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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session, 22-26 August 2016

Opinion No. 29/2016 concerning Ramze Shihab Ahmed Zanoun al-Rifa'i (Iraq)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the 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 1/102 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.
2. In accordance with its methods of work (A/HRC/30/69), on 9 November 2015 the Working Group transmitted a communication to the Government of Iraq concerning Ramze Shihab Ahmed Zanoun al-Rifa'i. Following a request dated 13 November 2015 from the Government, the Working Group transmitted the full name of Mr. Al-Rifa'i on 17 June 2016. The Government has not provided any substantive reply to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. 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 him or her) (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, disability, or other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Al-Rifa'i, 72 years old, is a dual national of Iraq and the United Kingdom of Great Britain and Northern Ireland.

5. In November 2009, Mr. Al-Rifa'i travelled to Iraq from London, where he was residing, after he learned that his son had been arrested.

6. On 7 December 2009, Mr. Al-Rifa'i was arrested in a relative's house in Iraq. After his arrest, he was held incommunicado in Al-Muthanna prison in Baghdad and his whereabouts were not disclosed to his family until 25 March 2010. According to the source, Mr. Al-Rifa'i was tortured during an interrogation carried out by 10 security officials in Al-Muthanna prison. A plastic bag was reportedly held over his head several times a day, severely obstructing his breathing. Mr. Al-Rifa'i was forced to stay in stressful positions and had electric shocks applied to various parts of his body, including his genitals. He was threatened with rape and was told that his family members would be raped in front of him. After being subjected to threats, torture and ill-treatment, Mr. Al-Rifa'i was forced to stamp his fingerprint on a statement that incriminated him for having links with Al-Qaida in Iraq.

7. In April 2010, Mr. Al-Rifa'i was transferred to Al-Rusafa prison in Baghdad, where he was held until May 2011. He was then transferred to Abu Ghraib prison.

8. In January 2011, trial proceedings under the antiterrorism law started. Initially, nine charges were made against Mr. Al-Rifa'i, including "belonging to a terrorist group", "murder of Mohammad Taher Qasem", "exploding a car bomb in a hospital area", "exploding a car bomb in a university area", "planting an explosive device in Arab quarters" and "funding terrorist groups linked to Al-Qaida". By May 2012, owing to a lack of evidence, eight of the charges were dropped.

9. On 20 June 2012, Mr. Al-Rifa'i was sentenced to 15 years' imprisonment by the Al-Rusafa Criminal Court (case number No. 1901 of 2012). He was convicted under the antiterrorism law for "funding terrorist groups". According to the source, the hearing lasted 15 minutes and the verdict was based on three pieces of testimony: the coerced "confession" that Mr. Al-Rifa'i stamped during his interrogation and which he retracted in court; the coerced testimony of a co-defendant in the same case; and information from a "secret" informant.

10. According to the source, Mr. Al-Rifa'i's lawyer was not given the opportunity to challenge the prosecution's accusation, to cross-examine witnesses or the secret informant or to call his own witnesses.

11. In November 2013, Mr. Al-Rifa'i was reportedly severely beaten in the detention facility for no apparent reason, which resulted in a temporary physical incapacitation as he could not move his limbs.

12. The verdict against him was upheld in 2013.

13. In April 2014, Mr. Al-Rifa'i was transferred to Chamchamal prison near Sulaimaniya, which is where he is currently serving his sentence.

14. The source submits that the continued deprivation of liberty of Mr. Al-Rifa'i is arbitrary and falls under category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. In its view, Mr. Al-Rifa'i has not been guaranteed the international norms of due process and guarantees to a fair trial during the period of his deprivation of liberty, in violation of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant. The source argues that the oral testimony from Mr. Al-Rifa'i was obtained by torture, that his lawyer was not given the opportunity to challenge the prosecution, to cross-examine the witnesses against Mr. Al-Rifa'i or to call his own witnesses, that the hearing lasted only 15 minutes and that all of the above is in violation of articles 14 (3) (d), (e) and (g) of the Covenant.

Response from the Government

15. On 9 November 2015, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. On 13 November 2015, the Government replied, requesting that the Working Group clarify and provide the full name of Mr. Al-Rifa'i and a copy of his identity card.

16. On 17 June 2016, the Working Group transmitted the full name of Mr. Al-Rifa'i and requested the Government to provide detailed information by 16 August 2016 about the current situation of Mr. Al-Rifa'i and any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds justifying Mr. Al-Rifa'i's continued detention and to provide details regarding the conformity of the legal proceedings against him with international human rights treaties to which Iraq is a party.

17. On 22 June 2016, the Government responded by indicating that the Working Group had not complied with the request to provide the required information concerning the identity of Mr. Al-Rifa'i. The Working Group regrets that it did not receive any substantive information in the response from the Government to the communication. The Government did not request an extension of the deadline for its reply as provided for in the Working Group's methods of work.

Discussion

18. In the absence of any substantive response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

19. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

20. In the present case, Mr. Al-Rifa'i was arrested and held incommunicado for more than three months and endured torture and ill-treatment that included restricting his breathing by placing a plastic bag over his head, applying electric shocks to his body parts, including his genitals, and threatening him and his family with rape. Mr. Al-Rifa'i was convicted and sentenced to 15 years' imprisonment based on his "confession" extracted under torture and testimonies presented in a trial during which his lawyer was not allowed to challenge the accusation against Mr. Al-Rifa'i, to cross-examine the prosecution's witnesses or to call his own witnesses.

21. The Government has not provided any explanation or justification for these serious violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Covenant and the Arab Charter on Human Rights, among other treaties, to all of which it is a party, as well as of article 127 of the Criminal Procedure Code and article 37 (c) of the Constitution. Articles 12 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifically require States parties to order a prompt and impartial investigation into allegations of torture and to ensure that any statement made as a result of torture shall not be invoked as evidence in any proceedings.

22. The guarantees of a fair and equitable trial set out in article 11 of the Universal Declaration of Human Rights and in article 14 of the Covenant grant the right to legal assistance and representation and to other measures of protection in order to ensure that no evidence is obtained by confession under torture. Under article 14 (3) (g) of the Covenant, no person may be compelled to testify against himself or herself or to confess guilt.

23. In its jurisprudence, the Human Rights Committee has stated that the prohibition on compelling a person to testify against oneself or to confess guilt “must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt”.¹ In its communication No. 1769/2008, *Bondar v. Uzbekistan*, the Committee found violations of article 14 (3) (b) and (d) of the Covenant on the grounds that the victim had not been provided with a lawyer during the interrogation and that his right to have the assistance of the lawyer of his own choosing had been denied. The Committee also found a violation of article 14 (3) (g) of the Covenant on the ground that the victim’s confession had been obtained under torture.²

24. In that regard, the Working Group recalls that the Human Rights Committee, in paragraph 41 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, stated:

Article 14, paragraph 3 (g), [of the Covenant] guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.

25. The Working Group takes note of the judgment of the International Court of Justice in *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, in paragraph 99 of which the Court expressed the opinion that the prohibition of torture was part of customary international law and had become a peremptory norm (*jus cogens*). The Court added:

¹ See Human Rights Committee, communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 253/1987, *Kelly v. Jamaica*, para. 5.5; No. 330/1988, *Berry v. Jamaica*, para. 11.7; and No. 912/2000, *Deolall v. Guyana*, para. 5.1.

² *Ibid.*, communication No. 1769/2008, *Bondar v. Uzbekistan*, paras. 7.4 and 7.6.

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international forums.

26. Similarly, the Committee against Torture, in its general comment No. 2 (2008) on the implementation of article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recalled that the obligation to prevent torture in article 2 was wide-ranging (para. 3), and added that its understanding of effective measures to be adopted to prevent torture was in a process of continual evolution (para. 4) and that effective prevention measures were not limited to those measures contained in articles 3 to 16 of the Convention (para. 1). The obligation to prevent torture applies to all contracting parties, all the more so when they assess the risk of torture and other cruel, inhuman or degrading treatment or punishment to which individuals may be subjected in a third country.

27. One of the aims of the provisions of article 11 of the Universal Declaration of Human Rights and of article 14 of the Covenant is to provide guarantees against all forms of direct or indirect, physical or psychological pressure by the authorities on the accused with a view to obtaining a confession. The right not to be compelled to testify against oneself or to confess guilt and the right to have access to counsel and legal aid are not intended to protect only the interests of the individual but also the interests of society as a whole, and to build trust in and the effectiveness of the judicial process and the reliability of evidence. Confessions made in the absence of legal counsel, especially while in police custody, are not admissible as evidence in criminal proceedings.

28. In the present case, the Working Group confirms that the torture to which Mr. Al-Rifa'i was subjected constitutes a plain violation of the international norms against torture, including the aforementioned norms, and that the use of evidence extracted through the use of such coercive acts severely hampered the assurances of a fair trial guaranteed to Mr. Al-Rifa'i. The Working Group urges the competent State authorities to hold a prompt and impartial investigation in accordance with article 12 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

29. There were other violations of Mr. Al-Rifa'i's due process and fair trial rights in the present case. Mr. Al-Rifa'i was held incommunicado for more than three months in prison without being brought before a judge or being allowed to institute habeas corpus proceedings, both of which constitute a violation of article 9 of the Universal Declaration of Human Rights and of article 9 (3) and (4) of the Covenant.

30. During the trial, Mr. Al-Rifa'i's attorney was not permitted to challenge the witnesses against Mr. Al-Rifa'i or to call his own witnesses, who could have exonerated his client. These restrictions denied Mr. Al-Rifa'i his right to a fair trial, guaranteed under articles 10 and 11 (1) of the Universal Declaration of Human Rights and under article 14 (3) (e) of the Covenant. His conviction, which was based on problematic testimonies and a confession extracted under torture, in violation of article 14 (3) (g) of the Covenant, makes a mockery of justice.

31. The conditions of Mr. Al-Rifa'i's detention in prison, especially the severe beatings that left him temporarily physically incapacitated, are also of concern to the Working Group, as they constitute a serious violation of the United Nations Standard Minimum

Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Rule 1 of the Nelson Mandela Rules explicitly bans torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification.

32. Given the above observations, the Working Group finds that the violations of Mr. Al-Rifa'i's right to a fair trial are of such gravity as to give his deprivation of liberty an arbitrary character, falling within category III of the categories applicable to the consideration of cases submitted to the Working Group.

Disposition

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

The deprivation of liberty of Ramze Shihab Ahmed Zanoun al-Rifa'i, being in contravention of articles 3, 5 and 9-11 of the Universal Declaration of Human Rights and of articles 7, 9 (3) and (4), 10 (1), 14 (3), (b), (d), (e) and (g) of the International Covenant on Civil and Political Rights, is arbitrary and falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

34. Consequent upon the opinion rendered, the Working Group requests the Government of Iraq to take the steps necessary to remedy the situation of Mr. Al-Rifa'i without delay and bring it into conformity with the standards and principles set forth in the international norms against arbitrary deprivation of liberty, including the Covenant and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

35. The Working Group considers that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Al-Rifa'i immediately and accord him an enforceable right to compensation in accordance with article 9 (5) of the Covenant and article 14 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition, the competent authorities should hold a prompt and impartial investigation in accordance with article 12 of that Convention.

36. In the light of the allegations of torture and other ill-treatment inflicted upon Mr. Al-Rifa'i, the Working Group considers it appropriate, in accordance with paragraph 33 (a) of its methods of work, to refer the allegations to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

Follow-up procedure

37. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Al-Rifa'i has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Al-Rifa'i;
- (c) Whether an investigation has been conducted into the violation of Mr. Al-Rifa'i's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

38. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and

whether further technical assistance is required, for example, through a visit by the Working Group.

39. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

40. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.³

[Adopted on 23 August 2016]

³ See Human Rights Council resolution 24/7, paras. 3 and 7.