See opinion No. 12/2013, para. 42.

[2] Government of Bahrain, Penal Code, 1976, available in English at https://www.unodc.org/res/cld/document/bhr/1976/bahrain_penal_code_html/Bahrain_Penal_Code_1976.pdf.
See art. 134: "A punishment of imprisonment for at least 3 months and a fine of at least BD 100, or either penalty, shall be inflicted upon every citizen who deliberately releases abroad false or malicious news, statements or rumours about domestic conditions in the State, so as to undermine financial confidence in the State or adversely affect its prestige or position, or exercises in any manner whatsoever activities that are harmful to the national interests."

[3] Ibid., see art. 133: "A punishment of imprisonment for a period not exceeding 10 years shall be inflicted upon any person who deliberately announces in wartime false or malicious news, statements or rumours or mounts adverse publicity campaigns, so as to cause damage to military preparations for defending the State of Bahrain or military operations of the Armed Forces, to cause people to panic or to weaken the nation's perseverance."

[4] Ibid., see art. 216: "A person shall be liable for imprisonment or payment of a fine if he offends, by any method of expression the National Assembly, or other constitutional institutions, the army, law courts, authorities or government agencies."

[5] Ibid., see art. 215: "A punishment of imprisonment for a period of no more than two years or a fine of no more than BD 200 shall be inflicted upon any person who offends in public a foreign country or an international organization based in the State of Bahrain or its president or representative."

9. On 22 November 2017, the High Criminal Court in Manama upheld that verdict, and on 15 January 2018, the Court of Cassation also confirmed his conviction and sentence. According to the source, the decision by the Court of Cassation is final, and Mr. Rajab has exhausted all domestic remedies for relief.

10. In addition to that conviction, Mr. Rajab is reportedly also in the midst of a trial regarding his comments on Twitter concerning torture in Bahraini prisons and the actions of the Saudi-led military coalition in Yemen. The source informs the Working Group that Mr. Rajab faces up to 15 years in prison on these charges, and that his hearings have been postponed and rescheduled on multiple occasions. The court has held 21 hearings in connection with this case over a period of 19 months, from 12 July 2016 until the date of the source's submission in January 2018, without reaching a determination.

Joint communications by special procedures

11. Mr. Rajab has been the subject of a significant number of joint communications by special procedure mandate holders, notably BHR 6/2004, sent on 6 October 2004; BHR 3/2005, sent on 25 July 2005; BHR 1/2010, sent on 5 March 2010; BHR 4/2011, sent on 22 March 2011; BHR 12/2011, sent on 16 June 2011; BHR 18/2011, sent on 9 September 2011; BHR 6/2012, sent on 24 July 2012; BHR 3/2013, sent on 23 May 2013; BHR 13/2014, sent on 14 October 2014; BHR 2/2015, sent on 15 April 2015; BHR 10/2015, sent on 14 December 2015; and BHR 3/2016, sent on 4 July 2016. The most recent joint communication, BHR 5/2017, was sent on 22 May 2017. The Working Group acknowledges the responses from the Government of Bahrain in relation to these joint communications, including the most recent substantive reply, received on 21 July 2017 in relation to BHR 5/2017.

Analysis of violations

12. The source submits that Mr. Rajab's prosecution and conviction are contrary to international human rights law, and that he has been arbitrarily detained. His conviction and two-year sentence for engaging in television interviews are in violation of his rights to freedom of opinion under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, rendering his detention arbitrary under category II.

13. The source also submits that Mr. Rajab's trial and hearings, held in absentia, are contrary to the international norms and standards of a fair trial, including under articles 9 and 10 of the Universal Declaration of Human Rights and article 9 of the Covenant. The source thus asserts that his detention could also be considered a category III deprivation of liberty.

14. The source further submits that the persistent prosecution and detention of Mr. Rajab by the Government of Bahrain are based on his status as a leading human rights defender, making his a detention for political purposes which is also arbitrary under category V.

Response from the Government

15. On 26 January 2018, the Working Group transmitted the allegations by the source to the Government under its regular communication procedure. The Working Group requested that the Government provide detailed information before 27 March 2018 about the current situation of Mr. Rajab, as well as any comments that it might have on the source's allegations.

16. The Working Group regrets that it did not receive a response from the Government to that communication. Nor did the Government request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work.

Updates from the source

17. On 16 April 2018, the source informed the Working Group that on 21 February 2018 the High Criminal Court had convicted Mr. Rajab and sentenced him to a five-year prison term on the charges relating to his tweets.

18. The three charges, relating to Mr. Rajab's second trial, of spreading false rumours in wartime, insulting governing authorities and insulting a foreign country, refer respectively to his Twitter comments criticizing the participation by Bahrain in the Saudi-led military campaign in Yemen; allegations of torture and ill-treatment in Bahraini prisons, including Jau Prison, as well as the silence and inaction of Bahraini authorities, including the Ministry of Interior's Ombudsman, the Special Investigation Unit of the Public Prosecution Office, and the National Institution for Human Rights; and the military intervention by Saudi Arabia in Yemen.

Discussion

19. 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.

20. 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). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

21. The Working Group wishes to reaffirm that the Government has an obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in compliance with the relevant international provisions set forth in the Universal Declaration of Human Rights, the Covenant and other applicable international or regional instruments.[6] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[7] 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.[8]

22. The Working Group also wishes to reiterate that it applies a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities, are restricted or where human rights defenders are involved.[9] Mr. Rajab's role as a prominent human rights defender in Bahrain who has been arrested, detained, prosecuted and released on multiple occasions since 2012 on charges relating to his human rights work requires the Working Group to undertake this kind of strict scrutiny.[10]

[6] See General Assembly resolution 72/180, fifth preambular paragraph; 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. 94/2017, para. 59; No. 88/2017, para. 32; No. 83/2017, paras. 51 and 70; No. 76/2017, para. 62; No. 28/2015, para. 41; and No. 41/2014, para. 24.

[7] See opinions No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

[8] See opinions No. 94/2017, para. 48; No. 88/2017, para. 24; No. 83/2017, para. 60; No. 76/2017, para. 50; and No. 33/2015, para. 80.

[9] See opinions No. 57/2017, para. 46; No. 41/2017, para. 95; No. 62/2012, para. 39; No. 54/2012, para. 29; and No. 64/2011, para. 20. Domestic authorities and international supervisory bodies should apply the heightened standard of review of government action, especially when there are claims of a pattern of harassment (see opinion No. 39/2012, para. 45). See also General Assembly resolution 53/144, annex (Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms), art. 9 (3).

[10] Human rights defenders, in particular, have the right to study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through those and other appropriate means, to draw public attention to such matters (see General Assembly

Category II

23. The Working Group recalls that the freedoms of opinion and expression as well as the freedoms of thought and conscience are fundamental human rights included in articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.[11] The Government must respect, protect and fulfil the right to hold and express opinions, including those that are not in accordance with its official policy, and to think and manifest personal convictions at odds with its official ideology, under the peremptory norms (*jus cogens*) of customary international law.[12]

24. The Working Group notes that the Human Rights Committee, in its general comment No. 34 (2011) on the freedoms of opinion and expression, stated that restrictions on the freedom of expression must not be overbroad, conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those which might achieve their protective function, and be proportionate to the interest to be protected.[13] It is worth noting that the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

25. Moreover, the Human Rights Committee went on to express its concern regarding laws on disrespect for authority, protection of the honour of public officials, and criticism of institutions, such as the army or the administration.[14] The Committee also emphasized that the penalization of a media outlet, publishers or a journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.[15]

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

27. With reference to its previous opinion in relation to the detention of Mr. Rajab, the Working Group reiterates that the courts of Bahrain, in order to ensure the right to a fair trial, would have to confront and rule on the matter of the constitutionality and legality of the law banning public demonstrations, and, in the present case, the restriction of freedom of expression. Denials of a universally accepted human right to freedom of opinion and expression should not be meekly condoned by a domestic court.[17]

28. In the present case, Mr. Rajab has been arrested, detained, prosecuted and imprisoned for allegedly spreading false news abroad which damages the national interest and for allegedly spreading false rumours in wartime, insulting governing authorities and insulting a foreign country — pursuant to articles 133, 134, 215 and 216 of the Penal Code.

29. The Working Group considers that these provisions of the Penal Code are so vague and overly broad that they could, as in the present case, result in penalties being imposed on individuals who had merely exercised their rights under international law. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law and can

resolution 53/144, annex, art. 6 (c)). Human rights defenders have the right to investigate, gather information on and report on human rights violations (see opinion No. 8/2009), para. 18.

[11] See Human Rights Committee, *Yong-Joo Kang v. Republic of Korea* (CCPR/C/78/D/878/1999), para. 7.2. See also arts. 30 and 32 of the Arab Charter on Human Rights.

[12] See opinion No. 94/2017, para. 59; No. 88/2017, para. 32; No. 83/2017, para. 80; and No. 76/2017, para. 62.

[13] See para. 34.

[14] Ibid., para. 38.

[15] Ibid., para. 42.

[16] See A/HRC/17/27, para. 37.

[17] See opinion No. 12/2013, para. 40.

regulate his or her conduct accordingly.[18] In the present case, the application of vague and overly broad provisions adds weight to the Working Group's conclusion that Mr. Rajab's deprivation of liberty falls within category II. Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

30. The Working Group therefore considers that Mr. Rajab's deprivation of liberty is arbitrary, as it resulted from his exercise of the rights or freedoms guaranteed under articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant, and falls within category II.

31. Given its finding that the deprivation of liberty of Mr. Rajab is arbitrary under category II, the Working Group wishes to emphasize that no such trial of Mr. Rajab should have taken place or take place in the future. However, he continues to be the subject of criminal proceedings, and the source has submitted arguments relating to violation of his right to a fair trial. The Working Group is of the opinion that its positive conclusion under category II suffices in the present case, and will not therefore consider the questions relating to the right to a fair trial.

Category V

32. The Working Group will now examine whether Mr. Rajab's deprivation of liberty constitutes illegal discrimination under international law and whether it therefore falls under category V.

33. First and foremost, the Working Group notes that Mr. Rajab is a prominent human rights activist and opposition leader serving as the President of the Bahrain Centre for Human Rights, a director of the Gulf Centre for Human Rights, Deputy Secretary-General of the International Federation for Human Rights, and a member of the Human Rights Watch Middle East and North Africa Advisory Committee, and was the former Chair of CARAM Asia. He has been the subject of numerous joint communications by special procedure mandate holders dating back to 2004, and he has been detained for his work on multiple occasions. In this respect, the Working Group recalls that it has held his deprivation of liberty by the Government for his public activities to be arbitrary on a previous occasion.[19]

34. In the discussion presented above concerning the application of category II to the present case, the Working Group has already established that Mr. Rajab's arrest, detention, prosecution and imprisonment resulted from his exercise of the right to freedom of thought and expression. When it is established that a deprivation of liberty has resulted from the active exercise of civil and political rights, there is a strong presumption that the deprivation of liberty also constitutes a violation of international law on the grounds of discrimination based on political or other views.[20]

35. The Working Group cannot help but notice that Mr. Rajab's political views and convictions are clearly at the centre of the present case and that the authorities have displayed an attitude towards him that can only be characterized as discriminatory; indeed, he has been the target of persecution, including deprivation of liberty, for many years and there is no other explanation for this except that he is exercising his right to express such views and convictions.

36. For these reasons, the Working Group considers that Mr. Rajab's deprivation of liberty constitutes a violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant — on the grounds of discrimination based on political or other opinion, as well as on his status as a human rights defender — aimed towards and resulting in ignoring the equality of human beings. His deprivation of liberty therefore falls under category V.

[18] See, for example, opinion No. 41/2017, paras. 98–101.
[19] See opinion No. 12/2013.
[20] See opinion No. 88/2017, para. 43.

37. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action. The Working Group also refers the case to the Assistant Secretary-General for Human Rights — the senior official designated by the Secretary-General to lead the efforts within the United Nations system to address intimidation and reprisals against those cooperating with the United Nations on human rights matters.

38. The present case is one of several brought before the Working Group in the past five years concerning the arbitrary deprivation of liberty of persons in Bahrain,[21] in which the Working Group has found the Government to be in violation of its human rights obligations. 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.

Country visit to Bahrain

39. The Working Group reiterates that it would welcome the opportunity to conduct a country visit to Bahrain, in accordance with the request that it made on 17 January 2017, so that it can engage with the Government constructively and offer assistance in addressing the serious concerns that it has relating to arbitrary deprivation of liberty.[22]

Disposition

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

> The deprivation of liberty of Nabeel Ahmed Abdulrasool Rajab, being in contravention of articles 2, 3, 7, 9, 10, 11, 18 and 19 of the Universal Declaration of Human Rights and of articles 2, 9, 10, 14, 18, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories II and V.

41. The Working Group requests the Government of Bahrain to take the steps necessary to remedy the situation of Mr. Rajab 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.

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

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

44. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, for appropriate action. The Working Group also refers the case to the Assistant Secretary-General for Human Rights — the senior official designated by the Secretary-General to lead the efforts within the United Nations system to address intimidation and reprisals against those cooperating with the United Nations on human matters.

[21] See opinions No. 55/2016, No. 35/2016, No. 41/2015, No. 23/2015, No. 37/2014, No. 34/2014, No. 27/2014, No. 25/2014, No. 22/2014, No. 1/2014 and No. 12/2013.

[22] See opinion No. 55/2016, para. 30.

Follow-up procedure

45. 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. Rajab has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Rajab;

(c) Whether an investigation has been conducted into the violation of Mr. Rajab'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 Bahrain with its international obligations in line with the present opinion;

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

46. 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.

47. 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.

48. The Government should disseminate through all available means the present opinion among all stakeholders.

49. 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.[23]

[*Adopted on 19 April 2018*]

[23] See Human Rights Council resolution 33/30, paras. 3 and 7.