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

REFERENCE:
AL IRQ 3/2019

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 United States of America.

At the outset, I wish to recall that, on 28 November 2018, I sent an allegation letter to the Government of Iraq (AL IRQ 4/2018), together with other Special Rapporteurs, concerning the risk of arbitrary deprivation of life and violations of other human rights of foreign nationals facing prosecution and trials in Iraq for alleged membership in the IS.

In the reply of 30 January 2019, the Government of Iraq referred to relevant domestic law concerning terrorism and consular assistance. In terms of steps taken to incorporate core international crimes into Iraqi domestic law, the Government informed that a bill on international crimes had been submitted to the secretariat of the Council of Ministers by the competent ministerial committee in coordination with the committee on international humanitarian law.

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 forces of the United States of America (USA; US) 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, the US forces would have handed Mr. Al Marchohi over to your Excellency’s authorities, who 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 he had reportedly 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 reported to have officially requested, by means of a note verbale, that the Iraqi Government not execute 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 28 November 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 trial.  

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

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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.

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.

Furthermore, I wish to reiterate 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. I 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; and A/74/47918 scheduled to be presented to the General Assembly in October 2019).

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.

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 on whether the alleged victim, was duly granted the right to consular notification and access. Please explain how these rights were implemented in practice. Please explain whether the Government of Iraq envisages to undertake any step in order to protect Mr. Al Marchohi and ensure that he is not arbitrarily deprived of his life.

3. Please provide information on the steps taken towards the adoption of a bill on international crimes.

4. Could you please explain what is the position of the Government of Iraq 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
Annex

Reference to international human rights law

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. (...)”.
