



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 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 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), 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);

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

(e) When the deprivation of liberty constitutes a violation of international law 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.

4. 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. He was detained in Camp Na'ma detention facility near Baghdad International Airport, accused of having been engaged in terrorism-related activities. The source submits that the Multinational Force tortured Mr. Omar and his wife with 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 an Iraqi criminal court. On 24 June 2010, Mr. Omar was sentenced to 15 years' imprisonment for the crime of entering Iraq illegally. The source reports 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 had not been informed of the change in the trial date. Furthermore, Mr. Omar believes that his identity was mistaken, as he was convicted under the name of a Palestinian national called Shawqi Ahmad Sharif. Mr. Omar appealed against the conviction and in February 2011 the Court of Cassation reduced the sentence to seven years' 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 against having being sentenced under a mistaken identity. The source believes that Mr. Omar has recently been 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 contention, the source reports 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 had 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 pretrial detention should be deducted from the sentence. In accordance with that provision, Mr. Omar had duly served his sentence by the end of October 2011 and should have been released then. The source

therefore maintains that there is no legal basis justifying Mr. Omar's detention and thus his detention is arbitrary.

The source also submits that Mr. Omar's detention is arbitrary, as he had been 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 defence and had no legal representation at the trial. The source contends that that non-observance of international norms was 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.

Communication with the Government

9. The Working Group addressed a communication to the Government of Iraq on 16 December 2013. The 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 Group also requested the Government to provide details regarding the conformity of his trial with international law.

10. The Government responded on 19 March 2014 that Mr. Omar, who has United States citizenship, had been sentenced to seven years in accordance with article 24 of the Amended Residence of Aliens Act No. 118 of 1978 and his sentence had begun on 24 June 2010.

11. 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

12. 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 had been held without charge or trial until 2010, when his case had been transferred to an Iraqi criminal court. On 24 June 2010, he had been sentenced to 15 years' imprisonment on charges of entering Iraq illegally, a charge that had previously never been mentioned to him and which he believed to have been made on the basis of mistaken identity, as he had been convicted under the name of a Palestinian national called Shawqi Ahmad Sharif. His case had gone to appeal and in February 2011 his sentence had been reduced by the Court of Cassation to seven years' imprisonment.

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

Discussion

Evidence

14. The Working Group regrets that the Government, in its reply, did not respond to the allegations transmitted to it. Despite the absence of any information from the Government beyond confirmation of the sentence against Mr. Omar, the Group considers that it is in a position to render its opinion on the detention of Mr. Omar in conformity with paragraph 16 of its methods of work.

15. 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 International Court of Justice has found that 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 the 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

16. Mr. Omar has been detained since 3 June 2004. He was detained by the Multinational Forces in various detention facilities before he was transferred to the Iraqi authorities on 15 July 2011. Having made 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 judgements 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 Geneva Convention of 12 August 1949 relative to the treatment of prisoners of war. As a United States citizen, he managed to have his habeas corpus action brought before the United States courts, and the United States Supreme Court, as one of two consolidated cases, *Munaf v. Geren* (06-1666) and *Geren v. Omar* (07-394), concluded in *Munaf v. Geren*, 553 U.S. 674 (2008) that the habeas corpus statute extended to United States citizens held overseas by American forces subject to an American chain of command, even if acting as part of a multinational coalition.

17. That did not bar Mr. Omar’s transfer to the Iraqi authorities at that 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”.³ The case of the Government of the United States before the United States courts was that Mr. Omar was a terrorist and had participated in terrorist networks, and that weapons and bombs had been found at his home.

18. The Working Group refers to its opinion No. 57/2013 (Djibouti, Sweden and the United States of America),⁴ in which it recalled that, in its jurisprudence, deliberations, legal opinions, concluding reports on country missions, and in its annual reports to the Human Rights Council, it had reviewed issues related to arrests and detention abroad and trials of terrorist suspects, including the 2010 Joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken jointly by four United Nations special rapporteurs and working groups, including the Working Group on Arbitrary

¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010*, pp. 660–661, para. 55; see also the Working Group’s constant jurisprudence, e.g. opinion No. 57/2013 (Djibouti, Sweden and the United States of America).

² See, for instance, Human Rights Committee, *Butovenko v. Ukraine*, communication No. 1412/2005, para. 7.3; *Medjnoune v. Algeria*, communication No. 1297/2004, para. 8.3; *Conteris v. Uruguay*, communication No. 139/1983, para. 7.2; and *Bleier v. Uruguay*, communication No. 30/1978, para. 13.3.

³ *Munaf v. Geren*.

⁴ A/HRC/WGAD/2013/57.

Detention.⁵ As stated in its opinion No. 57/2013, the Working Group emphasizes that the United States remains responsible under international law and international human rights law for the acts of its agents on foreign territory.

Detention by the Iraqi authorities

19. The present opinion concerns the detention of Mr. Omar by the 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 Residence of Aliens Act No. 118 of 1978. Article 24 provides: "Whoever contravenes the provisions of any of articles 3, 8 or 20 of this Law shall be punished by life imprisonment or by a term of imprisonment, as well as by confiscation of the properties in his possession." Article 3 prohibits entry on various grounds, including being without a passport or not having filled in an arrival form.

20. With respect to the criminalization of irregular entry and stay in a country, the Working Group has, in its constant jurisprudence⁶ and in numerous reports,⁷ taken the view that the criminalization of irregular migration exceeds the legitimate interests of States in protecting their territories and regulating irregular migration flows.⁸ The Group has also shown how penalties for not complying with the formal requirements for entry to a country are subject to review under international law.⁹ The review is a particularly worrying one, and disproportionate penalties are in violation of international law. Article 24 of the Amended Residence of Aliens Act is clearly disproportionate, and in violation of international law.

21. 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, 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 and article 14 of the International Covenant on Civil and Political Rights. The Government did not contest the allegations that Mr. Omar had 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 Group.

22. 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 often been subjected to enforced disappearance, tortured and otherwise ill-treated in custody. Those concerns have been expressed to the Government of Iraq over the past years and remain unaddressed. The Group regrets that its procedures, which rely on the cooperation of States, have not brought

⁵ Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin (A/HRC/13/42 of 19 February 2010).

⁶ See, for example, opinion Nos. 43/2012 (Iraq); 55/2011 (Lebanon) and 56/2011 (Lebanon).

⁷ A/HRC/10/21, paras. 65–68, and A/HRC/13/30, paras. 54–65.

⁸ A/HRC/13/30, para. 58.

⁹ See, for example, A/HRC/10/21, para. 65, and A/HRC/13/30, para. 55.

forward more information about the case of Mr. Omar after his transfer to the Iraqi authorities.

Disposition

23. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

Mr. Omar's detention is in breach of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

24. 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 Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

25. 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 International Covenant on Civil and Political Rights. 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.

26. In the 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]
