

OPINION No. 31/2006 (IRAQ and UNITED STATES OF AMERICA)**Communication addressed to the Governments on 3 May 2005****Concerning: Mr. Saddam Hussein Al-Tikriti****Both States are Parties to the International Covenant on Civil and Political Rights**

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the Commission on Human Rights. The mandate of the Working Group was clarified and extended by resolution 1997/50. It was reconfirmed by Commission resolution 2003/31, General Assembly resolution 60/251 and Human Rights Council decision 2006/102.
2. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - I. When it manifestly cannot be justified on any legal basis (such as continued detention after the sentence has been served or despite an applicable amnesty act) (Category I);
 - II. When the deprivation of liberty is the result of a judgement or sentence for the exercise of the rights and freedoms proclaimed in articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and also, in respect of States parties, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II);
 - III. When the complete or partial non-observance of the relevant international standards set forth in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned relating to the right to a fair trial is of such gravity as to confer on the deprivation of liberty, of whatever kind, an arbitrary character (Category III).
3. On 30 November 2005, the Working Group adopted opinion no. 46/2005 concerning the communication on behalf of Mr. Saddam Hussein Al-Tikriti against the Governments of Iraq and the United States of America. The Working Group stated its views on certain legal questions raised by the source and the Governments, in particular with regard to its mandate and the principles governing the responsibility of the Iraqi and United States Governments for the facts alleged by the source.
4. Firstly, the Working Group decided that in accordance with paragraph 16 of its methods of work and 14 of its revised methods of work¹, it will not assess the lawfulness of Mr. Saddam's detention for the period from 13 December 2003 to 30 June 2004, as it occurred during an ongoing international armed conflict and the

¹ "The Working Group will not deal with situations of international armed conflict in so far as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence".

United States Government recognized that the Geneva Conventions applied to individuals captured in the conflict in Iraq.

5. Secondly, the Working Group decided that until 1 July 2004 Saddam Hussein was detained under the sole responsibility of the Coalition members as occupying powers or, to be more precise, under the responsibility of the US Government. Since then, as the Supreme Iraqi Criminal Tribunal (SICT) is a court of the sovereign State of Iraq, his pre-trial detention on charges pending before the SICT is within the responsibility of Iraq. The Working Group also found that, considering that Saddam Hussein is in the physical custody of the USA authorities, any possible conclusion as to the arbitrary nature of his deprivation of liberty may involve the international responsibility of the US Government as well.

6. Finally, with regard to the alleged violations affecting the right to a fair trial, the Working Group considered that it was premature to take a stance on the allegations of arbitrary deprivation of liberty, because the procedural flaws amounting to the violation of the right to a fair trial could, in principle, be redressed during the subsequent stages of the criminal proceedings. Therefore, the Working Group decided that it would follow the development of the trial and would request more information from both concerned Governments and from the source. In the meantime, the Working Group decided to keep the case pending until further information was received, as provided in paragraph 17(c) of its Methods of Work.

7. On 14 December 2005 the Working Group notified its opinion to the two Governments and on 12 January 2006 to the source. The Working Group subsequently received new allegations by the source. On 3 May 2006, the Chairperson-Rapporteur of the Working Group transmitted them to the Governments of Iraq and of the United States of America through their respective Permanent Representatives in Geneva and requested their comments and observations. Since no reply arrived, on 28 June 2006 the Chairperson-Rapporteur of the Working Group sent a letter informing the Permanent Representatives of the two Governments that the Working Group will consider the case during its forthcoming 46th session from 28 August to 1 September 2006. While no reply was received from the Iraqi Government, the Government of the United States sent a reply on 30 August 2006.

8. The source has presented to the Working Group new information regarding alleged multiple violations of the right to a fair trial since the Working Group's Opinion of 30 November 2005. It also reiterates the allegations already brought to the attention of the Working Group.

9. A first set of allegations and arguments presented by the source regard the composition of the SICT. In January 2006 the presiding judge of the Dujail trial, Rizar Amin, resigned. His resignation followed public criticism of his handling of the trial by senior Iraqi government officials and was, according to the source, due to pressure by a high level member of a Shi'a party in the Interim Legislature. His successor as presiding judge of the Dujail trial chamber, Saeed al-Hameesh, was transferred to a different chamber of the SICT after being accused of being a former member of the Baath party. On 24 January 2006, a new judge, Raouf Rasheed Abdel-Rahman, was nominated to preside the Dujail trial. The source expresses serious doubts regarding his impartiality, since he was born in Halabja, the Kurdish town which was attacked

with poison gas by the Iraqi armed forces in 1988, and reportedly lost several family members in the attack. Moreover, judge Abdel-Rahman made statements indicating that the guilt of Saddam Hussein is a foregone conclusion. In particular, before assuming his position as presiding judge, he is reported to have stated on Iraqi national television that Saddam Hussein should be executed without trial. The source asserts that in February 2006 defense counsel for Saddam Hussein submitted several challenges to the impartiality of the new presiding judge. The challenges were rejected, but the SICT allegedly refused to give a decision in writing to the defense lawyers, despite their repeated requests. On 10 February 2006, Kurdish media reported that another judge of the trial chamber, Ali Hussein al-Shimmiri, had died on 9 February. The source affirms that with this death, four of the five judges who were on the original trial court were removed, two of them reportedly for political reasons.

10. The source further reports that the identity of the judges sitting on Saddam Hussein's trial in the Dujail case is not disclosed, with the exception of the presiding judge. It argues that as a consequence of the judges' "facelessness", the defense cannot verify whether they meet the requirements for judicial office and are impartial and independent.

11. A second set of allegations and arguments presented by the source concern restrictions of Saddam Hussein's rights to be represented by lawyers of his own choosing and to communicate with his lawyers. Most fundamentally, the source states that the lawyers were not allowed to meet the defendant in private, all meetings taking place in the presence of United States officials. Moreover, the source reports numerous instances of obstruction of the lawyers' work. On 5 December 2005, the presiding judge appointed as defense counsels some lawyers who had been waiting outside the courtroom, despite their lack of preparation and Mr. Hussein's protests. On 21 December 2005, one of Mr. Hussein's accredited lawyers was denied the right to present a request to see his client directly to the SICT. On 17 January 2006, the United States authorities refused the permission to visit Mr. Hussein to four of the nine lawyers, arguing that they had to present their original accreditation documents to the SICT, while they were at the same time not allowed to enter the courtroom to present their credentials.

12. The source states that the setting and cancellation of hearing dates at very short notice often made it impossible for Saddam Hussein's lawyers to attend hearings in the case. With regard to Mr. Hussein's foreign lawyers, the source adds that on 7 March 2006 the SICT communicated that two of them, experts on international human rights law, Mr. Doebler and Mr. Armouty, were not entitled to meet with their client and to enter the courtroom. The SICT did not give any reasons. Mr. Doebler and Mr. Armouty possessed powers of attorney from Mr. Hussein and had been previously admitted to act before the SICT.

13. According to the source, the failure of the authorities to take steps to protect the life and physical integrity of defense lawyers further contributed to undermining the fairness of proceedings. As publicly reported, defense lawyers have been the object of several attacks which resulted in the death of three of them, including Mr. Khamis Obedi, who was killed on 21 June 2006. After his death, the defense lawyers stated that they could not appear before the SICT until better security was provided. As no action to improve security was taken, the SICT convened on 10, 11, 24, 26 and

27 July 2006 without their attendance. The SICT appointed other defense lawyers over the express objections of the defendants.

14. The third set of allegations and arguments presented by the source relates to the right to present the defense case in conditions of equality with the prosecution. In this respect, the source states that evidence was reportedly read into the record on the basis of affidavits of which the defense counsel had no adequate prior notice, and which they therefore could not meaningfully question. Moreover, the defense was not provided with copies of the statements of prosecution witnesses.

15. The Working Group also takes notice of reports that on 13 June 2006, within 24 hours of having agreed to allow nine more witnesses, the SICT suddenly interrupted the defense case and disallowed the introduction of any further defense evidence.

16. In its submission of 30 August 2006, the United States Government notes the Working Group's recognition that the criminal proceedings against Mr. Hussein are ongoing. It states that the Working Group thereby acknowledged that Mr. Hussein had domestic remedies available which had not been exhausted. The United States Government also reiterates its position that, although it has physical custody of the detainee, Mr. Hussein is being held under the legal authority of an Iraqi court, and that, therefore the appropriate Iraqi authorities are best placed to respond to the questions about his continued detention. The United States Government accordingly chose not to comment on the new allegations of the source.

17. While noting with appreciation the cooperation of the United States Government, the Working Group regrets that neither the Government of Iraq nor the Government of the United States have submitted information in respect of the new allegations of the source or their position on its merits. Nonetheless, the Working Group believes that it is in a position to consider the case again and render an opinion on the facts and circumstances in the context of the new substantiated allegations made.

18. With regard to the doctrine of exhaustion of domestic remedies mentioned by the U.S. Government in its submission, the Working Group recalls that, as it has explained most recently in its 2006 report to the Commission on Human Rights, "the Commission [...] never intended the doctrine of exhaustion of domestic remedies to apply to the activity of the Working Group as a criterion for the admissibility of communications" (E/CN.4/2006/7, paragraph 11) ². This does not, however, preclude the Working Group from keeping in mind the rationale underlying the doctrine, i.e. that the State where a human rights violation has allegedly occurred should have the

² E/CN.4/2006/7, paragraph 11: "Commission resolution 1997/50 establishes that, as a rule, the Working Group shall deal with cases in which the national judiciary has not yet spoken its final word; paragraph 15 of that resolution "[d]ecides to renew ... the mandate of the Working Group ... entrusted with the task of investigating cases of deprivation of liberty imposed arbitrarily, *provided that no final decision has been taken in such cases by domestic courts*" (emphasis added). The resolution then proceeds to qualify this principle: the Working Group shall be competent in cases in which the domestic courts have rendered a final decision insofar as that decision is contrary to relevant international standards."

opportunity to redress the alleged violation by its own means within the domestic framework.

19. As already mentioned above (paragraph 6), in this spirit the Working Group decided on 30 November 2005 to clarify the principles governing its competence and the responsibility of the two Governments with regard to the detention of Mr. Saddam Hussein, but not to express an opinion on the merits yet. Since then, nine months have passed, the Governments concerned have not cooperated with the Working Group, and the source alleges that the violations of international law in the trial of Saddam Hussein have grown worse. Most importantly, Article 27(2) of the Iraqi Special Court's Statute provides that sentences shall be enforced within 30 days of becoming final, which in the case of imposition of the death penalty could result in a precipitous and irremediable end to the proceedings. Therefore, the Working Group considers that it can no longer delay giving its opinion on the communication submitted to it two years ago.

20. In the light of the allegations summarized above, which have not been refuted by the governments despite an invitation to do so, and also in the light of all the information publicly available about the trial of Mr. Saddam Hussein before the SICT, the Working Group notes that no action has been taken to correct the deficiencies identified in its opinion rendered on 30 November 2005. In addition, new procedural flaws have been reported to the Working Group.

21. In opinion no. 46/2005, the Working Group had clearly stated that the proper way to ensure that the detention of Mr. Saddam Hussein does not amount to arbitrary deprivation of liberty would be to ensure that his trial is conducted by an independent and impartial tribunal in strict conformity with international human rights standards. It is unfortunate to notice that Mr. Saddam Hussein's trial was conducted and ended with a series of violations of the right to defense and to a fair trial in breach of article 14 of the International Covenant on Civil and Political rights to which Iraq and the United States are parties.

22. More specifically, the Working Group finds that Saddam Hussein did not enjoy the right to be tried by an independent and impartial tribunal as required by Article 14(1) ICCPR. As reported by the source, the presiding judge of the chamber trying Saddam Hussein changed twice, both times as a result of political pressure exercised on the SICT. The current presiding judge is reported to have made statements incompatible with the requirement of impartiality and the presumption of innocence enshrined in Article 14(2) ICCPR. The known circumstances surrounding the changes of the presiding judge of the trial chamber render the fact that the identities of the other judges composing the chamber are not known all the more preoccupying. As pointed out by the source, neither the defendants nor the public are in a position to verify whether these judges meet the requirements for judicial office, whether they are affiliated with political forces, whether their independence and impartiality is otherwise undermined.

23. Saddam Hussein did not "have adequate time and facilities for the preparation of his defence", as required by Article 14(3)(b) ICCPR. The severe restrictions on his access to the lawyers of his own choosing and the presence of United States officials at such meetings violated his right to communicate with counsel. The assassination of

two of his counsel in the course of the trial, Mr. Sadoun al-Janabi on 20 October 2005 and Mr. Khamis al-Obedi on 21 June 2006, seriously undermined his right “to defend himself [...] through legal assistance of his own choosing” enshrined in Article 14(3)(d) ICCPR (in addition to being, first of all, a tragedy in its own right).

24. Finally, Saddam Hussein did not enjoy the possibility “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”, as required by Article 14(3)(e) ICCPR. This guarantee was undermined by the failure to adequately disclose prosecution evidence to the defendants, the reading into the record of affidavits without an adequate possibility for the defense to challenge them, and the sudden decision of the presiding judge to cut short the defense case on 13 June 2006.

25. It is because the Working Group is deeply committed to the principle that serious violations of human rights, whether committed by political leaders or others, must be inquired into and redressed by putting the perpetrators to justice, that it considers that procedures to hold the perpetrators of gross human rights violations accountable must scrupulously respect the rules and standards elaborated and accepted by the international community to guarantee a fair trial to any person charged with a criminal offence. This is all the more necessary when the death penalty could be imposed.

26. The Working Group believes that also from the perspective of the victims, who under international law enjoy the right to reparation, truth and justice, it is particularly important that the investigation of the gross violation of human rights and the trial of their alleged perpetrators are conducted in a legitimate and transparent legal process. For them as well, it is essential that justice is not only fair but also be seen to be fair.

27. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Saddam Hussein is arbitrary, being in contravention of article 14 of the International Covenant on Civil and Political rights to which Iraq and the United States are parties, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

28. As a consequence of the opinion rendered, the Working Group requests the Governments of Iraq and the United States to take the necessary steps to remedy the situation of Mr. Saddam Hussein and to bring it into conformity with the principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In this context, the Working Group invites the Government of Iraq to give serious consideration to the question whether a trial of the former Head of State in conformity with international law is at all possible before an Iraqi tribunal in the current situation in the country, or whether the case should not be referred to an international tribunal.

Adopted on 1 September 2006.