

**OPINION No. 44/2005 (IRAQ AND UNITED STATES OF AMERICA)**

**Communication: addressed to the Governments of Iraq and the United States of America on 18 March 2005.**

**Concerning: the case of Mr. Abdul Jaber al-Kubaisi.**

**Both States are parties to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 38/2005.)
2. The Working Group regrets that only the Government of the United States of America responded, providing general information only, which was not related to the person concerned. The Working Group believes that it is in a position to render an Opinion on the facts and circumstances of the case.
3. (Same text as paragraph 3 of Opinion No. 38/2005.)
4. According to the information received, Mr. Abdul Jaber al-Kubaisi, founder and director of the weekly newspaper *Nida al watan* (“*Call of the Nation*”) and President of the Patriotic Alliance of Iraq; resident in Al-Hamriya, Baghdad. Mr. Al-Kubaisi was a victim of the regime of Saddam Hussein. He had been forced into exile for almost 30 years. First he was in the Syrian Arab Republic and then, since 1995, in France, where he and his family obtained refugee status. Two of his brothers were executed under Saddam Hussein’s regime. However, Mr. Al-Kubaisi supported neither the United Nations sanctions against Iraq nor the war in 2003. He worked closely with some of the current leaders of Iraq.
5. Mr. Al-Kubaisi was arrested at his home on the night from 4 to 5 September 2004 by around 30 soldiers of a Special Forces Unit of the United States Army. They arrived in three armoured vehicles. One helicopter was surveying the operation. No arrest warrant was shown to him. The troops took him to an undisclosed destination. Eight hours later, on 5 September 2004, the same Special Forces returned to search his house. They confiscated the files and archives relating to the *Nida al watan* newspaper, broke the main door and the windows and destroyed the furniture.
6. In February 2005, Mr. Al-Kubaisi’s brother received unofficial reports that Mr. Al-Kubaisi was being detained in Cropper camp, a United States military camp located near Baghdad airport. No official information was given to his family and no reasons have been provided to justify his detention. Visits and correspondence have not been authorized. Mr. Al-Kubaisi’s lawyer has not been authorized to see him.
7. According to the source, Mr. Al-Kubaisi was being held in an isolation cell under deplorable and inhuman conditions. Fears have been expressed that he may be subjected to torture.

8. It was further reported that, on several occasions, Mr. Al-Kubaisi's relatives had addressed the Iraqi Ministry of the Interior; the Iraqi Army; the United States military authorities; the Embassy of the United States and the office of the International Committee of the Red Cross in Baghdad, without results.

9. The source considers that Mr. Al-Kubaisi was arrested because his articles opposing the United States-led military occupation of Iraq and calling on the Iraqi people to end it. It was said that, the day before his arrest, Mr. Al-Kubaisi had given an interview to the French newspaper *Journal du Dimanche* on the situation of two French journalists held hostage in Iraq, Christian Chesnot and Georges Malbrunot. In that interview, he stated he would do everything in his power to have the journalists freed.

10. The Government of the United States provided general information on Camp Cropper, a detention facility reserved for high-value security detainees. It argued that security detainees held by the multinational force in Iraq (MNF-I) under the authority of international humanitarian law and Security Council resolution 1546 fall into the scope of international humanitarian law and therefore claimed that the Working Group on Arbitrary Detention did not have the mandate to consider this issue.

11. The Government of the United States offered general information about the treatment of security detainees and its cooperation on this matter with the Government of Iraq and the International Committee of the Red Cross. However, it refused to confirm or deny the presence of Mr. Al-Kubaisi at Camp Cropper or under its custody. The Government of the United States invites the family to submit their request for information to the multinational force.

12. In commenting on the Government response, the source noted that the Government of the United States did not reply to the questions asked about the arrest of Mr. Al-Kubaisi, and reaffirmed that the ICRC is unable to visit Camp Cropper and to bring concrete information to his family. This is also the case for the Iraq authorities and the lawyers from the Iraq bar association. The source added that the European Parliament had adopted a resolution on Iraq in which it requested the liberation of Mr. Al-Kubaisi.

13. The Working Group would like to stress as a matter of principle that the application of international humanitarian law to an international or non-international armed conflict does not exclude the application of human rights law. The two bodies of law are complementary and not mutually exclusive. In the case of a conflict between the provisions of the two legal regimes with regard to a specific situation, the *lex specialis* will have to be identified and applied. The Working Group adopted this approach in its "Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay" (E/CN.4/2003/8, para. 64).

14. As far as the mandate is concerned, the Working Group considers that, where persons are deprived of their liberty in a situation of international armed conflict but are denied the protection of the Third or Fourth Geneva Conventions, the reasons for not dealing with situations

of international armed conflict underlying paragraph 14 of the Methods of Work cannot find any application.<sup>1</sup> Accordingly, the Working Group has already dealt with communications from detainees finding themselves in such a situation.<sup>2</sup>

15. In the case under consideration, Mr. Al-Kubaisi was arrested at his home on the night from 4 to 5 September 2004 by soldiers of a Special Forces Unit of the United States Army and taken to an undisclosed destination. This occurred at a time when the United States no longer has the status of occupying power in Iraq under the Fourth Geneva Convention. Even if we consider the United States as an occupying power in that country and that Mr. Al-Kubaisi is detained as a threat to the security of the occupying power, or if we consider that the United States has permission under the Security Council resolution 1546 (2004) to detain civilians, both countries are still bound by the provisions of the Fourth Geneva Convention and article 9 of the International Covenant on Civil and Political Rights to which the United States and Iraq are party and have not derogated from.

16. Under article 78 of the Fourth Geneva Convention, the administrative detention or internment of civilians in occupying territories can only proceed “for imperative reasons of security”. In its Commentary on article 78 of the Convention, the International Committee of the Red Cross explains that: “In any case, such measures can only be ordered for real and imperative reasons of security; their exceptional character must be preserved.” Internment shall be carried out according to regular procedure in accordance with the provisions of the Convention.

17. Article 9 (4) of the International Covenant on Civil and Political Rights requires that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.

18. In the absence of any comment from the Government of the United States on the specific case submitted to its attention and the lack of reply by the Government of Iraq, the Working Group is therefore bound to accept the allegations of the source, namely that Mr. Al-Kubaisi was arrested and continues to be detained in Camp Cropper, a United States military camp for no reason other than his political opinions. The Working Group thus considers that Mr. Al-Kubaisi’s prolonged detention (14 months) in an undisclosed place without any access to the International Committee of the Red Cross, family members, lawyers or other persons of the outside world violates the provisions of the Fourth Geneva Convention and article 9 of the International Convention on Civil and Political Rights.

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<sup>1</sup> See the Working Group’s *legal Opinions Regarding detention at El-Khiam prison (E/CN.4/2000/4, paras. 11-18) and the Deprivation of Liberty of Persons Detained in Guantánamo Bay (E/CN.4/2003/8, page 21)*.

<sup>2</sup> See Opinion No. 5/2003 (United States of America) (E/CN.4/2004/3/Add.1, page 33).

19. In the light of the foregoing, the Working Group renders the following Opinion:

On the basis of the above information, the Working Group concludes that the detention of Mr. Abdul Jaber al-Kubaisi is of an arbitrary character, being in contravention of article 9 of the International Covenant on Civil and Political Rights, and falls within category III of the categories applicable to the consideration of cases submitted to the Working Group.

20. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Abdul Jaber al-Kubaisi and to bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 30 November 2005.