

**Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on extrajudicial, summary or arbitrary executions; 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; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment**

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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; 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; Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 33/30, 35/15, 33/4, 31/3 and 34/19.

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 foreign nationals facing prosecution and trials for offences carrying the capital punishment under Iraq's Anti-Terrorism Law no. 13 of 2005, in relation to their alleged membership in the Islamic State of Iraq and the Levant (ISIL).**

According to the information received:

Some 40,000 foreign nationals travelled to Iraq to join ISIL. As the Iraqi authorities recaptured territory from ISIL control, they have detained and prosecuted ISIL fighters.

The majority of alleged foreign fighters are being 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 and executed 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 forms of ill-treatment 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 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. Exact figures as well as the identity of those concerned 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 joined ISIL under various circumstances: some may have joined voluntarily, while others may have been misled or brought to Iraq against their will or forced into marriage with ISIL fighters. Some may have been engaged in combat or abuses of human rights. In addition, there are approximately 1,100 foreign children held in detention with their mothers, whose welfare, including access to healthcare and other essential services remains significantly impaired.

While we do not wish to prejudge the accuracy of the information above, we would like to refer your Excellency's Government to Article 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 (see [CCPR/CO/75/VNM, para 7](#)).

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 that reflect the principle of legality and certainty of the law, whereby individuals subjected to the law can regulate their conduct in an informed and conscious manner.

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, in particular the ICCPR and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 8 of the Constitution of Iraq also demands “respect [for] its international obligations”, including its international human rights obligations.

In this regard, the Special Rapporteur on extrajudicial, summary or arbitrary executions also noted that the Iraqi Penal Code does not include provisions covering international crimes and that, as a result, Iraqi courts do not have jurisdiction over the

crimes of genocide, war crimes and crimes against humanity committed on Iraqi territory. Given the gravity of the crimes committed by ISIL, the Special Rapporteur stressed the need for the Iraqi authorities to amend domestic legislation in order to ensure jurisdiction over international crimes and fully implement the terms of reference (TORs) of the Investigative Team set up pursuant to UNSC resolution 2379. According to the TORs, the Team is mandated to “collect evidence pertaining to acts that may amount to war crimes, crimes against humanity and genocide” (para. 5); and the evidence collected by the Team may only be used in fair and independent criminal proceedings conducted by competent domestic courts in Iraq, and in third States (Ibid. para. 26). In addition, the Special Rapporteur warned against the use of any evidence collected by the Team for trials by domestic courts that could result in the application of the capital punishment, in violation of relevant international standards.

During her country visit, the Special Rapporteur was informed that foreign nationals 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 implementation of the death penalty without the requisite transparency makes it difficult, if not impossible, to assess whether it is being carried out in compliance with international human rights law and standards. States should systematically and publicly provide full and accurate data on death sentences that are carried out. These should include information on charges and disaggregated data, such as on gender, age, nationality, ethnic origin and other relevant demographics of the persons affected. Such data is necessary to ensure compliance with international human rights law and standards (see report on capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, [A/HRC/36/26](#)).

Last but not least, we wish to recall that **access to consular assistance** is an important aspect of the protection of those facing the death penalty abroad. The Vienna Convention on Consular Relations requires all States to take every possible action to ensure reciprocal compliance with this safeguard, in line with the relevant provision on the right to seek consular assistance. Under article 36 of the Convention, local authorities must inform all detained foreigners “without delay” of their right to have their consulate notified of their detention and to communicate with their consular representatives. This applies to all detained foreigners but is of particular significance to those who face the death penalty because of the irreversibility of the punishment. At the request of the national, the authorities must then notify the relevant consulate of the detention without delay; they must also facilitate consular communication and grant consular access to the detainee. Consuls are empowered to arrange for their nationals’ legal representation and to provide a wide range of humanitarian and other assistance, with the consent of the detainee. Local laws and regulations must give “full effect” to the rights enshrined in article 36. We wish to stress that the denial of the right to consular notification and access is a violation of due process and the execution of a foreign national deprived of such

rights constitutes an arbitrary deprivation 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 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 these 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. Please provide detailed information on terrorism-related trials, as well as death sentences and executions currently pending or carried out involving foreign nationals. Please include information on charges and disaggregated data on gender, age, nationality, ethnic origin and other relevant demographics of the persons affected.
2. Please provide information on whether foreign nationals facing or awaiting trial, or sentenced to death or awaiting execution in connection with terrorism-related charges are duly afforded with the right to consular notification and access. Please explain how these rights are implemented in practice.
3. Please elaborate on how your Excellency's Government envisages working and coordinating with the international investigative team to facilitate the discharge of its mandate.
4. Please provide information on steps taken by your Excellency's Government to incorporate core international crimes into Iraqi domestic law.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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.

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 the alleged violations.

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

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

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

## **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. (...)”