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Human Rights Council Working Group on Arbitrary Detention

Opinion adopted by the Working Group on Arbitrary Detention at its sixty-ninth session, 22 April-1 May 2014

No. 5/2014 (Iraq)

Communication addressed to the Government on 16 December 2013

Concerning Mr. Shawqi Ahmad Omar

The Government replied to the communication on 19 March 2014.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 the detainee) (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 International Covenant on Civil and Political Rights (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); and

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

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:

4. Mr. Shawqi Ahmad Omar, born in 1962 in Kuwait, is a national of Jordan and a naturalized citizen of the United States of America.

5. Mr. Omar arrived in Iraq from the Syrian Arab Republic with his wife on 3 June 2004 to work in the building industry. In late October 2004, Mr. Omar and his wife were arrested at his uncle's house in the Zaiyouna district of Baghdad by the Multinational Force led by the United States of America. He was detained in Camp Na'ma detention facility near the Baghdad International Airport on accusation that he engaged in terrorism-related activities. The source informs that the Multinational Force tortured Mr. Omar and his wife by electric shocks during interrogation.

6. Mr. Omar's wife was released after 16 days and subsequently left Iraq. Mr. Omar was held without charge or trial until 2010 when his case was transferred to the Iraqi criminal court. On 24 June 2010, Mr. Omar was sentenced to 15-year imprisonment for the crime of entering Iraq illegally. The source informs that Mr. Omar was never informed of the charge against him. Mr. Omar had no legal representation at the trial, as it was originally scheduled to take place in July 2010 and his lawyer was not informed of the change of the trial date. Furthermore, Mr. Omar believes that his identity is mistaken, as he was convicted under the name of a Palestinian national called Shawqi Ahmad Sharif. Mr. Omar appealed against the conviction and the Court of Cassation in February 2011 reduced the sentence to seven-year imprisonment.

7. On 15 July 2011, Mr. Omar was handed over to the Iraqi authorities. The source indicates that after his initial detention in Camp Na'ma in 2004, Mr. Omar was detained in various detention facilities, including Camp Bucca, Camp Cropper and Abu Ghraib prison. Mr. Omar was reportedly held in Camp Cropper at the time of the handover. According to the source, Mr. Omar went on hunger strike between February and August 2013, in protest against his prolonged detention and being sentenced under a mistaken identity. The source believes that Mr. Omar has been recently transferred to Abu Ghraib prison and is currently detained there.

8. The source argues that Mr. Omar's detention is arbitrary, as he was sentenced under a mistaken identity. In support of its argument, the source informs that one of Mr. Omar's co-accused signed a court-certified statement on 3 June 2012, after his release, stating that the Multinational Force tortured him in order to force him to incriminate Mr. Omar, whom he did not know, in return for his release. Furthermore, the source submits that Mr. Omar should have been released in 2011 in any case, as article 295 of the Iraqi Criminal Procedure Code provides that time spent in pre-trial detention should be deducted from the sentence. According to this provision, Mr. Omar has duly served his sentence by the end of

October 2011, and should have been released then. The source thus maintains that there is no legal basis justifying Mr. Omar's detention and thus his detention is arbitrary.

9. The source further submitted that Mr. Omar's detention is arbitrary, as he was held without charge or trial for over five years since his arrest in October 2004. Furthermore, Mr. Omar was not afforded adequate time and facilities to prepare for his defense and had no legal representation at the trial. The source contends that this non-observance of international norms is contrary to Mr. Omar's right to a fair trial enshrined in article 14 of the International Covenant on Civil and Political Rights. The source maintains that Mr. Omar's detention is thus arbitrary, in view of the non-observance of the international norms relating to the right to a fair trial.

Communications with the Government

10. The Working Group addressed a communication to the Government of Iraq on 16 December 2013. The Working Group requested the Government to provide detailed information about the current situation of Mr. Omar and to clarify the legal provisions justifying his continued detention. The Working Group further requested the Government to provide details regarding the conformity of his trial with international law.

11. The Government responded on 19 March 2014 that Mr. Omar, who has U.S. citizenship, had been sentenced to seven years according to article 24 of the Amended Alien Residence Act No.118 of 1978 and his sentence started on 24 June 2010.

12. While the Working Group appreciates the Government's response, it regrets that the response did not provide details of the current situation of Mr. Omar or clarify in a satisfactory manner the legal provisions justifying his continued detention and the conformity of his trial with international law.

Reply from the source

13. On 9 April 2014, the source provided comments on the Government's response. It provided further information about the circumstances of the arrest of Mr. Omar and his wife on 3 June 2004 and noted that Mr. Omar was held without charge or trial until 2010 when his case was transferred to the Iraqi criminal court. On 24 June 2010, he was sentenced to 15-years' imprisonment on charges of entering Iraq illegally, a charge that was never mentioned to him previously and which he believes to be a case of mistaken identity as he was convicted under the name of a Palestinian national called Shawqi Ahmad Sharif. His case went to appeal and his sentence was reduced in February 2011 to seven years' imprisonment by the Court of Cassation.

14. The source remains concerned that Mr. Omar should have been released in 2011 in compliance with article 295 of the Iraqi Criminal Procedure Code, which stipulates that time spent in pre-trial detention should be deducted from the final sentence.

Discussion

Evidence

15. The Working Group regrets that the Government in its reply has not responded to the allegations transmitted to them. Despite the absence of any information from the Government beyond the confirmation of the sentence against Mr. Omar, the Working Group considers it is in the position to render its Opinion on the detention of Mr. Omar in conformity with paragraph 16 of its Methods of Work.

16. The Government has not rebutted the prima facie reliable allegations submitted by the source and transmitted to the Government. Where it is alleged that a person has not

been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out."¹ A similar approach has been adopted by Human Rights Committee, according to which the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information.²

Background

17. Mr Omar has been detained since 3 June 2004. He was detained by the Multinational Forces and in different detention facilities before he was transferred to the Iraqi authorities on 15 July 2011. Making no findings about the detention by the Multinational Forces before the transfer to the Iraqi authorities, the Working Group briefly recalls some points set out in various judgments by courts in the United States. In 2004, a military panel classified Mr Omar as a "security internee under the law of war" and an "enemy combatant" in the war on terrorism" who was not a prisoner of war for purposes of the Third Geneva Convention. As a US citizen, he managed to have his habeas corpus action brought before the US courts, and the United States Supreme Court as one of two consolidated cases, *Munaf v. Geren* (06-1666) and *Geren v. Omar* (07-394), in *Munaf v. Geren*, 553 U.S. 674 (2008) concluded that the habeas corpus statute extends to U.S. citizens held overseas by American forces subject to an American chain of command, even if acting as part of a multinational coalition.

18. This did not bar his transfer to Iraqi authorities at this stage as 'Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them'. The US Government's case before the US courts was that Mr Omar was a terrorist and participated in terrorist networks, and that weapons and bombs were found at his home.

19. The Working Group recalls its Opinion No. 57/2013 (Djibouti, Sweden and the United States of America)³ where it discussed its jurisprudence, deliberations, legal opinions, and concluding reports from country missions and in its annual reports to the Human Rights Council on arrests and detention abroad and trial of terrorist suspects, including the 2010 Joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken jointly between by five UN Special Rapporteurs and Working Groups, including the Working Group on Arbitrary Detention.⁴ As reiterated in Opinion No. 57/2013, the Working Group emphasises that the United

¹ Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of the Congo*), ICJ, Judgment, 30 November 2010, para. 55, see Working Group's constant jurisprudence, e.g. Opinion No. 57/2013 (Djibouti, Sweden and the United States of America).

² See, for instance, *Butovenko v. Ukraine*, HRC, no. 1412/2005, para. 7.3; *Medjnoune v. Algeria*, no. 1297/2004, para. 8.3; *Conteris v. Uruguay*, no. 139/1983, para. 7.2; *Bleier v. Uruguay*, no. 30/1978, para. 13.3.

³ A/HRC/WGAD/2013/57

⁴ Joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken by the Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism; on torture and other cruel, inhuman or degrading treatment or punishment and the Working Groups on Arbitrary Detention and Enforced and Involuntary Disappearances, A/HRC/13/42, 19 February 2010.

States of America remains responsible for the acts of its agents on foreign territory under international law and international human rights law.

Detention by Iraqi authorities

20. This opinion concerns the detention by Iraqi authorities. The Government in its response confirms Mr. Omar's sentence of seven years for entering the country illegally, 'according to Article 24 of the Amended Alien Residence Act No.118 of 1978'. Article 24 provides that 'Whoever contravenes the provisions of any of the Articles 3, 8 or 20 of this Law shall be punished by life imprisonment or by imprisonment for a term as well as confiscating the properties being under his possession'. Article 3 prohibits entry on different grounds, including without passport or completion of an arrival form.

21. With respect to the criminalization of irregular entry and stay in a country, the Working Group has, in its constant jurisprudence⁵ and in numerous reports,⁶ taken the view that "the criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows".⁷ The Working Group has also shown how penalties for not complying with the formal requirements of entry to a country, are subject to review under international law.⁸ The review is a particularly anxious one, and disproportionate penalties are in violation of international law. Article 24 of the Amended Alien Residence Act is clearly disproportionate, and in violation of international law.

22. Furthermore, the present case reveals serious procedural violations, including Mr. Omar's lack of access to legal assistance during his detention by the Iraqi authorities or in preparation for or at his trial. This is in breach of his right to a fair trial, guaranteed under article 10 of the Universal Declaration of Human Rights (UDHR) and article 14 of the International Covenant on Civil and Political Rights (ICCPR). The Government did not contest the allegations that Mr. Omar has been convicted and sentenced to a harsh and disproportionate sentence of imprisonment, following a summary trial which did not respect due process in accordance with international law. The Working Group finds that the disregard of Mr. Omar's right to a fair trial in the present case is of such gravity as to give his deprivation of liberty an arbitrary character. Mr. Omar's detention clearly falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

23. ~~The Working Group shares the concerns expressed by civil society organizations about a vast number of individual cases of detention without charge or trial in Iraq, often for prolonged periods. The detainees have been often subjected to enforced disappearance and are have been tortured and otherwise ill-treated in custody. These concerns have been expressed to the Iraqi Government over the past years and remain unaddressed. The Working Group regrets that its procedures, which rely on the cooperation of States, have not brought forward more information about the case of Mr. Omar after his transfer to the Iraqi authorities.~~

Disposition

24. In the light of the preceding, the Working Group on Arbitrary Detention renders the following opinion:

⁵ See, e.g., No. 43/2012 (Iraq); No. 55/2011 (Lebanon) and No. 56/2011 (Lebanon).

⁶ A/HRC/10/21, paragraphs 65-68. A/HRC/13/30, paragraphs 54-65.

⁷ A/HRC/13/30, paragraph 58.

⁸ See, e.g. A/HRC/10/21, paragraph 65. A/HRC/13/30, paragraph 55.

Mr. Omar's detention is in breach of articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

25. Consequent upon the opinion rendered, the Working Group requests the Government of Iraq to remedy the situation of Mr. Omar and to bring it into conformity with international law and the standards and principles set out in the UDHR and the ICCPR.

26. Taking into account all the circumstances of the case, the adequate remedy is to immediately release Mr. Omar and to accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the ICCPR. The duty to provide Mr. Omar with compensation for the violations of his rights rests upon the state and should be enforceable before the national courts.

27. In light of the allegations of torture and ill-treatment, the Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

[Adopted on 23 April 2014]
