

OPINION No. 33/2006 (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. 32/2006.)
2. On 30 November 2005, the Working Group adopted Opinion No. 45/2005 concerning the communication addressed to the Governments of Iraq and the United States of America on behalf of Mr. Tariq Aziz. The Working Group stated its views on certain legal questions raised by the source and the Governments, in particular with regard to its mandate and the principles governing the responsibility of the Iraqi and United States Governments for the facts alleged by the source.
3. Firstly, the Working Group decided that in accordance with paragraphs 16 of its methods of work and 14 of its revised methods of work,¹ it will not assess the lawfulness of Mr. Tariq Aziz's detention for the period from 24 April 2003 to 30 June 2004, as it occurred during an ongoing international armed conflict and the United States Government recognized that the Geneva Conventions applied to individuals captured in the conflict in Iraq. According to the source, the International Committee of the Red Cross (ICRC) was allowed to visit Tariq Aziz and communicate two letters to his family.
4. Secondly, the Working Group decided that until 1 July 2004 Tariq Aziz was 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, as Mr. Aziz appeared on 1 July 2004 before the Supreme Iraqi Criminal Tribunal ("the Tribunal"), a court of the sovereign State of Iraq, in order to enter a plea, his pretrial detention on charges pending before the Tribunal is within the responsibility of Iraq. The Working Group also found that, considering that Tariq 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 as well.
5. Finally, with regard to the alleged violations affecting the right to a fair trial, the Working Group considered that it was premature to take a stance on the allegations of arbitrary deprivation of liberty, because the procedural flaws amounting to the violation of the right to a fair trial could, in principle, be redressed during the subsequent stages of the ongoing criminal proceedings. Therefore, the Working Group decided that it would follow the development of the

¹ "The Working Group will not deal with situations of international armed conflict insofar 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."

process and would request more information from both Governments concerned and from the source. In the meantime, the Working Group decided to keep the case pending until further information was received, as provided in paragraph 17 (c) of its methods of work.

6. On 14 December 2005 the Working Group notified its opinion to the two Governments and on 12 January 2006 to the source. The Working Group subsequently received new allegations from the source. On 3 May 2006, the Chairperson-Rapporteur of the Working Group transmitted them to the Governments of Iraq and of the United States of America through their respective Permanent Representatives in Geneva and requested their comments and observations. Since no reply was received, on 28 June 2006 the Chairperson-Rapporteur of the Working Group sent a letter informing the Permanent Representatives of the two Governments that the Working Group will consider the case during its forthcoming forty-sixth session from 28 August to 1 September 2006. While no reply was received from the Government of the United States, the Iraqi Government sent a reply on 14 July 2006. At its forty-sixth session the Working Group decided to write again to the Government of Iraq seeking clarification of its reply of 14 July 2006. No reply to this request was received. The Working Group also transmitted the Iraqi Government's reply of 14 July 2006 to the source, which on 11 August 2006 sent its observations. On 12 November 2006, the source informed the Working Group that there were no further developments in the case.

7. The source alleges multiple violations of Tariq Aziz's right to a fair trial. According to the source, Tariq Aziz was taken into custody by United States military forces on 24 April 2003. On 1 July 2004, he was taken to a military prison in Baghdad where he appeared at a hearing in his case. He had not been previously informed of the charges brought against him and was not assisted by a lawyer.

8. Since then, Tariq Aziz has had sporadic meetings with his defence counsel, Mr. Badie Arief Izzat. These meetings take place under circumstances which render the effective preparation of a defence case very difficult. The defence counsel is not allowed to see his client at dates he requests. Instead, he is informed at very short notice (never more than a day) by the United States authorities of a meeting date. A United States official always remains present during the meetings between Tariq Aziz and his lawyer who are not allowed to exchange any written documents. This not only seriously hampers their ability to prepare a defence case, it also makes it impossible to give formal power of attorney to the additional lawyers his family has retained for him.

9. Moreover, according to the source neither Tariq Aziz nor his counsel have ever received any formal act about the charges or any official communication from the Public Prosecutor's office or from the Tribunal. The few times Tariq Aziz was interrogated in presence of his lawyer, this was carried out by officers of the United States administration, instead of the prosecutor or judges of the Tribunal.

10. In its submission of 14 July 2006, the Iraqi Government states that Tariq Aziz was detained on 1 July 2004 to be brought to justice with regard to four criminal cases in which he is a defendant and that are currently being investigated and prepared for trial before the Tribunal. The four cases are (1) the events of 1991, (2) Kuwait, (3) human rights violations and (4) waste of national wealth. The Government adds that Tariq Aziz has been interrogated and witnesses and co-defendants have been heard. As far as the Kuwait case is concerned, the Government

states that the Government of Kuwait has submitted a complaint against Tariq Aziz on the basis of which the Tribunal has opened a case. It is being investigated and prepared for trial as provided for by law. With regard to the charges of human rights violations and criminal waste of national wealth, the Government states that Tariq Aziz and his co-defendants as well as the witnesses have been heard, but the outcome of the case (in the words of the Government “his fate”) has not been determined yet. Finally, the Government states that Tariq Aziz is enjoying all his rights and that he is being questioned in the presence of his lawyer Badia Aref Izzat.

11. In reply to the Government’s observations, the source reiterates its allegations. It stresses particularly that Tariq Aziz and his lawyers are not aware of the official complaint presented by the Kuwaiti Government before the Tribunal and that they have never received any formal act about the charges or any official communication from the Public Prosecutor’s office or from the Tribunal.

12. The Working Group notes with appreciation the cooperation of the Iraqi Government. It regrets, however, that neither the Government of Iraq nor the Government of the United States have submitted observations specifically addressing the allegations of the source. Nonetheless, the Working Group believes that it is in a position to consider the case again and render an opinion.

13. The Working Group also considered whether, in view of the fact that the trial against Tariq Aziz has not begun, it should again postpone stating its opinion on the case. However, already in its Opinion of 30 November 2005 (paragraph 30), the Working Group had expressed its concern about the violation of Tariq Aziz’s rights as a defendant when it stated that: “[a]lready 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 the hearing distance of the prison staff and any other officials”. Nearly two years have elapsed since the case was presented to the Working Group and more than a year since the Working Group decided to “keep the case pending”. As found below, during these two years, Tariq Aziz has not been presented to a judge, or even been heard a single time by the prosecution which is allegedly investigating the charges against him. The Working Group therefore considers that it cannot further delay issuing its opinion.

14. The Working Group observes that the United States Government has not submitted any reply on the merits of the allegations of the source, while the Government of Iraq has not in fact challenged the serious allegations of the source, particularly those regarding the right to be assisted by defence counsel in the preparation of his defence. The Working Group therefore considers it to be established that Tariq Aziz can only meet with his lawyer at the whim of the United States authorities; that a United States official always remains present during the meetings between Tariq Aziz and his lawyer; that the frequency and time allocated to these meetings make the adequate preparation of a defence utterly impossible; that the prohibition on the exchange of written documents further impedes the preparation of a defence case and the appointment of lawyers of the defendant’s own choosing; that the only hearing Tariq Aziz has had in connection with his case took place on 1 July 2004; that he was neither given an opportunity to prepare for that hearing nor assisted by a lawyer; and that in the two years and five months since then Tariq Aziz has not been brought before a judge.

15. As for the information provided by the Government of Iraq with regard to the criminal charges against Tariq Aziz and the proceedings based on them, the Working Group notes that two years and five months have passed since the initial hearing at which Tariq Aziz was asked to enter a plea with regard to some charges. The Government has not challenged the source's assertion that, whatever charges are being investigated and prepared for trial and whatever evidence is being collected, not a single document concerning these proceedings has been notified to Tariq Aziz or to his lawyers. The Government states that Tariq Aziz has been interrogated, but it does not dispute that he was interrogated by United States officials and not prosecutors or judges of the Tribunal. The Working Group finds the charges against Tariq Aziz as set forth in the Government's observations (e.g. "the events of 1991", "Kuwait" or "human rights violations") rather vague. In any event, as long as they are not brought to the attention of the defendant and his lawyers, it is irrelevant whether the charges are clearly defined or not. The Government has not submitted any document which would show that formal procedural steps have been taken and that the defendant has been informed of them.

16. Two years and five months after his status changed, at least in theory, from prisoner of war to criminal defendant, Tariq Aziz has only had one perfunctory hearing. He may have been informed at the time of some charges against him (no details have been brought to the Working Group's attention), as required by article 9 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), but the 14 July 2006 submission of the Government of Iraq does not suggest that the charges which the Government now mentions to the Working Group were brought to his attention on that day. Those charges have never been notified to the defendant, who in fact has no tangible indication of the fact that he is detained in the context of criminal proceedings (except for the Government's statements to the Working Group). While Tariq Aziz was "brought promptly before a judge" once responsibility for his detention was transferred from the United States to Iraq on 1 July 2004, since then there does not appear to have been any judicial review of his detention. Under the circumstances of the case, also his right to take proceedings before a court to have that court rule on the lawfulness of his detention, as enshrined in article 9 (4) ICCPR, appears purely hypothetical.

17. The Working Group is fully aware that the investigation of cases against senior political and military leaders for war crimes or crimes against humanity, committed in the context of a major military campaign or over an extended period of time, is extremely complex and time-consuming. The experience of international tribunals established by the United Nations shows that in many instances years pass between the arrest of the defendant and the actual start of his trial. What is extraordinary and unacceptable about the case of Tariq Aziz, however, is that during the two years and five months elapsed since 1 July 2004 there has not been any procedural step marking progress in his case of which he has been made aware. The right to "trial within a reasonable time or to release" (article 9 (3) ICCPR), a centrepiece of the protection against arbitrary detention, is therefore violated.

18. Insofar as important procedural steps have taken place, such as the questioning of witnesses and co-defendants mentioned by the Government, they remain shrouded in mystery for the defendant and his lawyer. Who are these witnesses and co-defendants? In relation to which of the four cases allegedly being investigated were they heard? Who questioned them? What did

they say? Article 7 (f) of the Statute of the Tribunal provides that “the Chief Tribunal Investigative Judge shall assign cases to individual tribunal investigative judges”, but Tariq Aziz has not been informed of the assignation of the cases concerning him. Under article 18 (d) of the Statute “the Tribunal Investigative Judge shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute”. No such indictment has ever been notified to Tariq Aziz. On the other hand, article 21 (a) of the Statute, providing that “[a] person against whom an indictment has been issued shall, pursuant to an order or an arrest warrant of the Tribunal Investigative Judge, be taken into custody”, would appear to suggest that indeed such an indictment exists, as Tariq Aziz has been in custody for 29 months. To sum up, if there are indeed criminal proceedings under the Statute of the Tribunal in course against Tariq Aziz, they are being kept completely secret to the defendant and his lawyer. This secrecy over such an extended period of time is incompatible with the right to a fair trial, particularly when the defendant is detained.

19. The Working Group further considers that insofar as Tariq Aziz is currently subjected to “the determination of a criminal charge against him” (article 14 (1) ICCPR), irrespective of whether the trial against him has begun or not, he is entitled to the minimum guarantees afforded by article 14 (3) ICCPR. These include “to be tried without undue delay” (article 14 (3) (c) ICCPR). Also the right to “communicate with counsel of his own choosing” enshrined in article 14 (3) (b) ICCPR is seriously undermined, as the meetings take place at unforeseeable intervals as dictated by the United States authorities, no documents can be exchanged between the lawyer and his client and a United States official always remains present, denying the privacy which is essential between a defendant and his counsel. Moreover, article 18 (c) of the Statute dictates that “[t]he suspect is entitled to have non-Iraqi legal representation”, but for Tariq Aziz exercise of this right is made impossible in practice.

20. As to the right to be tried by an “independent and impartial tribunal”, the Working Group has expressed its grave misgivings about the current situation of the Tribunal in its Opinion No. 31/2006, paragraph 22.

21. The Government of Iraq, as the Government asserting legal responsibility for the detention and trial of Tariq Aziz, and the Government of the United States, as his de facto custodian and the power whose officials are currently interrogating him, are both responsible for this situation.

22. As the Working Group stated in its Opinion No. 31/2006, paragraph 26, it is firmly convinced that “also from the perspective of the victims, who under international law enjoy the right to reparation, truth and justice, it is particularly important that the investigation of the gross violation of human rights and the trial of their alleged perpetrators are conducted in a legitimate and transparent legal process. For them as well, it is essential that justice is not only fair but also be seen to be fair”.

23. It would not appear that it is too late to remedy the ongoing violations of Tariq Aziz’s rights as a criminal defendant. The Working Group expresses its hope that the Government of Iraq, if it indeed intends to pursue criminal charges against Tariq Aziz, will take the steps necessary to afford him a fair trial.

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

The deprivation of liberty of Mr. Tariq Aziz is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights to which Iraq and the United States are parties, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

As a consequence of the opinion rendered, the Working Group requests the Governments of Iraq and the United States to take the necessary steps to remedy the situation of Mr. Tariq Aziz, and bring it into conformity with the principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Adopted on 17 November 2006.