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Working Group on Arbitrary Detention

4 July 2017

Dear Ms. Legner,

I would like to refer to 78th session of the Working Group on Arbitrary Detention, during which the Working Group adopted several Opinions on cases of deprivation of liberty submitted to it.

In accordance with paragraph 18 of the Working Group's revised methods of work, I am sending to you, attached herewith, the text of Opinion No. 20/2017 (Kuwait) adopted on 24 April 2017, regarding a case submitted by your organization.

In conformity with its revised methods of work, the Working Group transmits its Opinions to the source of the petitions, forty eight hours after having transmitted it to the relevant Government.

This Opinion will be published on the website of the Working Group and reflected in its annual report to the Human Rights Council. In the meanwhile, we would encourage you to treat the information given to you by the Working Group on this matter with discretion.

Yours sincerely,

Lucie Viersma
Secretary
Working Group on Arbitrary Detention

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Working Group on Arbitrary Detention

**Opinions adopted by the Working Group on Arbitrary
Detention at its 78th session, 19-28 April 2017**

**Opinion No.20/2017 concerning Musallam Mohamed Hamad Al-Barrak
(Kuwait)**

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/33/66), on 24 June 2016 the Working Group transmitted a communication to the Government of Kuwait concerning Mr. Al-Barrak. The Government replied to the communication on 16 August 2016 and 19 August 2016. 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. **Musallam Mohamed Hamad Al-Barrak** (البراك حمد محمد مسلم) is a Kuwaiti national, born on 30 January 1956. He was a member of the Kuwaiti parliament from 1996 to 2012. Mr. Al-Barrak is a widely known and respected political figure from the opposition, who spoke up on many occasions against violations of civil and political rights committed by the Kuwaiti authorities. During his time as a parliamentarian, he publicly condemned the practice of torture committed by governmental forces.

5. According to the information received, on 20 June 2012, the Parliament of Kuwait was dissolved by decision of the Constitutional Court under the Emir's orders. The source claims that the dissolution of the Parliament happened after the opposition to the existing Government, composed of the majority of elected members of parliament, including Mr. Al-Barrak, called for new democratic reforms and public life improvements following several corruption scandals, which reportedly involved individuals close to the Emir.

6. The source claims that in this political context, Mr. Al-Barrak defended the human rights of all individuals subjected to arbitrary decisions, both within the Parliament and in the media. As a parliamentarian, he marked his political life by courageously speaking up for victims of human rights violations without any discrimination. Notably, in the institutional and public forums, he condemned the use of torture and asked for proper investigations and accountability of those responsible.

7. Reportedly, during a conference that took place at the Erada Square in October 2012, Mr. Al-Barrak delivered a speech criticising the arbitrariness of the Emir's policies and decisions resulting in restrictions of political and civil rights, and denounced the effects of the new draconian electoral law reform.

8. On 29 October 2012, as a direct consequence of his speech, Mr. Al-Barrak was arrested. While he was released on bail four days later, criminal proceedings against him continued. On 15 April 2013, he was found guilty of violating article 25 of the Law No. 31 of 1970 on State Security, that prohibits any public expression that challenges the rights or the authority of the Emir, commits *lèse-majesté*, or disrespects the Emir of Kuwait and thereby was sentenced to five years in prison by the Court of First Instance. However, he remained on bail pending his appeal.

9. On 22 February 2015, an appeal court upheld the decision while reducing his conviction to two years of imprisonment. On 1 March 2015, Mr. Al-Barrak was arrested by the officers of the police department, on execution of the criminal court's decision to be placed in the Kuwaiti Central Prison. On 20 April 2015, he was released pending completion of his appeal before the Court of Cassation.

10. On 18 May 2015, the Court of Cassation decided to uphold the decision of the Court of Appeal. This last decision is final and cannot be appealed. On 13 June 2015, Mr. Al-Barrak was arrested by the State Security forces and detained in the Kuwaiti Central Prison to serve his sentence.

11. In light of the aforementioned information, the source claims that this case meets the requirements of category I of the Working Group's classifications of deprivations of liberty, because there is no legal basis, in view of Kuwait's international obligations, justifying Mr. Al-Barrak's deprivation of liberty. In this regard, the source submits that Mr. Al-Barrak has been charged and convicted pursuant to article 25 of the Law No. 31 of 1970, which states the following: "Shall be punished by imprisonment for a term not exceeding five years, anyone who publicly or in a public place, or in a place where he can be heard or seen, while being in a public place through speech or shouts or writing or drawings, or pictures, or any other means of expression of thought, challenges the rights or the authority of the Emir, commits *lèse-majesté*, or disrespects the Emir."

12. Based on the above, the source claims that the article 25 of the Law No. 31, which was used by the Kuwaiti authorities as the legal basis for the deprivation of Mr. Al-Barrak's liberty, cannot be considered as legitimate, because it is not in line with Kuwait's international human rights obligations. The source argues that, as a party to the Covenant,

Kuwait has an international obligation to comply with its provisions. By criminalising any criticism against the Emir through article 25 of the Law No. 31, Kuwait is in clear violation of the Covenant and, therefore, this provision cannot be considered as a valid legal basis for the deprivation of Mr. Al-Barrak's liberty.

13. Also, the source claims that this case meets the requirements of category II of the Working Group's classifications of deprivations of liberty, because the deprivation of Mr. Al-Barrak's liberty resulted from the legitimate exercise of his right to freedom of expression. The source claims that he was sentenced to two years in prison for the conduct that falls under the protection of the right to freedom of opinion and expression.

14. In this regard, the source provides a quote of the essential parts of Mr. Al-Barrak's speech, which he delivered at the Erada Square in October 2012.

In the name of the nation, in the name of the people, we will not allow you, your highness, to take Kuwait into the abyss of autocracy. Your highness some of your advisors have businesses interests and some of them have deep hatred to democracy and for all people of your nation. When the history books present your reign, how would you want them to describe you? Do you want them to say that you, Sheikh Sabah Al Ahmad Al Sabah, were throwing in jails all thinkers who dare to have an opinion? Do you want history to write that people were beaten; do you want history to write that during the era of Sheikh Sabah Al Ahmad, Kuwait wealth has been looted? Do you want History to write that during your era people's rights were violated and the constitution undermined?

15. The source submits that this quote mirrors the content of Mr. Al-Barrak's entire speech delivered during that event. According to the source, it is clear that, while Mr. Al-Barrak expressed criticism against the decisions taken by the Emir, he did not call for violence or hate but instead was peacefully requesting the Emir to put an end to what he considered an abuse of power.

16. Finally, the source argues that the deprivation of Mr. Al-Barrak's liberty was used by the Government to prevent him from engaging in the State's political life by keeping him away from public debate and ultimately preventing him from presenting his candidacy to the next Parliamentary elections, which should take place in 2017. Therefore, the source asserts that the Kuwaiti authorities are also in violation of article 25 of the Covenant that recognises and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service.¹

Response from the Government

17. On 24 June 2016, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure, requesting the Government to provide detailed information, by 24 August 2016, about the current situation of Mr. Al-Barrak and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify his arrest and continued detention, and to provide the details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular the norms of international human rights treaties that Kuwait has ratified. Moreover, the Working Group called upon the Government to ensure Mr. Al-Barrak's physical and mental integrity.

18. On 28 June 2016, the Government acknowledged the receipt and assured the Working Group that its reply will be submitted within the time limit. On 16 August 2016, the Permanent Mission of Kuwait submitted its initial response, with a confirmation that a more detailed and exhausted reply will be forwarded as soon as it becomes available. On 19 August 2016, the Permanent Mission of Kuwait added the reply of the Attorney General Office of the Public Prosecution.

¹ Human Rights Committee (HRC), General Comment No. 25 (57), Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 24.

19. According to the Government's reply, Musallam Al-Barrak was convicted in State Security case No. 15 of 2012 on 15 October 2012, for having committed the crime of openly challenging in a public place the rights and authority of the Emir, defaming his person, and disparaging the basis on which he holds office at a public assembly. The Criminal Court decided, at a hearing on 15 April 2013, to sentence him to five years' imprisonment with hard labour and without a stay of execution. The Appeal Court then decided, at a hearing on 22 February 2015, to amend the judgment and to sentence him to imprisonment for two years with hard labour and without a stay of execution. The Court of Cassation upheld the judgment at a hearing on 18 May 2015 in a final enforceable judgment.

20. The Government states that the accused was convicted of committing the crime pursuant to article 25 of Act No. 31 of 1970 concerning offences against internal State security, which reads as follows:

Anyone who openly, in a public place or in a place where he can be heard or seen by persons in a public place, by word of mouth, vociferation, in writing or through graphic or pictorial representation, or by any other means of expression, contests the rights and authority of the Emir, defames his person or disparages the basis on which he holds office shall be liable to a penalty of up to five years' imprisonment.

21. The Government contends that there can be no doubt that the accused was convicted of the offence that he perpetrated on 15 October 2012 after the adoption of article 25 of Act No. 31 of 1970, which was promulgated on 21 July 1970. Accordingly, there are no grounds for finding a violation of article 15, paragraph 1 of the Covenant, which prohibits the conviction of a person for acts committed prior to the enactment of a law.

22. The Government submits that the provisions of article 25 of Act No. 31 of 1970 contain no vague terms but a specific definition of the kinds of speech and acts that are prohibited. This was confirmed by the Kuwaiti Constitutional Court in a judgment handed down on 2 December 2013, which rejected criticism of the provisions of the article on the ground that the terms used were extremely general and had no clear-cut import or specific meaning. According to the Government, the Constitutional Court concluded, with a view to protecting principles that guarantee the unity of the nation and the internal security of the country, preventing any harm to the nation and the destruction of the regime, and ensuring that it is treated with veneration and respect, and in light of the guarantees of personal freedom enshrined in the Constitution, that the criminalization of acts that challenge the rights and authority of the Emir, that defame his person, and that disparage the basis on which he holds office, does not constitute a violation of freedom of opinion and expression, since it does not penalize reflection and the formation of opinions but penalizes views that are contrary to the law and the public dissemination of those views in any of the ways listed exhaustively in the provisions of the article.

23. The Government submits that the speech which Mr. Al-Barrak gave in October 2012, at the Erada Square, fell within the scope of paragraph (3) of article 19 of the Covenant, outlining the restrictions to freedom of expression, i.e. (a) for respect of the rights or reputations of others, and (b) for the protection of national security or of public order, or of public health or morals.

Further comments from the source

24. The reply from the Government of Kuwait was transmitted to the source on 17 August 2016. The source responded on 19 August 2016.

25. The source recalls the recommendations made by the Human Rights Committee after its recent review of Kuwait's obligations under the Covenant, in particular in relation to the right to freedom of opinion and expression. The Committee expressed its concern over the criminalisation of defamation and prosecution of individuals expressing critical views or views deemed to "insult" the Emir or undermine his authority or threaten Kuwait's national security. Hence, the Committee urged the State to:

(a) repeal or revise laws containing provisions restricting the right to freedom of expression and opinion and repeal laws criminalizing blasphemy and insulting the

Emir, among other acts, with a view to bringing them into conformity with its obligations under the Covenant; (b) clarify the vague, broad and open-ended definition of key terms in those laws and ensure that they are not used as tools to curtail freedom of expression beyond the narrow restrictions permitted by article 19 (3) of the Covenant (CCPR/C/KWT/CO/3, para. 41).

26. The source notes that the Government argued that the speech which Mr. Al-Barrak gave in October 2012, at the Erada Square, fell within the scope of paragraph (3) of article 19 of the Covenant, outlining the restrictions to freedom of expression, i.e. (a) for respect of the rights or reputations of others, and (b) for the protection of national security or of public order, or of public health or morals. The source also mentions that the Government has elaborated its argument by stating that Mr. Al-Barrak has accused certain individuals and members of parliament of corruption and theft. In this context, the source recalls that there was indeed a major corruption scandal that surfaced in Kuwait in 2012, involving bribes and funds allegedly transferred to members of Parliament in return for voting along government lines. According to the source, this was denounced not only by Mr. Al-Barrak, but was widely discussed by civil society, national and international press and human rights organisations. Therefore, the statements made by Mr. Al-Barrak did not constitute a personal attack or slander of the reputation of private individuals falling under the restrictions of paragraph (3) article 19 of the Covenant, but ought to be deemed a contribution to the discussion on the misconduct of certain members of parliament and public figures.

27. The source notes that, additionally, the information conveyed in a speech, whether false or true, could hardly be threatening to national security and stability. Hence, the source argues that sentencing Mr. Al-Barrak to two years in prison under the National Security Law No. 31 of 1970 did not fall under the limits of article 19, paragraph 3 of the Covenant.

28. Lastly, the source recalls the Government's claim that Mr. Al-Barrak's speech also included a direct call and incitement to chaos and violence, quoting the expression, "وأجهوا والغاشمة السلطة", used in his speech. In this context, the source states that this excerpt means "face the oppressive power"; and that it does in no way constitutes a call for violence but rather represents an appeal to the citizens to peacefully claim their political rights and demand a fair, reliable and representative government.

29. In light of the above information, the source reiterates that Mr. Al-Barrak was currently arbitrarily detained according to categories I and II of the categories applicable to the consideration of cases submitted to the Working Group.

Discussion

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

31. 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 Report of the Working Group on Arbitrary Detention, 26 December 2011, A/HRC/19/57, para. 68).

32. The Working Group recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden of proof should rest with the public authority, because the latter is in a better position to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law.²

² See Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 661, para. 55; Opinion No. 41/2013 concerning Saif Al-Islam Gaddafi (Libya), para. 27; Opinion No. 59/2016 concerning Mohamed Nazim (Maldives), para. 61.

33. The Working Group notes that Mr. Al-Barrak was previously the subject of a joint letter of allegations sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association on 13 August 2015 (Ref. AL KWT 5/2015).³ The Working Group acknowledges the Government's response to that communication received on 14 September 2015.

34. The Working Group will first consider whether Mr. Al-Barrak's arrest, trial and imprisonment, for his alleged violation of article 25 of the Law No. 31 of 1970 on State Security, through his speech of 15 October 2012 at Erada Square, is arbitrary and falling within category I.

35. The Working Group is concerned that the Law No. 31 of 1970 on State Security risks allowing for excessively broad interpretation due to its vagueness, thus resulting in unjustified and arbitrary criminalization of legitimate exercise of the right to freedom of expression. However, the Working Group finds it difficult to conclude that Mr. Al-Barrak's deprivation of liberty is completely without legal basis so as to fall within category I.

36. The Working Group will further consider whether Mr. Al-Barrak's deprivation of liberty resulted from his legitimate exercise of his rights or freedoms, rendering it arbitrary and falling within category II.

37. The Working Group wishes to reaffirm that any national law allowing deprivations 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 relevant international legal instruments. Consequently, even if the detention is in conformity with national legislation, the Working Group must assess whether such detention is also consistent with the relevant provisions of the international human rights law.⁴

38. 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 and article 19 of the Covenant.⁵ In this regard, the Human Rights Committee stated in its general comment No. 34 (2011) on freedoms of opinion and expression, that:

[T]he mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties, albeit public figures may also benefit from the provisions of the Covenant. Moreover, 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. (para. 38)

39. With regard to the Law No. 31 of 1970 on State Security in Kuwait, particularly article 25, and its application, the Working Group is concerned with its nature as a *lèse majesté* law. The Working Group recalls that in a previous case of *lèse majesté* from Kuwait, it found the charge and conviction under article 25 of the Law No. 31 of 1970 on State Security, as well as article 1 of the Law No. 9 of 2001 on Misuse and Telecommunication and Eavesdropping Equipment, in violation of articles 19 of the Universal Declaration of Human Rights and the Covenant (Opinion No. 28/2015).

40. The Working Group also notes that the Human Rights Committee, in its concluding observations on the third periodic report of Kuwait, explicitly urged the repeal or revision of "laws containing provisions restricting the right to freedom of expression and opinion and repeal laws criminalizing blasphemy and insulting the Emir, among other acts, with a view to bringing them into conformity with its obligations under the Covenant", and requested the Government to "clarify the vague, broad and open-ended definition of key terms" (CCPR/C/KWT/CO/3, paras. 40-41). The Working Group, mindful of the chilling effect on the freedom of expression that such vaguely and broadly worded regulation may

³ [https://spdb.ohchr.org/hrdb/31st/public_-_AL_Kuwait_13.08.15_\(5.2015\).pdf](https://spdb.ohchr.org/hrdb/31st/public_-_AL_Kuwait_13.08.15_(5.2015).pdf)

⁴ Opinion No. 28/2015 concerning Abdullah Fairouz Abdullah Abd al-Kareem (Kuwait), para. 41.

⁵ See also article 32 of the Arab Charter on Human Rights.

have, also concurs with the Human Rights Committee's assessment, which was previously cited in a recent opinion where it found deprivation of liberty to be arbitrary under a similar legal framework of *lèse majesté*.⁶

41. The Working Group notes that the Government, in its response, has referred to the restrictions on the freedom of expression permitted under article 19, paragraph 3 of the Covenant, in order to justify article 25 of the Law No. 31 of 1970 on State Security, as well as Mr. Al-Barrak's deprivation of liberty. According to article 19(3) of the Covenant, freedom of expression may be subject to restrictions, when provided by law and necessary "(a) [f]or respect of the rights or reputations of others" and "(b) [f]or the protection of national security or of public order (*ordre public*), or of public health or morals". Furthermore, article 29, paragraph 2 of the Universal Declaration of Human Rights states that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely 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."

42. In this regard, the Working Group has stated in its Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, 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" (para. 61).

43. In the present case, the Working Group has been unable to find Mr. Al-Barrak's deprivation of liberty for the *lèse majesté* offense, under article 25 of the Law No. 31 of 1970 on State Security, as well as the criminal provision itself, necessary or proportional for the purposes as set out in paragraph 3 of article 19 of the Covenant. The Working Group concurs with the assessment of the Human Rights Committee 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 (general comment No. 34 (2011) on freedoms of opinion and expression, para. 38). The Working Group also notes the Human Rights Committee's specific reference to *lèse majesté* when stating that "laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned" (General Comment No. 34 (2011), para. 38).

44. The Working Group also recalls that the Human Rights Council, in its resolution 12/16, noted that "the right to freedom of expression includes expression of views and opinions that offend, shock or disturb."⁷ In addition, the Working Group wishes to note that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated that:

[P]rotection of national security or countering terrorism cannot be used to justify restricting the right to expression unless the Government can demonstrate that: (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.⁸

45. It is difficult for the Working Group to consider that Mr. Al-Barrak's speech could plausibly threaten national security or public order, let alone public health or morals. Therefore, the Working Group considers that Mr. Al-Barrak's deprivation of liberty for the *lèse majesté* charge related to his speech of 15 October 2012 resulted from the exercise of the right to freedom of expression guaranteed by article 19 of Universal Declaration of Human Rights and article 19 of the Covenant.

⁶ Opinion No. 48/2016 concerning Mohammed Rashid Hassan Nasser al-Ajami (Qatar).

⁷ See A/HRC/RES/12/16, para. 5(p). See also the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, A/HRC/17/27, para. 37.

⁸ Report of the Special Rapporteur, pursuant to Commission on Human Rights resolution 1993/45, Annex, 22 March 1996, E/CN.4/1996/39 cited in Human Rights Council resolution 12/16, 12 October 2009, A/HRC/RES/12/16, para. 5(p); The Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 16 May 2011, A/HRC/17/27, para. 36.

46. Moreover, the Working Group received information that the Government revised the electoral law, in June 2016, and that this barred Mr. Al-Barrak and other politicians, convicted under article 25 of the Law No. 31 of 1970 on State Security, from competing in the parliamentary elections. These allegations indicate that the new law resulted in the loss of parliamentary seats by certain individuals in the latest elections, held on 26 November 2016, including Mr. Al-Barrak.

47. The Government did not refute the claims that by arresting and prosecuting Mr. Al-Barrak, it prevented him from running in the elections. Instead, the Government only asserted that it was enforcing the law. In this view the Working Group considers that preventing Mr. Al-Barrak from exercising his right to participate in public affairs and to be elected, under article 21 of the Universal Declaration and article 25 of the Covenant, has also been a motivation for Mr. Al-Barrak's imprisonment.

48. For these reasons, the Working Group is of the opinion that Mr. Al-Barrak's deprivation of liberty, under article 25 of the Law No. 31 of 1970 on State Security, falls within category II of categories referred to by the Working Group when considering the cases submitted to it.

Laws on lèse majesté

49. The Working Group will elaborate further on the propriety of the *lèse majesté* law in view of the principle of legality and its effect on the right a fair trial. One of the fundamental guarantees of due process is the principle of legality, including the principle of *nullum crimen sine lege certa*, which is particularly relevant in the case of Mr. Al-Barrak. The principle of legality, in general, assures that no defendant may be punished arbitrarily or retroactively by the state. This means that a person cannot be convicted of a crime that was not publicly accessible; nor can be charged by a law that is excessively unclear; nor can she be convicted by a penal law that is passed retroactively to criminalize a previous act or omission.

50. Laws that are vaguely and broadly worded may have a chilling effect on the exercise of the right to freedom of expression, as they have potential for abuse.. They also violate the principle of legality under article 15 of the Covenant, as it makes unlikely or impossible for the accused to have a fair trial. In this regard, the Working Group notes that, as discussed above, the Human Rights Committee in its Concluding observations on the third periodic report of Kuwait, also urged the Government to "clarify the vague, broad and open-ended definition of key terms" in the relevant provisions (CCPR/C/KWT/3, paras. 40-41). Furthermore, the Working Group has found in its case-law that detention pursuant to proceedings that are incompatible with article 15 is necessarily arbitrary within the meaning of article 9(1) of the Covenant.⁹

51. The Working Group has also expressed its concern that anti-terrorism laws "by using an extremely vague and broad definition of terrorism, bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention" with the consequence that "[I]egitimate democratic opposition becomes a victim in the application of such laws"¹⁰. Notably, with regard to Article 15(1) of the Covenant, the prohibition of terrorist conduct must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct and the law is formulated with sufficient precision so that the individual can regulate his or her conduct.¹¹

52. The concerns expressed with regard to the vague definition of terrorist conduct¹² and other criminal offences, such as organized crime,¹³ are equally pertinent for the alleged acts

⁹ Human Rights Committee, *Fardon v Australia*, Communication No. 1629/2007, para. 7.4(2).

¹⁰ Report of the Working Group on Arbitrary Detention, 21 December 1994, E/CN.4/1995/31, para. 25 (d).

¹¹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 December 2005, E/CN.4/2006/98, para. 46.

¹² See e.g. CCPR/CO/81/BEL, para. 24.

¹³ See, e.g. CCPR/C/79/Add. 115, para. 12; and CCPR/C/79/Add.115, para. 12.

criminalized by *lèse majesté* laws. In this respect, the WGAD notes with concern that article 25 of the Law No. 31 of 1970 on State Security, which aims to regulate acts criminalized by *lèse majesté* laws contains an unclear wording, that denies foreseeability for the potential, unsuspecting defendants.

Disposition

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

The deprivation of liberty of Mr. Al-Barrak, being in contravention of articles 9, 11, 19 and 21 of the Universal Declaration of Human Rights and of articles 9, 15, 19 and 25 of the International Covenant on Civil and Political Rights, is arbitrary and falls within category II.

54. The Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Al-Barrak without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

56. The Working Group urges the Government to bring relevant legislation, particularly laws such as article 25 of the Law No. 31 of 1970 on State Security which have been used to restrict the right to freedom of expression, into conformity with Kuwait's commitment under international human rights law.

Follow-up procedure

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

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

58. 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.

59. 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.

60. 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.¹⁴

[Adopted on 24 April 2017]

¹⁴ See Human Rights Council resolution 24/7, paras. 3 and 7.