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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 32/2017 concerning Salih Mohammed Salih Mansour al Dulaimi (Iraq)

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 10 January 2017 the Working Group transmitted to the Government of Iraq a communication concerning Salih Mohammed Salih Mansour al Dulaimi. 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. Salih Mohammed Salih Mansour al Dulaimi, born on 3 May 1970, is a professor at the Electrical Engineering Department, College of Engineering, University of Anbar. He normally lives in Al Karmah, Al Anbar province.
5. On 26 March 2015 at approximately 9 p.m., Mr. Al Dulaimi was arrested at Baghdad International Airport by officers of the Iraqi National Intelligence Service in civilian clothes. No arrest warrant was presented to Mr. Al Dulaimi at the time of his arrest nor was he informed of the reasons for his arrest.
6. Following the arrest, Mr. Al Dulaimi was taken to an unofficial detention centre at the airport, where he was held for more than one year.
7. According to the information received, Mr. Al Dulaimi was subjected to torture during the entire time of his detention. Reportedly, it was particularly violent during the first week. He was kept handcuffed and blindfolded and subjected to severe beatings and psychological threats. He was forced to sign a document containing his “confession” without being able to read the content as he was blindfolded.
8. During the first three months of his detention, Mr. Al Dulaimi was kept incommunicado. He was not allowed to contact or receive any visit from his lawyer or family.
9. On 11 August 2015, over four months after his arrest, Mr. Al Dulaimi was accused by the public prosecutor of the Central Criminal Court of “belonging to an armed terrorist organization” under article 4 of the anti-terrorism Law No. 13 of 2005. However, no material evidence was ever provided to support those accusations. Mr. Al Dulaimi was then referred to the third chamber of the Central Criminal Court.
10. On 8 November 2015, he was indicted for the same crime.
11. In 2015, Mr. Al Dulaimi’s lawyer was subjected to threats by members of the security services and as a result he had to terminate his work on the case.
12. On 26 April 2016, Mr. Al Dulaimi was transferred to Camp Taji prison, north of Baghdad. On 5 May 2016, he was transferred again to the Tasferat prison near the Al Shaab stadium in Baghdad, where he remains in detention.
13. Reportedly, as a result of torture, Mr. Al Dulaimi has developed a number of injuries, including torn ligaments in the elbows with calcification, nasal septum deviation and internal bleeding. In addition, because of the very low sanitary and hygienic standards in the detention facility, he suffers from various health problems, including skin diseases and eye infections. Furthermore, he has been denied access to medication provided by his family, which includes medication to treat his diabetes. Mr. Al Dulaimi has not been allowed to see a doctor for over one year.
14. On 12 May 2016, Mr. Al Dulaimi was sentenced to death on the basis of article 4 of the anti-terrorism law, relying on documents he signed as a result of torture and documents allegedly provided by the intelligence services of the United States of America, according to which he “had personal links with the Islamic State in Iraq”. During the hearings, Mr. Al Dulaimi indicated that he had been tortured and forced to sign the “confession” and that he was still bearing the signs of torture. However, the judge neither ordered a medical examination, nor an investigation into the allegations of torture and forced confession. Two intelligence officers were called by the judge to appear in court as witnesses. According to them, Mr. Al Dulaimi made the confession “of his own will”. In the judgment it was stated that the wounds he showed during the hearing were inflicted by Mr. Al Dulaimi himself in order to convince the court that he had been mistreated.
15. Mr. Al Dulaimi has filed an appeal, which is still pending.
16. The source submits that the deprivation of liberty of Mr. Al Dulaimi is arbitrary and falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. The source submits that Mr. Al Dulaimi has

not been guaranteed the international norms relating to the right to a fair trial during the period of his deprivation of liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

17. The source argues that no arrest warrant was presented to Mr. Al Dulaimi at the time of his arrest, nor was he provided with any reason for his arrest; following his arrest, he was detained at an unofficial detention centre for over one year and he was held incommunicado for the first three months; he was indicted almost eight months after his arrest; during his detention, he was subjected to torture and forced to sign a document containing a “confession” that he was not allowed to read beforehand; the “confession” made under duress was later used as the primary source of evidence against him during the trial; and Mr. Dulaimi’s lawyer was subjected to harassment of such gravity that he had to terminate his work on the case. The source argues that these actions are in violation of articles 9 (2) and (3) and 14 (3) (a) (b) (c) and (g) of the Covenant.

18. In addition, the source raises serious concerns that the imposition of the death penalty following such a flawed procedure, during which forced confessions were admitted as evidence, is in violation of article 6 (2) of the Covenant, which provides that the imposition of the death penalty should not be contrary to other provisions of the Covenant.

Response from the Government

19. On 10 January 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 11 March 2017 about the current situation of Mr. Al Dulaimi and any comments which it might have 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 details regarding the conformity of the relevant legal provisions and proceedings with international law, in particular human rights treaties that it has ratified. Moreover, the Working Group called upon the Government to ensure Mr. Al Dulaimi’s physical and mental integrity.

20. The Working Group regrets that it did not receive a response from the Government to this communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group’s methods of work.

Discussion

21. 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.

22. In its jurisprudence, the Working Group has established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for a 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.

23. The Working Group considers that it is entitled to assess the proceedings of the court and the law itself to determine whether they meet international standards.¹ However, the Working Group also reiterates that it has consistently refrained from taking the place of the national judicial authorities or acting as a kind of supranational tribunal when it is urged to review the application of domestic law by the judiciary.²

¹ See opinion No. 33/2015, para. 80.

² See opinion No. 40/2005.

Category I

24. The Working Group will examine the relevant categories applicable to its consideration of this case, including category I, which concerns deprivation of liberty without invoking any legal basis.

25. In the present case, the Working Group notes that on 26 March 2015, Mr. Al Dulaimi was arrested at Baghdad airport by officers of the Iraqi National Intelligence Service in civilian clothes, without being presented with an arrest warrant or informed of the reasons for his arrest. Furthermore, on 11 August 2015, over four months after his arrest, the public prosecutor of the Central Criminal Court charged Mr. Al Dulaimi with “belonging to an armed terrorist organization” under article 4 of the anti-terrorism law No. 13 of 2005. Such a lapse of time between arrest and the charge makes his deprivation of liberty arbitrary.

26. The Government has failed to provide any legal basis for Mr. Al Dulaimi’s arrest and initial detention. The four and a half month delay between the notification of his charge and the formal indictment adds weight to the view that the Iraqi National Intelligence Service initially deprived him of liberty without legal justification.

27. Given the above observations, the Working Group, therefore, determines that the Government has failed to undertake the necessary formal procedures to establish the legal basis for Mr. Al Dulaimi’s arrest. The Working Group further observes that Mr. Al Dulaimi was subsequently held incommunicado without being brought before a judge and without any access to his lawyer or family.

28. Furthermore, the Working Group notes with concern a series of cases over the past few years in which the Government of Iraq has subjected its citizens and foreign nationals to secret detention or incommunicado detention.³ Such practices of holding persons incommunicado effectively place the victims outside the protection of the law and deprive them of any legal safeguards.

29. The Working Group, therefore, considers that Mr. Al Dulaimi’s arrest and incommunicado detention between 26 March 2015 and 11 August 2015 lack a legal basis in violation of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, falling within category I.

Category III

30. With regard to category III, the Working Group will now consider whether there have been any violations of the international norms relating to the right to a fair trial, during the period of Mr. Al Dulaimi’s deprivation of liberty. Notably, the Working Group addresses the following considerations, which have not been disputed by the Government:

(a) Mr. Al Dulaimi was not brought promptly before a judge, but instead held incommunicado at an unofficial detention centre at the airport for at least three months. This effectively nullified his right to recognition everywhere as a person before the law (contrary to articles 6 and 9 of the Universal Declaration of Human Rights and articles 9 (3) and 16 of the Covenant);

(b) Mr. Al Dulaimi was not informed promptly and in detail of the nature and the reasons for the criminal charge against him: the prosecutor formally charged him on 11 August 2015, four months after his arrest, and indicted him on 8 November 2015, seven months after his arrest (contrary to articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) and (3) (a) of the Covenant);

(c) During the first three months of his detention, Mr. Al Dulaimi was kept incommunicado, denied contact with or visits from his family or lawyer and interrogated without his lawyer being present (contrary to articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) and (d) of the Covenant);

³ See opinions No. 29/2016, No. 20/2016, and No. 5/2014.

(d) Mr. Al Dulaimi's lawyer faced harassment of such gravity from the security forces that he had to terminate his work on the case (contrary to articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) and (3) (b) and (d) of the Covenant);

(e) Mr. Al Dulaimi cannot be said to have been tried without undue delay as he was indicted on 8 November 2015, 7 months after his arrest, sentenced by the court of first instance on 12 May 2016, almost 14 months after his arrest, and his appeal is still pending, which means that he has already been in detention for over two years (contrary to articles 10 and 11 (1) of the Universal Declaration of Human Rights and article 14 (1) and (3) (c) of the Covenant);

(f) Mr. Al Dulaimi was subjected to severe torture, including beatings and psychological threats. He was blindfolded and forced to sign a document containing his "confession" without being able to read the content. That confession was presented and accepted as a primary source of evidence in his conviction by the Central Criminal Court (contrary to articles 10 and 11 (1) of the Universal Declaration of Human Rights and articles 7 and 14 (1) and (3) (g) of the Covenant).

31. The Working Group therefore observes that the international norms of due process and guarantees to a fair trial during the period of Mr. Al Dulaimi's deprivation of liberty have not been respected, in violation of articles 3, 5, 6, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 7, 9, 10, 14 and 16 of the Covenant.

32. The Working Group has consistently argued that holding persons *incommunicado* breaches the right to challenge the lawfulness of detention before a judge.⁴ Furthermore, the Committee against Torture has made it clear that holding persons *incommunicado* creates conditions that lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see A/54/44, para 182 (a)); the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has consistently argued that use of *incommunicado* detention is unlawful (see A/54/426, para. 42 and A/HRC/13/39/Add. 5, para 156); while the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person has argued that *incommunicado* detention that prevents prompt presentation before a judge inherently violates paragraph 3 of article 9 of the Covenant (see para. 35). Moreover, *incommunicado* detention is a violation of the right to contact the outside world under applicable standards, such as rules 58 and 61 of the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (principles 15, 18 and 19).

33. The Working Group is concerned about the allegations of torture, including for the extraction of confessions, made by the source. Those allegations have not been challenged by the Government of Iraq. The treatment described reveals a *prima facie* breach of the absolute prohibition of torture, which is a peremptory norm of international law, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁵ of article 5 of the Universal Declaration of Human Rights and of articles 7 and 10 of the Covenant. Moreover, it is in violation of article 37 (1) (c) of the Iraqi Constitution.

34. The use of forced confession in the court proceedings against Mr. Al Dulaimi raises particular concern and is in violation of article 14 of the Covenant. The Working Group concurs with the statement by the Human Rights Committee in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial that "article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt ... A fortiori, it is unacceptable to treat an accused person in a manner

⁴ See, for example, opinions No. 53/2016 and No. 56/2016.

⁵ See also the judgment by the International Court of Justice in the case *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, in which the Court stated that the prohibition of torture was part of customary international law and it had become a peremptory norm (*jus cogens*) (para. 99).

contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence”.

35. The death sentence passed against Mr. Al Dulaimi based on a confession extracted under torture is a particularly grave miscarriage of justice and constitutes a violation of article 6 (2) of the Covenant.

36. The Working Group is particularly concerned that Mr. Al Dulaimi’s right to have effective legal representation, adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, has not been respected by the Government of Iraq, in violation of article 14 (3) (b) of the Covenant and principle 17.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group further recalls that, according to principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings Before a Court: “Legal counsel shall be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment.”

37. The Working Group also expresses its concern about allegations made regarding a widespread practice of arrests without warrants, protracted pretrial detention and systematic sentences to death based on confessions obtained under torture that is related to the regime of anti-terrorism law and trials conducted by the Central Criminal Court. Moreover, the Working Group has in the past expressed concerns about a number of individual cases of detention, often for prolonged periods, without charge or trial in Iraq. The detainees have often been subjected to enforced disappearance, tortured and otherwise ill-treated in custody. These concerns have been transmitted to the Government over the past years and remain unaddressed.⁶

38. The Working Group will refer the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers for their further consideration.

39. The Working Group consequently finds that the 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 ratified by Iraq is of such gravity as to give the deprivation of liberty of Mr. Al Dulaimi an arbitrary character, falling within category III.

40. The Working Group further notes that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the fundamental rules of international law may constitute crimes against humanity.

41. The Working Group urges the Government to adopt effective measures to guarantee that confessions or statements obtained by coercion are inadmissible in practice; that where there is an allegation that a statement was made under torture, the burden of proof is on the prosecution and the courts; and that sanctions are taken against judges who fail to respond appropriately to allegations of torture raised during judicial proceedings in accordance with the recommendations of the Committee against Torture (see CAT/C/IRQ/CO/1, para. 22). The courts and the Government itself should make sure that confessions obtained by coercion, especially those extracted under torture, are excluded from all phases of judicial proceedings.

42. The Working Group further brings to the attention of the Government the calls for reform of a broad definition of terrorism susceptible to broad interpretation and the mandatory death penalty for a wide range of activities defined as terrorist acts in the anti-terrorism Law No. 13 of 2005 (see CCPR/C/IRQ/CO/5, para. 9). The Working Group adds

⁶ See opinion No. 5/2014, para. 22. See also opinions No. 20/2016, No. 29/2016, No. 59/2011 and No. 43/2012.

that it has raised similar concerns in the past vis-à-vis the anti-terrorism Law No. 3 of 2006 applicable in Iraqi Kurdistan.⁷

Disposition

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

The deprivation of liberty of Salih Mohammed Salih Mansour al Dulaimi, being in contravention of articles 3, 5, 6, 9, 10 and 11 of the Universal Declaration of Human Rights and of articles 6, 7, 9, 10, 14 and 16 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

44. Consequent upon the opinion rendered, the Working Group requests the Government of Iraq to take the steps necessary to remedy the situation of Salih Mohammed Salih Mansour al Dulaimi 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.

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

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

Follow-up procedure

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

48. 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.

49. 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.

⁷ See Opinion No. 20/2016, para. 25.

50. 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.⁸

[Adopted on 27 April 2017]

⁸ See Human Rights Council resolution 33/30, paras. 3 and 7.