Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions

REFERENCE:
AL USA 18/2019

19 September 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Human Rights Council resolution 35/15.

In this connection, I would like to bring to the attention of your Excellency’s Government information I have received concerning the risk of arbitrary deprivation of life and violations of other human rights of a Belgian national sentenced to death under Iraq’s Anti-Terrorism Law no. 13 of 2005, in relation to his alleged membership in the Islamic State of Iraq and the Levant (IS). Please note that a letter expressing similar concerns was sent to the Government of Belgium. Similarly, a letter will be sent to the Government of the Iraq.

At the outset, I should note that, on 14 September 2018, I sent an allegation letter (AL USA 14/2018) to the Government of the United States of America, together with other Special Rapporteurs, concerning the risk of arbitrary deprivation of life and violations of other human rights of US nationals facing prosecution and capital punishment under Iraq’s Anti-Terrorism Law no. 13, for their alleged membership in the IS. I hope to receive a reply from your Excellency’s Government soon.

According to the information received:

In October 2013, Mr. Bilal Al Marchohi, a Belgian national, allegedly left Belgium at the age of 18 to join the IS in Syria.

On 26 November 2015, a European arrest warrant was reportedly issued against him by a Belgian investigating judge so that Mr. Al Marchohi could be brought to trial in Belgium.

On 27 August 2017, Mr. Al Marchohi reportedly surrendered to Kurdish fighters in Syria. He was allegedly handed over to US forces and transferred to Erbil, in Iraq. He was reportedly held there for several months and interrogated several times.

It is reported that the US forces shared a copy of their reports concerning Mr. Al Marchohi with the Belgian authorities. They also allegedly asked Belgium to repatriate Mr. Al Marchohi.
In the absence of a response from the Belgian authorities, it is alleged that the US forces would have handed Mr. Al Marchohi over to the Iraqi authorities, who then reportedly detained him in Baghdad.

During his detention, while interrogated, Mr. Al Marchohi was reportedly tortured by the Iraqi intelligence services and forced to confess to having participated in the battle of Mosul as a member of the IS, even though it is alleged he had never been to Iraq.

On 18 March 2019, after a summary trial, Mr. Al Marchohi was sentenced to death for terrorism, pursuant to Law no. 13 of 2005.

The Belgian Government is reportedly to have officially requested, by means of a note verbale, that the Iraqi Government does not proceed with enforcing this death penalty.

At present, the Iraqi High Judicial Council of Al Karkh, Al Harthiya, is expected to take a final decision on Mr. Al Marchohi's death sentence.

While I do not wish to prejudge the accuracy of these allegations, I would like to reiterate the concerns already expressed in the above-mentioned letter of 14 September 2018, particularly and primarily with regard to the right to life of Mr. Al Marchohi. I wish to note that the International Covenant on Civil and Political Rights (ICCPR) sets out specific safeguards for ensuring that the death penalty, when not prohibited, is applied only for the most serious crimes, and only in the most exceptional cases and under the strictest limits aimed at ensuring a fair trial.

In this regard, I wish to emphasize the concerns already expressed in relation to the serious flaws affecting 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, the allegations of torture and other ill-treatments and the use of forced confessions. This has been corroborated by the United Nations Assistance Mission for Iraq and the Office of the United Nations High Commissioner for Human Rights. In a joint report, they pointed out the shortcomings of the Iraqi judicial system, stressing in particular that criminal investigations and judicial proceedings in death penalty cases do not fully respect and protect international and constitutional guarantees of due process and a fair trial1.

In addition, I would like to highlight the concerns I have already expressed on many occasions regarding the serious limitations of 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.

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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.

Therefore, I would like to stress, once again, 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.

As a party to the ICCPR, the USA have the duty to take appropriate measures to protect individuals against the arbitrary deprivation of life by other States and/or international organizations in all areas subject to their jurisdiction (CCPR/C/GC/36, paragraph 22). On these grounds, the USA are expected to take all reasonable steps to ensure that no individual under their jurisdiction face the unfair and unlawful imposition, and the execution, of the death penalty anywhere in the world, including Iraq. In addition, States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life (CCPR/C/GC/36, paragraph 63).

I would like to express my most serious concerns at what could have been the role of the US authorities in the transfer of Mr. Al Marchohi from Syria to Iraq. The transfer was, in fact, reportedly carried out despite the risks faced by Mr. Al Marchohi of being subjected to torture, of not receiving a fair trial and of being sentenced to death and thus arbitrarily executed.

In this regard, I would like to recall that Article 16 of the Draft articles on Responsibility of States for Internationally Wrongful Acts prohibits complicity in the commission of internationally wrongful acts. It is internationally wrongful for any State to impose the death penalty in violation of international law. Therefore, all States must refrain from providing assistance in situations where the death penalty could be imposed in this way. It seems difficult to me to imagine that the authorities of the USA were not aware of how trials are conducted in Iraq, particularly in terrorism cases.

In these circumstances, I urge Your Excellency's Government to take all possible steps to ensure that Mr. Al Marchohi, as well as any other foreigner held under the same conditions, is not arbitrarily deprived of his life and that he can return to his country to be tried in a manner consistent with international law.

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 my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would 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. Please provide information as to whether the Government of the United States of America has intervened, in any way, or failed to take action, in order to facilitate the transfer of the above-mentioned person from Syria to Iraq. If so, please explain the reasons why.

3. Could you please explain whether the US Government made any effort to prevent this transfer and, if so, what actions have been taken in this regard? In particular, could you please confirm whether the Government of the USA informed the authorities of Belgium of the above-mentioned case and asked that Mr. Al Marcholi be repatriated to be tried in Belgium? If so, could you please explain what was the reaction of the Belgian authorities and the subsequent course of action undertaken by the US Government as a result? If not, could you please explain why?

4. Could you please explain whether, at present, the US Government envisages to take any action in order to prevent the person concerned, as well as any other individual in a similar situation, from being executed in Iraq in an arbitrary manner?

5. Could you please explain what is the position of the Government of the United States of America on the administration and functioning of the justice system in Iraq, particularly in terrorism cases?

6. Could you please explain what is the position of the Government of the United States of America on the possibility of setting up an ad hoc or hybrid international tribunal to prosecute alleged IS fighters for their crimes?

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, I 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.

I may publicly express my concerns in the near future as, in my view, the information available to me is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. Any public expression on this matter
will indicate that I have been in contact with your Excellency’s Government to clarify the issue/s in question.

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

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions
In connection with above alleged facts and concerns, I 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, I 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. (…)”