

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, including possibly Australian 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 expressing similar concerns was sent to the Government of Iraq.

According to the information received:

Some 40,000 foreigners travelled to Iraq to join ISIL. An unspecified number of Australian nationals was reportedly among them. 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).

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 Article 3 of the Universal Declaration of Human Rights and Article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia in 1980, 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 foreign nationals, including possibly nationals of Australia, 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.

Australia abolished the death penalty by 1985. It acceded to the Second Optional Protocol to the ICCPR in 1990. In 2010, the Federal Government passed legislation that prohibited the reintroduction of capital punishment.

Australia opposes the death penalty in all circumstances for all people and supports the universal abolition of the death penalty. Within this overreaching goal, the country has set as a specific policy goal, among others, that of ensuring that people facing a death sentence can access adequate legal representation, and that their rights to a fair trial and due process under Article 14 of the ICCPR are realised (<https://dfat.gov.au/international-relations/themes/human-rights/Pages/australias-strategy-for-abolition-of-the-death-penalty.aspx>).

Furthermore, Australia 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).

In particular, Article 36 of the Vienna Convention serves a dual purpose: that of recognizing a State’s right to assist its nationals through the consular officer’s actions and, correspondingly, that of recognizing the correlative right of the national of the sending State to contact the consular officer to obtain that assistance. Based on the Vienna Convention’s text and its travaux préparatoires, it was found that Article 36 of the Convention “endows a detained foreign national with individual rights that are the counterpart to the host State’s correlative duties” (The Right to Information on Consular

Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-American Court of Human Rights, Advisory Opinion No. OC-16/99, (1999)).

As a State party to ICCPR, Australia also has the duty to see that the rights of its own nationals abroad are respected. On these grounds, Australia is expected to take all reasonable steps, including the provision of consular assistance, to ensure that its nationals do not face the unfair and unlawful imposition and the execution of the death penalty overseas.

To ensure due process of law, a defendant must be able to assert his rights and defend his interests without obstacles. Article 14 of the ICCPR establishes minimum due process guarantees to those subject to criminal proceedings. With respect to detained foreign nationals, the right to communicate with consular officials can significantly contribute to an effective defense and help to ensure that legal proceedings will be conducted with greater adherence to the law and respect for personal dignity. It follows that the individual's right to information established in Article 36 of the Vienna Convention facilitates effective implementation of the right to due process of law as set forth in Article 14 of the ICCPR.

In cases involving the imposition of the death penalty, the provision of consular assistance shall therefore be assessed in light of the absolute nature of the right to life. All States, whether they have abolished the death penalty or not, are required to protect individuals from arbitrary executions, especially when the death penalty is imposed after an unfair trial or for crimes that do not meet the threshold of 'most serious'.

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 an unfair and unlawful death sentence, a State that does not take all reasonable steps to provide such assistance in an adequate manner 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 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 any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Does the Government of Australia seek the extradition of its nationals who may be prosecuted on terrorism-related charges in Iraq?
3. Please indicate whether the Government of Australia has officially sought information from the Iraqi authorities about the number and identities of its own nationals facing trial in Iraq on charges of terrorism, including for real or suspected membership in or association with ISIL. In this respect, please provide information on the number of Australian nationals that are being prosecuted in Iraq on these grounds.
4. Please indicate whether consular protection was extended to any national of Australia 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 international human rights obligations that Australia has under the international instruments it has ratified.
5. Please indicate whether the Government of Australia has provided the families of its nationals facing trial or execution, or sentenced to death for terrorism in Iraq, with any information related to their conditions of detention, trial or execution.
6. Please indicate what steps have been taken to address the rights and protection of Australian women and children in Iraq who are detained and/or are awaiting trial for terrorism-related charges.

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

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.

We may publicly express our concerns in the near future as, in our view, the information at hand is 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 expression of concern 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.

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Vice-Chair of the Working Group on Arbitrary Detention

Agnes Callamard
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Saeed Mokbil
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Nils Melzer
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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 judgment 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](#)).

Moreover, circumstances surrounding the actual imposition or execution of the death penalty can also constitute cruel, inhuman or degrading treatment or punishment or even torture. As such, the harshness of the death penalty goes beyond the execution itself. Physical or mental torture or other cruel, inhuman or degrading treatment or punishment may be inflicted on a convict and his or her relatives awaiting execution at different stages of his or her time in detention. (A/67/279, para. 75).

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) capital 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. (...)”.