Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

REFERENCE:
AL GBR 8/2018

28 August 2018

Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, pursuant to Human Rights Council resolutions 33/30, 35/15, 31/3, 34/19 and 33/4.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **risk of arbitrary deprivation of life and violations of other human rights of British nationals facing prosecution and trials for offences carrying capital punishment under Iraq's Anti-Terrorism Law no. 13, in relation to their alleged membership in the Islamic State of Iraq and the Levant (ISIL).** Please note that a letter on similar concerns will be sent to the Government of Iraq for information.

According to the information received:

Some 40,000 foreigners travelled to Iraq to join ISIL. Among them, was an unspecified number of citizens of the UK. As the Iraqi authorities recaptured territory from ISIL control, they have detained and prosecuted ISIL fighters.

The majority of alleged foreign fighters are prosecuted under Iraq's Anti-Terrorism Law no. 13 of 2005. The law contains a definition of terrorism that is vague and overly broad. Pursuant to this law, even petty crimes, such as vandalism, may be considered as a terrorist act. In addition, the Law does not require proof of terrorist intent. As a result, an individual can face trial on terrorism charges and can be sentenced to death for a non-violent crime committed without intent to terrorize the population.

Furthermore, Article 4 of the law provides that those who "incite[], plan[], finance[], or assist[] terrorists . . . shall face the same penalty as the main perpetrator", thus failing to distinguish between different levels of participation,

involvement and responsibility, and with no assessment based on the severity of the act when rendering punishment, including the death penalty.

Persistent and serious flaws affect the administration of the Iraqi criminal justice system, particularly with regard to the independence and competence of the courts and the related lack of due process and fair trial guarantees. Allegations of torture, other ill-treatments and forced confessions of detainees are also reported.

Concerns in this regard have repeatedly been expressed by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Assistance Mission for Iraq (UNAMI) (see Report on the Death Penalty in Iraq, UNAMI/OHCHR).

Most recently, in December 2017, OHCHR reiterated its call to the Iraqi authorities to halt all executions, establish an immediate moratorium on the use of the death penalty and carry out an urgent and comprehensive review of the criminal justice system (see https://news.un.org/en/story/2017/12/639662-un-rights-wing-appalled-mass-execution-iraq).

The Iraqi government has not released information on the number of foreign nationals currently held in its custody, facing or awaiting trial, sentenced to death or awaiting execution. Therefore, exact figures concerning foreigners as well as their identities are not available.

At present, there is an estimated 3,000 suspected ISIL members or collaborators, including foreign nationals, awaiting trial before Iraqi courts. Of these, approximately 600 are believed to be foreign women who have joined ISIL under various circumstances: some may have joined voluntarily, while others may have been brought to Iraq against their will or forced into marriage with ISIL fighters. Some may and others may not have been engaged in combat or abuses of human rights. In addition, there are approximately 1100 foreign children held in detention with their mothers, whose welfare, including access to healthcare and other essential services remains significantly impaired.

It has been reported that when countries extend consular services to their nationals in detention, Iraqi authorities are more likely to charge them with immigration violations, which may carry penalties of up to 7 years imprisonment, rather than with terrorism offenses.

While we do not wish to prejudge the accuracy of the information above, we would like to refer your Excellency's Government to Articles 2 of the Universal Declaration of Human Rights and Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), which respectively guarantee the right of every individual to life and security and provide that these rights shall be protected by law and that no one shall be arbitrarily deprived of his or her life. In addition, Common Article 3 of the

Geneva Conventions requires all States Party to respect "judicial guarantees recognized as indispensable by civilized peoples".

In particular, the ICCPR sets out specific safeguards to ensure that when not prohibited, the death penalty is applied only in the most exceptional cases and under the strictest limits. The Human Rights Committee further specified that excessively vague definitions of crimes for which the death penalty may be imposed are inconsistent with Article 6 (2) of the ICCPR.

Furthermore, Article 5 of the United Nations Safeguards protecting the rights of those facing the death penalty (1984) provides that capital punishment may only be carried out pursuant to legal procedures which guarantee all necessary safeguards to ensure a fair trial, which must be at least equivalent to those contained in Article 14 of the ICCPR. This is so because only full respect for the most stringent due process guarantees distinguishes capital punishment, as possibly permitted under international law, from an arbitrary execution.

Resolution 2178 of the UN Security Council addressed the issue of "foreign terrorist fighters" and explicitly called on States to ensure that international human rights law is respected in their responses to any threat posed by them. The same principle is stated in the United Nations Global Strategy on Counter Terrorism adopted by consensus by the General Assembly in 2006. Similar calls are contained in regional anti-terrorism legal instruments and in the Guidance to States on human rights-compliant responses to the threat posed by foreign fighters, which was issued in 2018 by the United Nations Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism.

A matter of concern relating to Resolution 2178 is that it does not provide a definition of terrorism or of terrorist acts. This may fuel – and has fueled - the adoption of measures by domestic jurisdictions that rely on a vague or overly broad definition of terrorism and fail to clearly delineate the proscribed conduct. Vague or overly broad definitions of terrorism violate the principle of legality, which requires that the imposition of criminal liability is limited to clear and precise provisions with respect for the principle of certainty of the law.

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, adopted on 19 May 2015, demands that State parties ensure that "the implementation of this Protocol… is carried out while respecting human rights obligations…as set forth in the [European] Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights and other obligations under international law". The Declaration of the Organization for Security and Cooperation in Europe on its role in countering the phenomenon of foreign fighters adopted on 5 December 2014, also calls on States to respect their obligations under international law, including international human rights law, international refugee law and international humanitarian law, when responding to the phenomenon.

Following her country visit to Iraq in November 2017, the Special Rapporteur on extrajudicial, summary or arbitrary executions noted that the Iraqi people have been subjected to inconceivable sufferings and called for investigations into possible crimes against humanity. She warned, however, that hasty judgment, death sentences and the execution of ISIL members are a disservice to the country. Iraq has the right and the obligation to respond to ISIL and to exercise "sovereignty and jurisdiction within its territory over all persons within it". However, it must do so by upholding human rights and the rule of law, in conformity with its international obligations, under the international conventions it has ratified, in particular the ICCPR and the Convention against torture (CAT). Article 8 of the Constitution of Iraq also demands "respect [for] its international obligations", including its international human rights obligations.

Your Excellency's Government retains a protective surveillance over citizens abroad to ensure that their rights remain protected under international human rights law. It can therefore invoke consular protection over its nationals in a State that fails to conform to international law.

During the visit to Iraq, the Special Rapporteur was informed that nationals of the UK were detained in Iraq, facing or awaiting trial, for membership in or association with ISIL. They may be or may have been sentenced to death penalty without a fair trial. In this regard, we wish to stress that any death sentence carried out following an unfair trial or on the basis of an ambiguous law, amounts to an arbitrary deprivation of life.

The UK abolished the death penalty and has been promoting its worldwide abolition for years as part of its foreign policy. The UK is a signatory of the Vienna Convention on Consular relations, and is thus entitled to protect the rights of its own nationals detained in a foreign country, as per Articles 5 (Consular functions) and 36 (Communication and contact with nationals of the sending state). As a signatory of the ICCPR, the UK has also the duty to see that the rights of its own nationals abroad are respected. On these grounds, the UK is expected to take all reasonable steps to ensure that its nationals do not face the imposition and the execution of the death penalty overseas.

We thus call on Your Excellency's Government, to extend consular protection to its own nationals so as to ensure that they are not deprived arbitrarily of their life, and, where possible, to seek their extradition in order to enable them to return home.

We wish to recall that, since the provision of consular assistance can materially diminish the likelihood of the imposition of a death sentence, a State that does not take all reasonable steps to provide adequate consular assistance could arguably be said to have failed in its duty of due diligence to protect its nationals from arbitrary deprivations of life (see Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/70/304).

In connection with the above alleged facts and concerns, please also refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to the allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. What is Your Excellency's Government position on the prosecution of its nationals in Iraq under the Anti-Terrorism Law no. 13 of 2005 including for crimes that carry capital punishment? Did the Government intervene or does it plan to intervene to ensure that the right to a fair trial of its nationals is upheld if they are tried in Iraq?

2. Does the British Government seek the extradition of its nationals who may be prosecuted for terrorism related crimes in Iraq?

3. Please indicate whether Your Excellency's Government has officially sought information from the Iraqi authorities about the number and identities of its own nationals facing trial in Iraq in connection with offences of terrorism, including for membership in or association with ISIL.

4. Please provide information on the number of nationals of the UK that are being prosecuted in Iraq for terrorism-related offenses. Please indicate whether consular protection was extended to any British national and the steps taken to ensure full respect of their human rights. If no action was undertaken, please explain why, and how this is consistent with the UK's international human rights obligations under the universal and regional Conventions it has ratified.

5. Please indicate whether Your Excellency's Government has provided the families of its nationals facing trial or execution, or sentenced to death for terrorism in Iraq, with any information related to the conditions of detention, the trial or the execution.

6. Please indicate what steps have been taken to address the rights and protection of British children in Iraq who are detained and/or awaiting trial, or whose parents are detained or awaiting trial.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the

investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for any alleged violations.

We are considering to publicly express our concerns in the near future as, in our view, the information in our possession appears to be sufficiently reliable to indicate a matter warranting serious attention. We also believe that the wider public should be alerted to the potential human rights implications of these allegations. Any public statement on our part will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Elina Steinerte
Vice-Chair of the Working Group on Arbitrary Detention

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions

Fionnuala Ní Aoláin
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Saeed Mokbil
Chair-Rapporteur of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to refer your Excellency's Government to Article 3 of the Universal Declaration of Human Rights which states that "Everyone has the right to life, liberty and security of person".

Furthermore, Article 6 (1) of the International Covenant on Civil and Political Rights states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

Article 6 of the ICCPR also specifies in paragraph 2 that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.".

In this regard, we wish to recall that the Human Rights Committee expressed the view that "the definition of certain acts (…) for which the death penalty may be imposed, are excessively vague and are inconsistent with article 6, paragraph 2, of the Covenant." (see CCPR/CO/75/VNM, para 7).

Pursuant to Article 5 of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984, "(c)apital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the [ICCPR], including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings".

Lastly, Article 5 of the Vienna Convention on consular relations establishes that "(c)onsular functions consist [inter alia] in: (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; (…); (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons; (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests; (…)".

Article 36 of the Convention also states that "(w)ith a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. (…)".