

**OPINION No. 45/2005 (IRAQ AND UNITED STATES OF AMERICA)**

**Communication: addressed to the Governments on 17 January 2005.**

**Concerning: Mr. Tariq Aziz.**

**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. (Same text as paragraph 3 of Opinion No. 38/2005.)
3. In the light of the allegations made, the Working Group welcomes the information provided by the Government of the United States of America. It would have welcomed the cooperation of the Government of Iraq. The Working Group transmitted the reply provided by the Government of the United States to the source and received its comments.
4. According to the information received from the source, Mr. Tariq Aziz, a citizen of Iraq born in Mousal, Iraq, on 6 February 1936, is a journalist and English language teacher by profession. He was a high-ranking member of the Government of Iraq, first as Minister of Foreign Affairs and then as Vice-President.
5. On 20 March 2003, military forces belonging primarily to the United States and the United Kingdom of Great Britain and Northern Ireland invaded Iraq. On 9 April 2003, Baghdad was formally secured by United States forces and the regime of Saddam Hussein was declared to have ended. On 1 May 2003 the President of the United States announced the end of major combat operations in the Iraq war. As recognized in Security Council resolution 1483 (2003), around this date the United States and the United Kingdom “assumed the specific authorities, responsibilities, and obligations under applicable international law ... as occupying powers under unified command”. The Coalition forces established a Coalition Provisional Authority (CPA) under an Administrator named by the United States. CPA named an Interim Iraqi

Governing Council. On 30 June 2004, the occupation of Iraq ended and CPA ceased to exist. As of that date, Iraq reasserted its full sovereignty and an Interim Government of Iraq assumed full responsibility for governing Iraq (see paragraphs 1 and 2 of Security Council resolution 1546 (2004)). In accordance with this resolution, however, a multinational force, composed primarily of United States and United Kingdom military forces, remained in Iraq at the request of the Iraqi Government.

6. The source further states that, on 24 April 2003, Mr. Tariq Aziz surrendered to the members of the United States military forces in Iraq and was taken into custody at an undisclosed location. From that date to the date of the communication in December 2004, his only contact with his family (which currently lives in Jordan) was through two letters delivered to them through the Baghdad section of the International Committee of Red Cross. His family does not know whether he has ever received the numerous letters they sent to him.

7. The source does not know whether Mr. Aziz was initially detained as a prisoner of war or with a different legal status.

8. On 10 December 2003, the Iraqi Governing Council established the Iraqi Special Tribunal. According to article 1 (b) of its Statute, the Tribunal “shall have jurisdiction over any Iraqi national or resident of Iraq accused of the crimes listed in articles 11 to 14 below, committed since 17 July 1968 and up until and including May 1, 2003, in the territory of the Republic of Iraq or elsewhere, including crimes committed in connection with Iraq’s wars against the Islamic Republic of Iran and the State of Kuwait.” The crimes listed in articles 11 to 14 of the Statute are genocide, crimes against humanity, war crimes, and violations of certain Iraqi laws listed in article 14. On 11 October 2005, the President of Iraq signed a new statute and new rules of procedure of the court, which rename it the Supreme Iraqi Criminal Tribunal (which is the term used hereinafter).

9. The source states that on 1 July 2004, Mr. Aziz appeared before the Iraqi Special Tribunal in order to enter a plea, as provided in article 21 (c) of the Statute. The hearing took place at a secret location and the defendant was not assisted by counsel. Pictures of this hearing were taken by an authorized company and passed to broadcasters all over the world. These pictures showed Tariq Aziz wearing the orange overalls typical of persons in United States detention and with chains at his feet. He had greatly lost weight and appeared lost and confused.

10. A son of Tariq Aziz appointed a team of lawyers to represent his father. As of the date of the communication in December 2004, however, these lawyers had not been allowed to contact their client, either by visiting him in his place of detention, or by phone, or by exchange of correspondence. Nor had the lawyers received any information or documents relating to the charges raised against him. He continued to be detained incommunicado at an undisclosed location, without access to legal counsel or family.

11. The source alleges that the detention of Tariq Aziz is arbitrary in respect of category III of the Working Group’s mandate. The source argues that because Tariq Aziz was forced to prepare his trial in conditions of complete isolation from the outside world, detained at a secret location, deprived - at the time of the initial communication - of all contact with legal counsel

(although the charges raised against him must be of the most serious nature to fall within the mandate of the Supreme Iraqi Criminal Tribunal), and in a precarious state of health, the non-observance of international norms relating to fair trial is so serious as to render his pretrial detention, as well as any detention upon conviction, arbitrary.

12. The source submits that, whatever Tariq Aziz's status in the period following his arrest, he is currently de jure detained by the sovereign Iraqi authorities, while he is de facto in the hands of the Coalition forces, more specifically United States forces. The source therefore concludes that legal responsibility for his arbitrary detention attaches both to Iraq and to the United States of America.

13. In its reply to the communication, the Government of the United States underlines that, as also noted by the source, Tariq Aziz is under physical custody of the multinational forces (MNF-I) pursuant to arrangements between MNF-I and the Iraqi Ministry of Justice, but is being held under the legal authority of an Iraqi tribunal. The Government of the United States therefore considers that the Government of Iraq is best placed to clarify the legal basis for the detention of Tariq Aziz.

14. As noted above, however, the Working Group did not receive any information from the Government of Iraq.

15. In replying to the statement by the Government of the United States, the source insists that both Governments must be considered responsible for the detention of Tariq Aziz. In particular, the Government of the United States is responsible for the severe isolation to which Tariq Aziz is subjected, which prevents him from adequately preparing his defence.

16. The source further provides an update on the situation of Tariq Aziz, who soon after the communication was submitted to the Working Group in December 2004, was allowed a first visit by one of his defence counsels. Four further meetings between Tariq Aziz and the lawyer followed in March and August 2005. At all times during these interviews, a United States official remained present. Moreover, Tariq Aziz still has not been informed of any charges against him. The source concludes that the detention of Tariq Aziz continues to be arbitrary for the reasons it adduced at the time of the communication.

17. The communication was brought to the attention of both concerned Governments by a letter of the Chairperson-Rapporteur dated 17 January 2005 in conformity with section 15 of the Working Group's revised methods of work, requesting the Governments to provide their respective reply within 90 days.

18. Since no response was received from either Government within the given time limit, the Working Group sent a communication to the Permanent Mission of the Republic of Iraq to the United Nations Office at Geneva (on 29 April 2005) and to the Permanent Mission of the United States of America to the United Nations Office at Geneva (on 3 May 2005). In the communication it informed both Governments that the forthcoming session of the Working Group would take place in Geneva from 23 to 27 May 2005, during which the Group would discuss the communication submitted on behalf of Tariq Aziz. It reminded the Permanent Missions that no answer had been received to the Chairperson-Rapporteur's letter of 17 January.

On 18 July 2005 the Government of the United States provided a reply, in which it recommended that the Working Group seek information from the Government of Iraq. Since the Government of Iraq had not responded to the Chairperson-Rapporteur's letter of 17 January 2005, the Working Group again urged the Iraqi Permanent Mission in Geneva in two communications dated 8 August and 28 October 2005. No response was received.

19. Paragraph 16 of the Working Group's revised working methods reads, that "Even if no reply has been received upon expiry of the time limit set, the Working Group may render an opinion on the basis of all the information it has obtained."

20. To be able to spell out the law applicable to the different issues raised by the source and identify the Government(s) responsible under international law for the legality of the detention and the possible violation, if any, of the rights of Mr. Tariq Aziz, the Working Group considers it necessary to highlight the particularity of the circumstances of the case before it.

21. The Working Group would like to stress that Mr. Tariq Aziz was Vice-President of Iraq when armed forces of the United States and the United Kingdom invaded Iraq in March 2003. On 1 May 2003, the Security Council of the United Nations in its resolution 1483 admitted that the United States and the United Kingdom of Great Britain had assumed the authority, responsibility and applicable obligations under international law in the territory of Iraq. It is undisputed that Mr. Aziz surrendered to the United States military forces on 24 April 2003 and since that time has been detained. The source is uncertain as to whether Mr. Aziz was given "prisoner of war" (POW) or "civilian internee" status during the initial period of his detention. In its reply, the United States Government did not clarify under which status Tariq Aziz had initially been detained. It is, however, well known that from the early days of the conflict in Iraq, the United States Government recognized that the Geneva Conventions applied comprehensively to individuals captured in the conflict. The United States Government also gave assurances that it intended to comply with article 5 of the Third Geneva Convention by treating all belligerents captured in Iraq as prisoners of war unless and until a competent tribunal determined that they were not entitled to POW status.<sup>3</sup>

22. The position of the Working Group is that it is indifferent whether at the time of his being taken into custody he was considered a prisoner of war or a civilian internee, because it is undisputed that even if the invading coalition stated that the major combat operations finished on 1 May 2003, the total occupation still continued until 30 June 2004. Therefore as Tariq Aziz's detention took place in the context of an international armed conflict resulting in the invasion of Iraq by the United States Government forces and the armed coalition, his status is protected by the Third Geneva Convention, at least until 30 June 2004.

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<sup>3</sup> Statement made in April 2003: see e.g. "Briefing on Geneva Convention, EPW and war crimes" 7 April 2003, available at: [http://www.defenselink.mil/transcripts/2003/t04072003\\_t407genv.html](http://www.defenselink.mil/transcripts/2003/t04072003_t407genv.html).

23. Consequently, and in accordance with paragraph 16 of its methods of work (14 of its revised methods of work),<sup>4</sup> the Working Group, will not assess the lawfulness of Mr. Tariq Aziz's detention for the period from 13 December 2003 to 30 June 2004, as it occurred during an ongoing international armed conflict insofar as that the US Government recognized that the Geneva Conventions applied to individuals captured in the conflict in Iraq and it seems according to the source that the International Committee of the Red Cross was in a position to communicate two letters to Tariq Aziz's family.

24. According to the fifth paragraph of article 119 of the Third Geneva Convention and the second paragraph of article 133 of the Fourth Geneva Convention it is permissible for prisoners of war and civilian internees, against whom penal proceedings are pending, to be detained until the close of such proceedings. The Working Group is not in a position to assess the conformity to the applicable provisions of international humanitarian law (articles 12, 118 and 119 of the Third Geneva Convention to which the United States and Iraq are parties), of the procedure under which, Mr. Tariq Aziz was transferred by the Coalition Provisional Authority in its power of occupant to the Interim Government of Iraq. It is, however, not disputed that if de jure transferred, Mr. Tariq Aziz remains de facto in United States custody. The United States Government, in its reply to the Working Group, recognizes that "the detainee is under the custody of the 'Multinational Force - Iraq' according to an agreement reached with the Minister of Iraqi Justice although he is under the authority of an Iraqi court".

25. The Working Group concludes that until 1 July 2004, Mr. Tariq Aziz had been detained under the sole responsibility of the Coalition members as occupying powers or, to be more precise, under the responsibility of the United States Government. Since then and as the Iraqi Criminal Tribunal is a court of the sovereign State of Iraq, the pretrial detention of a person charged before the Tribunal is within the responsibility of Iraq. In the light of the fact that Mr. Aziz is in the physical custody of the United States authorities, any possible conclusion as to the arbitrary nature of his deprivation of liberty may involve the international responsibility of the United States Government.

26. As to the period of detention subsequent to 30 June 2004, Mr. Aziz appeared on 1 July 2004 before the Supreme Iraqi Criminal Tribunal in order to enter a plea. Arguably, he was then informed of the charges against him. On this occasion he did not have the assistance of a lawyer. Later, in December 2004 and on four more occasions between March and August 2005 he was allowed to meet and consult with one of his lawyers, but on each occasion a United States official remained present. Therefore, whatever was his status when detained prior to 1 July 2004, he subsequently became a defendant in a criminal procedure entitled to the protection of the International Covenant on Civil and Political Rights. As both the United States and Iraq have ratified the Covenant, articles 9 (3) and 14 ICCPR are applicable to his detention.

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<sup>4</sup> "The Working Group will not deal with situations of international armed conflict in so far as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence".

27. The Working Group has neither received information concerning the trial being scheduled against Mr. Aziz, nor regarding the facts and offences for which he is to stand trial. Whether he will be given a fair trial - a crucial issue for the assessment of the lawfulness or arbitrariness of his detention before, pending, and if convicted after trial - will largely depend on the particular circumstances of how the trial will be conducted. What will happen in the future is not a matter of speculation for the Working Group. However, some negative signs can already be detected at present. The Working Group had access to and gathered information regarding the Supreme Iraqi Criminal Tribunal and its rules of procedure.

28. This Tribunal was established by the Iraqi Governing Council on 10 December 2003, and in the first days of August 2004, the Interim Iraqi Assembly modified the statute that was regulating it. The Working Group does not know the criteria according to which the Iraqi Government has nominated the judges who form this tribunal. However, the alleged withdrawal or substitution of several judges is a matter of concern. The atmosphere surrounding the preparation of the trial, which can negatively affect the independence and impartiality of the Tribunal - or at least give the impression that it lacks the requisite independence and impartiality- is also a matter of concern to the Working Group. The murder of defence lawyers, the threatening behaviour of the crowd against some of the accused, motivated by past wrongs suffered in the previous regime, might exert undue pressure on the Tribunal. More specifically, the fact that capital punishment was recently re-introduced and that no appeal is allowed against conviction and sentence, which is in complete disregard of article 14 paragraph 5 of the International Covenant on Civil and Political Rights, may cast a shadow over the requisite fairness of the process. The Working Group was also made aware of discrepancies between the old Iraqi criminal procedure code and the rules of procedure of the Supreme Iraqi Criminal Tribunal on important points, and it is not clear which law prevails.

29. In his annual report (2005) to the General Assembly of the United Nations, Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, raised his own concerns about the judicial proceedings taking place before the "Iraqi Special Tribunal":

“Despite the commitment and personal efforts of the judges and the cooperation provided by several countries in setting up the Tribunal, he [the Special Rapporteur] is concerned that the pressure weighing on the judges and the prevailing insecurity in Iraq may undermine its independence. Moreover, the Tribunal itself has certain deficiencies, some of which can be traced back to the manner in which it was set up and, in particular, to the restriction of its jurisdiction to specific people and a specific time frame; i.e., the Tribunal may only try Iraqi citizens for acts committed prior to 1 May 2003, when the occupation began. The Tribunal’s power to impose the death penalty demonstrates the extent to which it contravenes international human rights standards. Because it was established during an occupation and was financed primarily by the United States, its legitimacy has been widely questioned, with the result that its credibility has been tarnished.

“The Special Rapporteur urges the Iraqi authorities to follow the example set by other countries with deficient judicial systems by asking the United Nations to set up an independent tribunal which complies with international human rights standards.”<sup>5</sup>

30. The concerns raised above also fully apply to the trial prepared against Mr. Tariq Aziz. Already at the preparatory stage of the trial against him, some serious procedural flaws can be identified, above all in respect of his full and unlimited access to his defence counsel to prepare his defence out of earshot of the prison staff and any other officials.

31. The Working Group is fully aware that the ongoing judicial procedure in Iraq is aimed at bringing to justice the highest-ranking leaders of the past Iraqi regime of Saddam Hussein, including Mr. Tariq Aziz, for the most serious crimes they allegedly committed against the Iraqi people and some neighbouring countries. The crimes for which they are prosecuted against comprise, but are not limited to: genocide, crimes against humanity and war crimes.

32. The Working Group would like to stress that as one of the mechanisms of the United Nations Commission on Human Rights, it is deeply committed to the principle that any violation of human rights, whether committed by politicians or others, must be inquired into and redressed, if necessary, by bringing the perpetrators to justice. Yet, any procedure aiming to put right gross human rights violations and as such, welcomed by the Working Group, shall scrupulously respect the rules and standards drawn up and accepted by the international community to respect the rights of any person charged with a criminal offence. The violation of the rights of the person charged may easily backfire. This is particularly true in the present case; any lack of respect for the rights of the leaders of the former Iraqi regime in the criminal proceedings against them may undermine the credibility of the justice system of the newly emerging democratic Iraq.

33. The Working Group believes that under the circumstances the proper way to ensure that the detention of Mr. Tariq Aziz does not amount to arbitrary deprivation of liberty would be to ensure that his trial is conducted by an independent and impartial tribunal in strict conformity with international human rights standards.

34. In the light of the above-mentioned, the Opinion of the Working Group is that:

(a) It will not take a position on the alleged arbitrariness of the deprivation of liberty of Mr. Tariq Aziz during the period of international armed conflict;

(b) As far as the alleged arbitrariness of his detention after the re-establishment of Iraqi sovereignty is concerned, the Working Group will follow the development of the process and will request more information from both concerned Governments and from the source. In the meantime, and referring to paragraph 17 (c) of its methods of work, the Working Group decides to keep the case pending until further information is received.

Adopted on 30 November 2005.

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<sup>5</sup> See (A/60/321) page 15.