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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its sixty-second session, 16 – 25 November 2011

No. 59/2011 (Iraq)

Communication addressed to the Government on 10 August 2011

Concerning: Hasna Ali Yahya Husayn, and Mohamed, Maryam and Fatima Ali
Yahya Husayn (minors)

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. The mandate of the Working Group was clarified and extended in Commission resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102. The mandate was extended for a further three-year period by Council resolution 15/18 of 30 September 2010.

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 sentence or despite an amnesty law applicable to him) (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);

(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; 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. Hasna Ali Yahya Husayn, aged 29, is a Yemeni citizen, widow and mother of three children, Mohamed, Maryam and Fatima Ali Yahya Husayn, usually residing with her family in Baghdad.

4. On 16 April 2010, Ms. Husayn's home was raided by American forces in Iraq searching for Ms. Husayn's husband, who was suspected of belonging to a terrorist organization. During the assault Ms. Husayn's husband was killed.

5. Ms. Husayn was taken with her children, aged 5 years, 3 years and 6 months, to the premises of the security services. There she was allegedly tortured and held incommunicado for several months. At no point was Ms. Husayn or her children presented before a judge or notified of the charges. The source contends that the sole reason for her arrest and detention related to the fact that she had not denounced her husband.

6. It is reported that Ms. Husayn and her children were subsequently transferred to Rusafa prison in Baghdad, run by the Iraqi authorities (her inmate number is 62324). It was only on 14 May 2011 that Ms. Husayn's children were released and returned to Ms. Husayn's family. Ms. Husayn is still being held in detention in Rusafa prison in Baghdad.

7. The source informs the Working Group that it was only following the release of Ms. Husayn's children that the Iraqi authorities notified Ms. Husayn of the charges against her. Her trial was held on 23 June 2011 in Baghdad (case registered under number 996 J2/2011), more than one year after the date of her arrest. The source alleges that her Yemeni lawyer was prevented from attending the trial due to alleged threats and intimidation. Her trial lasted only 10 minutes in a closed session. Ms. Husayn was convicted under article 4 of the Anti-Terrorism Law and article 49 of the Penal Code for concealing the whereabouts of her husband. According to the information received, Ms. Husayn was sentenced to life imprisonment. Her appeal is currently pending before the Iraqi courts.

8. The source considers that the circumstances of Ms. Husayn's trial and prolonged incommunicado detention attest to grave violations of her right to a fair trial. In particular, the source contends that Ms. Husayn did not have adequate time and facilities to prepare her defence. She was not tried in the presence of her lawyer due to constant intimidation and threats and she was informed of the charges only after a prolonged period of incommunicado detention. Finally, the source is of the view that Ms. Husayn's expedient trial in a closed session further attests to the alleged lack of independence and impartiality of the tribunal.

9. In the light of the foregoing, the source submits that Ms. Husayn's deprivation of liberty is arbitrary, being in alleged violation of the minimum guarantees as enshrined in her right to a fair trial.

Response from the Government

10. The Working Group transmitted the above information provided by the source to the Government of Iraq on 10 August 2011, requesting detailed information about the current

situation of Ms. Husayn and clarification of the legal provisions justifying her continued detention. Since the source also alleged the detention of three minor children of Ms. Husayn, the Working Group requested the Government to specifically inform it of the veracity of this information and, if it is correct, of any measures undertaken to provide adequate reparation to Ms. Husayn's children.

11. The Working Group regrets that the Government of Iraq has not provided a response clarifying the allegations made by the source within the stipulated 60-day period; nor has the Government requested an extension from the Working Group in this regard.

12. Despite the lack of response from the Government, and on the basis of information made available to it, the Working Group considers itself in a position to render an opinion on the arrest and detention of Ms. Husayn and her minor children in accordance with paragraph 16 of its methods of work.

Discussion

13. The information presented by the source, and not rebutted by the Government, alleges grave violations of a range of human rights, not only of Ms. Husayn but also those of her minor children. These rights are protected by the Constitution of Iraq and its Criminal Procedure Code, as well as by the international human rights norms and standards as enunciated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on Rights of the Child, among others. The rights violated include the right to access to a lawyer and magistrate within a specific period of time, the right to be informed of the charge or charges against the person and the right to a fair trial. Furthermore, there exist certain core minimum principles for the treatment of detainees, including the right not to be ill-treated, tortured or held incommunicado. Finally, the act of detaining three minor children and keeping them in detention with their mother (Ms. Husayn) violates a further catalogue of rights, as will be discussed in the succeeding paragraphs.

14. The Constitution of Iraq, adopted in 2005, provides basic protections for criminal defendants. It affirms the principle of equality before the law and guarantees criminal defendants a broad array of rights, including: the right to be deprived of liberty only by decision of a competent judicial authority; the right to freedom from unlawful detention; the right to have preliminary investigative documents submitted to a competent judge within 24 hours from the time of arrest (which may be extended only once, for an additional 24 hours); the right to have a private residence searched only following the decision by a competent judicial authority; the right to be presumed innocent until proven guilty pursuant to law; the right to a fair trial; the right to legal defence during all phases of investigation and trial, and for a court-appointed counsel to be provided for those without access to defence counsel; the right to remain silent; and the right to freedom from all forms of torture and inhumane treatment (arts. 17, 19 and 37 of the Constitution of Iraq).

15. Similarly, article 123 of the Criminal Procedure Code of Iraq requires that a defendant be brought before an investigative judge or a judicial investigator within 24 hours of arrest. At this initial hearing the defendant must be informed of the offences that he or she has been accused of committing. The Criminal Procedure Code provides that authorities may renew detention for a period of 15 days upon each separate judicial hearing, up to a maximum of six months total for the most serious offenses. In the event that an investigation has not been completed after six months, the appropriate criminal court must authorize an extension of the detention.

16. At the level of international human rights law, the International Covenant on Civil and Political Rights, which Iraq ratified in 1971, requires that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by

law to exercise judicial power and shall be entitled to trial within a reasonable time or to release” (art. 9, para. 3). According to information provided to the Working Group, Ms. Husayn was not brought before a competent authority for over a year after her arrest and detention, including the period of incommunicado detention.

17. A further violation of the International Covenant on Civil and Political Rights relates to Ms. Husayn’s right to a fair trial, including access to a defence counsel, under article 14. According to information transmitted by the source to the Working Group, Ms. Husayn’s right to defence counsel was not respected, as her Yemeni lawyer was intimidated and consequently was not present at the trial, in violation of article 14, paragraph 3 (d), of the Covenant. This left her with restricted ability and time to prepare her defence. Under the Covenant, the right to due process and a fair trial includes the right to counsel in the determination of any charge against a detainee. This indicates that the right to counsel applies to all stages of legal proceedings, and investigative hearings conducted without the benefit of counsel violate this requirement. The right to counsel also encompasses the ability to adequately consult with counsel and, in the case of Ms. Husayn, this ability was absent. This leads the Working Group to find a further violation of article 14, paragraph 3 (b), of the International Covenant on Civil and Political Rights.

18. The source states that Ms. Husayn was arrested and detained without being informed of the charges against her and with no access to legal counsel. Ms. Husayn was eventually charged under article 4, paragraph 1, of the Anti-Terrorism Law of Iraq, which states that the death penalty will apply to those who incite, plan, finance or assist terrorists to commit any of the crimes covered by the Law. Ms. Husayn was charged under this law for not informing the Iraqi authorities of her husband’s suspected terrorist activities. The Working Group regrets once again that in this serious allegation, the Government’s viewpoint is absent. The charge as it stands is vague; being the spouse of an alleged terrorist does not automatically ascribe criminality to the person. Robust, accurate and irrefutable evidence must be presented before a court of law to prove this very serious charge.

19. The source also points to the fact that Ms. Husayn was allegedly tortured and held in incommunicado detention for several months, which violates domestic and international law. The prohibition against torture and other ill-treatment is a long-standing and fundamental norm of customary international law. The International Covenant on Civil and Political Rights requires that detainees be treated with respect for their “inherent dignity,” (art. 10, para. 1) and mandates that detainees shall not be “subjected to torture or to cruel, inhuman or degrading treatment or punishment” (art. 7). Similar prohibitions are found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Iraq acceded in August 2011.

20. Information received from the source and not refuted by the Government indicates that three minor children of Ms. Husayn, aged 5 years, 3 years and 6 months, were detained by the security services and were kept incommunicado along with their mother from 16 April 2010 to 14 May 2011. On the latter date, they were handed over to Ms. Husayn’s family. Their incommunicado detention not only runs contrary to international human rights law but also to the State’s own laws on children’s rights. Under the Iraqi Child Welfare Law of 1983, children between the ages of 9 and 18 are considered juveniles (art. 3, para. 2) and they are subject to a distinct regime from adults at variance with the law. But the three children in the instant case are well below this age, the youngest being 6 months old at the time of arrest and the eldest 5 years old. Article 37 (b) of the Convention on the Rights of the Child, to which Iraq acceded in 1994, requires that “the arrest, detention or imprisonment of a child ... be used only as a measure of last resort and for the shortest appropriate period of time”. Apart from finding a violation of article 37 (b) of the Convention on the Rights of the Child, the Working Group expresses serious concern about the mental, physical, emotional and psychological scars that this detention will have caused.

Disposition

21. In the light of the foregoing, the Working Group renders the following opinion:
- (a) The detention of Ms. Husayn is arbitrary, falling under category III of the categories of the Working Group in violation of articles 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 7, 9, 10, and 14 of the International Covenant on Civil and Political Rights. Her detention also violates principles 11, paragraph 1, and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly in its resolution 43/173 of 9 December 1988;
- (b) The detention of the three minor children, Mohamed, Maryam and Fatima Ali Yahya Husayn, is arbitrary under category I, being without legal basis, and category III, being in violation of articles 7, 8, 9, 10 and 11 of the Universal Declaration of Human Rights, articles 7, 9, 10, and 14 of the International Covenant on Civil and Political Rights and article 37 of the Convention on the Rights of the Child.
22. As a result of the opinion rendered, the Working Group requests the Government of Iraq to release Ms. Husayn forthwith, reunite her with her three children, and ensure a fair and independent trial to bring her situation in conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.
23. In view of the adverse effect of the wrongful arrest and detention of the three minors, Mohamed, Maryam and Fatima Ali Yahya Husayn, adequate and appropriate reparation should be ensured to them and Ms. Husayn.
24. The Working Group decides to refer the allegations of torture and cruel, inhuman and degrading treatment of Ms. Husayn and Mohamed, Maryam and Fatima Ali Yahya Husayn to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in accordance with paragraph 33 (a) of its methods of work (A/HRC/16/47, annex).
25. The Working Group urges the Government of Iraq to comply with resolutions of the Human Rights Council calling for cooperation of States with human rights monitoring bodies.

[Adopted on 21 November 2011]
