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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 34/2023 concerning Adel Attia Khudair, Raad Mohsin Ghazi Al-Hares and Bahaa Abdul Hussein Abdul Hadi (Iraq)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 51/8.
2. In accordance with its methods of work,¹ on 3 May 2023 the Working Group transmitted to the Government of Iraq a communication concerning Adel Attia Khudair, Raad Mohsin Ghazi Al-Hares and Bahaa Abdul Hussein Abdul Hadi. The Government did not provide a timely response to the communication. The State is a party to the International Covenant on Civil and Political Rights.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
 - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);
 - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);
 - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);
 - (d) When asylum-seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);
 - (e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability,

¹ [A/HRC/36/38](#).



or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

1. Submissions

(a) Communication from the source

4. Adel Attia Khudair, born on 14 October 1961 in Baghdad, holds Iraqi citizenship. From 2008, he worked as an Assistant General Manager, and from 15 January 2020 acted as General Manager, of the Agricultural Bank. He resides in Baghdad.

5. Raad Mohsin Ghazi Al-Hares was born on 1 July 1955 in Al-Najaf. He worked as an engineer and as the energy adviser to the Prime Minister. He is married and has five children. He resides in the Al-Harthiya neighbourhood in Baghdad.

6. Bahaa Abdul Hussein Abdul Hadi was born on 15 August 1969. He is a businessperson and the manager of the Qi Card smart card company. He is married and has two children. He resides in the Al-Jadriya neighbourhood in Baghdad.

(i) Context

7. The source submits that the three individuals held various positions within the Iraqi private sector. They were arrested in September and October 2020 by members of the Anti-Corruption Committee that was established on the basis of Executive Order No. 29 (known as Committee No. 29). They were sentenced to four to six years of imprisonment following trials that did not respect due process guarantees. All alleged that they had been subjected to torture while being secretly detained. Their lawyers filed motions for retrials.

8. Committee No. 29 was formed on 6 September 2020 and was tasked with investigating “cases of corruption and major crimes”, with the Iraqi Counter-Terrorism Service mandated to implement its decisions. The establishment of a special mechanism outside the regular system and reporting directly to the Prime Minister raised concerns about due process and fair trial rights. On 2 March 2022, the Federal Court of Iraq issued a decision abolishing Executive Order No. 29 as it violated several articles of the Constitution – guaranteeing, *inter alia*, the rights to liberty and dignity and the principles of separation of powers and the independence of the judiciary. Reportedly, investigations into the Committee’s open cases are continued by the relevant investigative and judicial entities, while cases with final decisions will not be reopened.² Human rights organizations and activists had reported human rights violations, including allegations of torture, committed by Committee No. 29.

a. Adel Attia Khudair

9. Hours after the formation of Committee No. 29, a lieutenant-general heading the Committee went to the Agricultural Bank to investigate the matter of demonstrations held against the bank’s newly appointed manager. The demonstration had been organized by employees who disapproved of the newly appointed manager’s nomination after accusations of corruption in public institutions had surfaced against him. The manager has never been convicted for these alleged acts. At that time, Mr. Khudair, who had taken part in the demonstration, was taken to the Office of the Prime Minister, was interrogated about the demonstration and was forced to write a pledge that he would continue to work under the new manager.

10. On 7 September 2020, a lieutenant-general summoned Mr. Khudair and 10 employees, including a close relative of Mr. Khudair’s, to his office located in the Green Zone. After their arrival, they were taken from Jadriyah Bridge to the Green Zone in cars displaying prime ministerial number plates. An hour later, Mr. Khudair informed his family that he was in a lieutenant-general’s office at the Office of the Prime Minister. A few hours

² United Nations Assistance Mission for Iraq (UNAMI), Update on accountability in Iraq, June 2022, p. 9.

later, Mr. Khudair and his close relative were arrested without arrest warrants by members of Committee No. 29, who later referred Mr. Khudair and the other defendants to court.

11. The family of Mr. Khudair and his close relative was unaware of their whereabouts following their arrests. They searched for them in hospitals and in forensic institutes, but to no avail. On 13 September 2020, Mr. Khudair's family reported their disappearances to Bab al-Moatham Police Station in Baghdad and to the office of the Iraqi High Commission for Human Rights in Baghdad. The complaints were referred to the Office of the Prime Minister, as that is where they had last been seen.

12. On 17 September 2020, the family discovered that Mr. Khudair and his close relative had been arrested alongside 10 other employees on accusations of corruption, through the media.

13. On 29 September 2020, at 2 a.m., the family was contacted by an officer from Committee No. 29. The call came from an unknown phone number. The caller asked the family to bring two employees who could testify that Mr. Khudair's close relative had nothing to do with corruption, so that he could be released. The family proceeded accordingly, and the close relative was released from a detention centre located in the Green Zone, where the office of a major-general was located. On 2 November 2020, the close relative was summoned again to the Green Zone to be presented as a witness to one of the bank's transactions. The close relative went there accompanied by two of his family members. When they reached the Green Zone, a car displaying prime ministerial number plates arrived, and the two family members were told to leave. The close relative was then detained with Mr. Khudair and subjected to enforced disappearance in the Baghdad Airport prison until his release on 26 November 2020.

14. Within two weeks of his arrest in a major-general's office in the Green Zone, Mr. Khudair was detained and transferred to the Baghdad Municipality prison for a few days, before being moved to the Baghdad Airport prison in November 2020 where he stayed for several weeks before being transferred back to the Municipality prison. On 9 February 2021, he was transferred to Tasferat al-Rusafa Prison, where he is detained until now.

15. Mr. Khudair was not allowed to receive visits until the beginning of January 2021. During the first visit, his family was told not to ask about his well-being, whether he had been subjected to torture or ill-treatment or why he had been arrested. He was wearing the same uniform in which he had gone to work, showing that he had not changed or received additional clothes.

16. During the visit, the authorities took pictures and sent them to the Prime Minister and to Iraqi human rights entities including the High Commission for Human Rights. Mr. Khudair was not allowed another visit until March 2022.

17. In the Baghdad Airport prison, Mr. Khudair was detained with another inmate in a cell measuring about one and a half metres by two metres.

18. On 2 March 2022, the Federal Court of Iraq announced the dissolution of Committee No. 29, as the basis for its establishment was unconstitutional. As a result, Mr. Khudair's lawyer was finally able to visit him. He was only allowed to visit him twice for the purpose of signing the proxy representation document, which was before the trial of February 2021 and the retrial of June 2022. He was not allowed to speak with him, and was only able to take his signature for the power of attorney.

19. Mr. Khudair is detained at Tasferat al-Rusafa Prison.

20. Mr. Khudair was tortured during his detention in the Baghdad Airport prison in November 2020. He was subjected to beatings, hanging (the "scorpion method") and electric shocks to sensitive body parts. They brought in front of him his close relative, who was naked, and threatened to rape him before his eyes if he did not sign the confession that investigative officers of Committee No. 29 had written admitting to having accepted a financial bribe from a branch manager of Salah al-Din Bank. Mr. Khudair signed the confession under duress.

21. Reportedly, some members of Committee No. 29 wore civilian clothes in order to make the detainees believe that they were from the High Commission for Human Rights. When detainees told them that they had been tortured, they would be subjected to reprisals

for revealing the acts of torture. As such, the detainees did not know with whom they could share their testimony in confidence.

22. Mr. Khudair's lawyer was not allowed to visit him or to have a copy of his case file before the hearing, which was held on 9 February 2021.

23. Mr. Khudair was presented before the investigating judge for the first time six days after his arrest, and he did not have access to legal counsel during the hearing. The hearing took place in the Green Zone at the office of a major-general who was not present.

24. On 9 February 2021, Mr. Khudair was tried, along with four other defendants, by the Central Anti-Corruption Criminal Court in Karkh. Each of the five defendants was sentenced on the same day to six years' imprisonment and a fine of 10 million Iraqi dinars on the basis of article 2 (1) of resolution No. 160/1983 of the dissolved Revolutionary Command Council which punishes anyone who has offered or received bribes, and articles 47, 48 and 49 of the Penal Code.

25. On 24 February 2021, 2 March 2021 and 13 April 2021, Mr. Khudair's lawyer requested annulment of the sentence, due to the lack of evidence, of complainants and of witnesses.

26. On 13 October 2021, the Federal Court of Cassation decided to retry the case pursuant to articles 259 (A) (7) and 268 (B) of the Criminal Procedure Code.

27. On 17 November 2021, after the decision had been issued for a retrial, a lieutenant-general addressed the prison's administration asking it not to provisionally release the defendants.

28. On 2 March 2022, the Federal Court of Cassation announced the dissolution of Committee No. 29, as the basis for its establishment had been unconstitutional.

29. On 15 June 2022, the Central Anti-Corruption Criminal Court in Karkh dismissed the charges against the close relative for lack of evidence, and decreased the sentences of Mr. Khudair and the four other defendants to three years' imprisonment and fines of 10 million dinars.

30. Mr. Khudair's lawyer appealed the sentence in due time. On 9 November 2022, the second chamber of the Federal Court of Cassation confirmed the sentence.

31. On 24 December 2022, the Office of the Prime Minister announced that it had referred 3,000 complaints of violations committed by Committee No. 29 to the Public Prosecutor. Mr. Khudair's lawyer informed his family that one of the officers who had tortured Mr. Khudair was among the individuals referred to the Public Prosecutor for accusations of torture. A committee from the Office of the Prime Minister involved in investigating such violations interviewed Mr. Khudair in prison in November 2022. The officer concerned was referred to Karkh Criminal Court. At the time of the submission, his trial had not yet begun.

b. Raad Mohsin Ghazi Al-Hares

32. Mr. Al-Hares was asked to attend a meeting at 10 a.m. on 3 October 2020 at the Office of the Prime Minister on the maintenance of power stations. He was arrested by members of Committee No. 29. They did not present him with an arrest warrant.

33. After his arrest, Mr. Al-Hares was taken to a detention centre of the Investigations Directorate of the Anti-Terrorism Service at Baghdad Airport, where he was detained until 10 January 2022. He was then moved to Tasferat al-Rusafa Prison where he was detained until 15 March 2022, and to Al-Adela Prison in Kadhimiya, Baghdad, where he is currently detained.

34. Mr. Al-Hares was not allowed to contact his lawyer until 5 January 2022, after the end of his trial. He was only allowed to contact his family two weeks after his arrest, and family visits could take place every 40 days. After the trial, he was allowed family visits once every two weeks.

35. Mr. Al-Hares was subjected to torture in the detention centre of the Investigations Directorate of the Anti-Terrorism Service at Baghdad Airport. The torture methods included

beatings, foot whipping with the hands and feet tied (*falqa* method), electric shocks all over the body including sensitive body parts, dryboarding with bags put over his head, and waterboarding. Mr. Al-Hares lost consciousness more than once at the Investigations Directorate. He still has traces on his body from the torture. He was also threatened that members of his family would be arrested. He was detained in solitary confinement in a cell measuring one metre in length by one metre in width.

36. Although he suffers from prostate and blood pressure problems, Mr. Al-Hares was not allowed to take his medication, nor was he provided with a doctor during the detention prior to the trial. He has only been allowed to take his medication regularly since his sentencing.

37. Mr. Al-Hares was presented before the investigating judge for the first time two weeks after his arrest. Mr. Al-Hares was not assisted by a counsel of his own choosing. A lawyer appointed by the court was presented to him while he was providing his statement before the investigating judge, but Mr. Al-Hares was not allowed to speak to him.

38. Mr. Al-Hares' pretrial detention was renewed by the investigating judge for the period from 3 November 2020 to 5 January 2022.

39. The authorities accused him of bribery without providing evidence and in the absence of complainants. He initially denied the charges against him but he ended up signing a confession under torture in the first two weeks after his arrest.

40. On 5 January 2022, Mr. Al-Hares' trial took place at Al-Russafa Criminal Court. The lawyer appointed by Mr. Al-Hares did not have access to his client's case file until the day of his pleading. During the hearing, Mr. Al-Hares requested to be examined by a medical committee to verify acts of torture but the judge rejected his request. The judge also rejected Mr. Al-Hares' requests to call witnesses to the torture he had suffered.

41. Mr. Al-Hares' trial lasted 20 minutes, at the end of which a sentence of six years' imprisonment was pronounced on the basis of article 2 (1) of resolution No. 160/1983 of the dissolved Revolutionary Command Council. On 15 February 2022, the Court of Cassation confirmed the verdict. The ruling was based solely on confession. On 1 April 2022, Mr. Al-Hares' lawyer submitted a request for a retrial to the Supreme Judicial Council, which is still pending.

c. Bahaa Abdul Hussein Abdul Hadi

42. On 17 September 2020, Mr. Abdul Hadi was arrested without an arrest warrant by members of Committee No. 29 at Baghdad Airport. The officers conducting the arrest were wearing civilian clothing. Mr. Abdul Hadi's personal belongings were seized. News about the arrest was distributed to television channels and social media.

43. After Mr. Abdul Hadi's arrest, he was not allowed to communicate with his family or with a lawyer. His family tried to enquire about him, but to no avail. The family did not know his whereabouts until 40 days after his arrest, when they learned that he had been placed in a detention centre under the control of the Special Anti-Terrorism Service, which is not supervised by the Ministry of Justice or the Ministry of the Interior.

44. His family and his lawyers were only able to see him 40 days after his arrest. The family was allowed to visit him four times, for only three minutes.

45. Mr. Abdul Hadi is detained at Al-Rusafa Prison 2 in Baghdad.

46. From September 2020 to January 2021, Mr. Abdul Hadi was subjected to various types of physical and psychological torture, including beatings with sticks, waterboarding, suffocation with plastic bags, being hung by his legs and hands, electric shocks on sensitive body parts, foot whipping with the hands and feet tied (*falqa* method), and deprivation of sleep and food, as well as threats of rape of members of his family, of extortion and of bargaining over the company. The torture of Mr. Abdul Hadi, which caused the dislocation of his jaw and damage to his vertebrae, was used to force him to provide a confession. In addition to his heart disease, Mr. Abdul Hadi now suffers from stress and psychological trauma resulting from his torture and the conditions of his detention.

47. Mr. Abdul Hadi was allowed to be medically examined. Two medical reports were issued: one on 10 April 2021 regarding the psychological effects of the torture, and the other on 7 August 2022 dealing with the physical effects.

48. On 14 October 2020, Mr. Abdul Hadi was presented before the Committee No. 29 investigating judge in an unofficial place, outside official working hours and without the knowledge of his lawyers, and he was not informed of the charges against him. He was asked to confirm and sign his initial statement.

49. His trial took place on 24 January 2021 before the Central Anti-Corruption Criminal Court. The same day, he was sentenced to four years' imprisonment and a fine of 10 million dinars, on the basis of articles 308 and 310 of the Penal Code, even though the Court ordered the completion of a medical examination that resulted in the issuance of the aforementioned medical reports attesting that he had been subjected to torture. During the trial, the lawyers were not allowed to present witnesses or evidence, and statements extracted under torture were used.

50. In 2021, Mr. Abdul Hadi's lawyer submitted a request for a retrial to the Supreme Judicial Council, which was granted. The retrial took place on 5 December 2022, and the Central Anti-Corruption Criminal Court sentenced Mr. Abdul Hadi to one year and nine months' imprisonment with a fine of 10 million dinars, on the basis of article 2 (1) of resolution No. 160/1983 of the dissolved Revolutionary Command Council and article 132 (3) of the Penal Code. Mr. Abdul Hadi's lawyer submitted a request challenging that sentence. The case is still pending.

(ii) *Analysis of violations*

a. Category I

51. The source submits that the three individuals were not presented with arrest warrants upon their arrests, and they were not arrested in flagrante delicto which may have obviated the need for a warrant. As such, their deprivation of liberty was not grounded in law, in breach of articles 3 and 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, article 14 of the Arab Charter on Human Rights and principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

52. The source recalls that arrests, detention or imprisonment may only be carried out by people legally authorized to do so. Under article 17 (2) (b) of the International Convention for the Protection of All Persons from Enforced Disappearance, the authorities should "indicate those authorities authorized to order the deprivation of liberty".

53. On 2 March 2022, the Federal Court of Iraq issued a decision abolishing Executive Order No. 29 that had served as the basis for establishing Committee No. 29, because the Executive Order violated several articles of the Constitution guaranteeing, inter alia, the rights to liberty and dignity and the principles of separation of powers and the independence of the judiciary. Reportedly, investigations into the Committee's open cases are continued by the relevant investigative and judicial entities, while cases with final decisions will not be reopened.³ Committee No. 29 does not figure in article 39 of the Criminal Procedure Code, which explicitly lists the members of the judicial police force that have the authority to conduct arrests.

54. Therefore, the arrests and investigations carried out by Committee No. 29 against the three individuals are arbitrary, and in violation of article 9 of the Universal Declaration of Human Rights, article 9 of the Covenant, article 14 of the Arab Charter on Human Rights and article 17 (2) (b) of the International Convention for the Protection of All Persons from Enforced Disappearance.

55. The source recalls that persons held on a criminal accusation in pretrial detention must be brought "promptly" before a judge or another officer authorized by law to exercise judicial power, for judicial control of the pretrial detention. "Promptly" should be understood as not

³ UNAMI, Update on accountability in Iraq, June 2022, p. 9.

exceeding a few days; 48 hours is ordinarily considered sufficient.⁴ The Criminal Procedure Code attributes the primary responsibility for the interrogation of suspects to the investigating judge or to the judicial investigator under the supervision of the former, and stipulates that the interrogation must happen within 24 hours.⁵

56. Mr. Khudair was presented before the investigating judge for the first time six days after his arrest, and he did not have access to legal counsel during the hearing. Furthermore, the session was conducted at 10 p.m. at the office of a major-general⁶ in the Green Zone. Mr. Al-Hares was presented before the investigating judge for the first time 14 days after his arrest. The State-appointed lawyer was present but could not assist Mr. Al-Hares during the hearing. Mr. Abdul Hadi was presented before the investigating judge for the first time 27 days after his arrest, without the knowledge of his lawyers. He was provided with a State-appointed lawyer who, however, did not intervene.

57. The source recalls that according to the Human Rights Committee, the authority that reviews detentions is required to be independent, objective and impartial in relation to the issues dealt with,⁷ and needs to decide whether the individual in question should be released, or remanded in custody to await trial or to be further investigated.⁸ The United Nations Assistance Mission for Iraq (UNAMI) considers that the right of the detainee to have access to an authority that is independent, objective and impartial cannot be guaranteed effectively if the reviewing authority is the investigating judge, given the role of the latter in Iraq as the investigating authority with control over the defendant similar to that of a prosecutor.⁹ UNAMI has also found that interrogations by investigating judges are reported to be focused on confirming statements that have been made before security forces.¹⁰

58. The source thus submits that the Iraqi authorities violated the three individuals' rights to have prompt access to an independent, objective and impartial authority to review their pretrial detentions, in contravention of articles 51 and 123 of the Criminal Procedure Code, article 9 (3) of the Covenant, article 14 (5) of the Arab Charter on Human Rights and principles 11 (1) and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

59. Finally, the three individuals were sentenced on the basis of, inter alia, resolution No. 160/1983 of the dissolved Revolutionary Command Council. There are about 3,000 resolutions of the dissolved Revolutionary Command Council. There have been draft laws to repeal the resolutions of the dissolved Revolutionary Council, including resolution No. 160/1983, but these are still pending before Parliament.

60. The source recalls that persons deprived of their liberty have a right to communicate with and be visited by their family, friends, medical staff and lawyer based on the conditions established by law (principle 15 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and rules 41 (5), 54, 58, 61 and 119 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)).¹¹

61. Mr. Khudair's arrest took place on 7 September 2020 and he was not allowed visits or phone calls until the beginning of January 2021. His family heard about his arrest in the media on 17 September 2020. Although Mr. Al-Hares was arrested on 3 October 2020, his family was only able to contact him two weeks after his arrest and his lawyer was not able to contact him before the end of his trial on 5 January 2022. Mr. Abdul Hadi was arrested on

⁴ Human Rights Committee, general comment No. 35 (2014), para. 33.

⁵ See arts. 51 and 123 of the Criminal Procedure Code.

⁶ On 2 November 2022, an arrest warrant was issued against the major-general on a charge of "taking an amount of money for doing his job", under resolution No. 160/1983 of the dissolved Revolutionary Command Council.

⁷ See the Committee's general comment No. 35 (2014), para. 32.

⁸ Ibid., para. 36.

⁹ UNAMI, Human rights in the administration of justice in Iraq, August 2021, p. 17.

¹⁰ Ibid., p. 5.

¹¹ *McCallum v. South Africa* (CCPR/C/100/D/1818/2008), para. 6.8.

17 September 2020 and his family and lawyer were only able to visit him 40 days after his arrest. During this period, he was not authorized to make phone calls.

62. The three individuals' incommunicado detentions impeded their ability to challenge the legality of their detentions (their right to habeas corpus) by making them unable to access legal counsel.¹² Unlawful restrictions on the right of contact with the outside world, particularly when prolonged, may constitute ill-treatment or even torture.¹³

63. Therefore, the incommunicado detentions of the three individuals violated the prohibition of ill-treatment under article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and may have violated the prohibition of torture under article 2 as well as their right to contact the outside world. Consequently, their right to challenge the legality of their detention, enshrined in article 9 (4) of the Covenant, article 14 (6) of the Arab Charter on Human Rights and principles 11 (1) and 32 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, was not complied with.

64. The source submits that incommunicado detention, which places detainees completely outside the protection of the law, is a *prima facie* form of arbitrary detention that violates the right of an individual to be recognized as a person before the law under article 16 of the Covenant, and is highly conducive to torture.

65. The source submits that pretrial detention must be proportionate and lawful if there are no lesser measures that could mitigate the risk of releasing the defendant. Under article 9 (3) of the Covenant, the detention of persons awaiting trial is not to be the general rule. Accordingly, the authorities could have made the release conditional on guarantees ensuring presentation before the court.

66. The burden of establishing the necessary and proportionate nature of a deprivation of the liberty of an individual awaiting trial rests on the State. It is the State's responsibility to establish that the individual's release would create a substantial risk of flight, harm to others or interference with evidence or the investigation that could not be allayed by other means.

67. Article 109 of the Criminal Procedure Code provides that the investigating judge is empowered to take decisions on the necessity of pretrial detention to prevent flight and interference with justice. The decisions must be reviewed every 15 days and pretrial detention should generally not exceed six months. The investigating judge may submit an application to the felony court to extend the maximum period, which must not exceed one quarter of the permissible sentence. Mr. Al-Hares' pretrial detention was renewed from 3 November 2020 to 5 January 2022, thereby exceeding the six-month period.

68. Since the maximum penalty under article 2 (1) of resolution No. 160/1983 of the dissolved Revolutionary Command Council is a period of 10 years, it cannot be argued that the extension exceeded one quarter of the permissible sentence. However, it is unclear whether the investigating judge submitted an application to the felony court to extend the maximum period, or ruled that there were substantial reasons for believing that, if released, the individuals would abscond, commit a serious offence, interfere with the investigation or the course of justice, or pose a serious threat to public order, there being no possibility of alternative measures to address these concerns. Unless proven otherwise, the source fears that less restrictive measures pending trial were not examined by the investigating judge.

b. Category III

69. The source submits that when the three individuals were tortured, they were being held in the detention centre of the Investigations Directorate of the Anti-Terrorism Service at Baghdad Airport.

70. Mr. Khudair was subjected to beatings, hanging, and electric shocks to sensitive body parts. Most notably, they brought in front of him his close relative, who was naked, and threatened to rape him before Mr. Khudair's eyes if Mr. Khudair did not sign the confession.

¹² *Marques de Morais v. Angola* (CCPR/C/83/D/1128/2002), para. 6.5.

¹³ See, for example, *Boucherf v. Algeria* (CCPR/C/86/D/1196/2003), para. 9.6.

71. Mr. Abdul Hadi was subjected to various types of physical and psychological torture from the moment of his arrest until January 2021. Particularly, he was subjected to beatings with sticks, waterboarding, suffocation with plastic bags, being hung up by his legs and hands, electric shocks on his sensitive body parts, foot whipping with the hands and feet tied (*falqa* method), deprivation of sleep and food, as well as threats of rape of members of his family, of extortion and of bargaining over the company.

72. Mr Al-Hares was subjected to beatings, foot whipping with the hands and feet tied (*falqa* method), electric shocks all over his body including his sensitive body parts, dryboarding with bags put over his head, and waterboarding.

73. Messrs. Khudair, Al-Hares and Abdul Hadi signed statements under duress, and these statements were used against them in court, in violation of the rule of non-admission in any proceedings of evidence obtained by torture or ill-treatment (the “exclusionary rule”) found in article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. During his trial, Mr. Al-Hares requested to be examined by a medical committee for his injuries resulting from the torture, but the judge rejected his request. Although Mr. Abdul Hadi was medically examined, he was sentenced to four years’ imprisonment regardless.

74. This treatment contravenes the absolute prohibition of torture and the prohibition on taking undue advantage of the situation of a detained person for the purpose of compelling them to confess, thus violating article 5 of the Universal Declaration of Human Rights, articles 2, 15 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 8 of the Arab Charter on Human Rights and principles 6 and 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

75. The source recalls that the former Special Rapporteur on extrajudicial, summary or arbitrary executions expressed concerns regarding the serious flaws that had reportedly been affecting the administration of justice in Iraq, including in regard to the independence and competence of the courts.¹⁴ The Human Rights Committee raised concerns “about reports indicating that, in practice, the judiciary is neither fully independent nor impartial”.¹⁵ The European Union Agency for Asylum described the Iraqi judiciary as “having restricted independence and impartiality, with a weak and dependent nature, due to the unstable security situation and historical political conflict. According to sources, the Iraqi judiciary is susceptible to corruption, bribery and political interference, and pressure from religious and tribal forces. Court decisions are reportedly influenced by political and sectarian identity. Abuses by paramilitary groups have gone on with impunity and without being addressed by the judicial system.”¹⁶

76. Messrs. Khudair and Abdul Hadi were sentenced by the Central Anti-Corruption Criminal Court in Karkh. This special court was set up by the Supreme Judicial Council on 16 October 2019 on the basis of article 29 (2) of the Judicial Organization Law, according to which it is permissible to establish more than one criminal court in a governorate by virtue of a statement issued by the Minister of Justice determining its specific and spatial jurisdiction and its seat. The source recalls that article 95 of the Constitution of Iraq provides that “the establishment of special or extraordinary courts is prohibited”. The court is composed of a chairperson, two members, two substitute members, one public prosecutor and one substitute public prosecutor. The hearings for Mr. Khudair’s trial, held in the Federal Court of Cassation preceding the 9 November 2022 decision, were presided over by the same judges who presided at the Central Anti-Corruption Criminal Court during the retrial.

77. The source thus argues that the independence of the judiciary was not provided for and that Messrs. Khudair and Abdul Hadi were not tried before a competent, independent

¹⁴ See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25736>.

¹⁵ CCPR/C/IRQ/CO/6, para. 26.

¹⁶ European Union Agency for Asylum, “The Iraqi State”, June 2019, see <https://euaa.europa.eu/country-guidance-iraq-2021/iraqi-state>.

and impartial tribunal, in violation of article 10 of the Universal Declaration of Human Rights, article 14 of the Covenant and article 13 of the Arab Charter on Human Rights.

78. The source recalls that every person deprived of their liberty has the right to communicate with a counsel of their own choosing, within 48 hours of the arrest at the latest¹⁷ and at all stages of the procedure,¹⁸ and that anyone charged with a criminal offence has the right to adequate time and facilities for the preparation of their defence. The accused must be able to communicate privately with their counsel.¹⁹ It is the duty of the competent authorities to ensure lawyers' access to appropriate information, files and documents in their possession or control in due time.²⁰

79. The source notes that UNAMI reported that in Iraq, access to a lawyer was systematically delayed until after the interrogations. Additionally, detainees had no contact with court-appointed lawyers prior to or during their trial, and the court-appointed lawyers regularly showed no "noticeable substantive involvement", leaving the defendants de facto without any legal defence.²¹ UNAMI further observed that some detainees believed that requests for a lawyer might have a negative impact on their case during the investigation,²² which indicates a climate of intimidation.

80. The source submits that the three individuals' rights to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their choosing were undermined at key stages of the legal proceedings, in contravention of article 14 (3) of the Covenant, principles 15 to 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

81. Mr. Khudair was presented before the investigating judge for the first time six days after his arrest, and he did not have access to legal counsel during the hearing. Mr. Khudair's family was only able to appoint a lawyer to represent him two days before his court hearing and sentencing on 9 February 2021. The lawyer was then able to visit Mr. Khudair in prison for the sole purpose of obtaining his signature for the power of attorney. Mr. Khudair's lawyer was not allowed to speak with him or to have a copy of his case file before the hearing of 9 February 2021. Mr. Khudair's access to legal assistance improved after 2 March 2022 when the Federal Court of Iraq announced the dissolution of Committee No. 29.

82. Mr. Abdul Hadi was presented before the Committee No. 29 investigating judge for the first time 27 days after his arrest, on 24 October 2020. It was in an unofficial place, outside official working hours and without the knowledge of his lawyers. His hearing was conducted without the presence of lawyers of his own choosing. A State-appointed lawyer was present but did not intervene. Furthermore, Mr. Abdul Hadi's lawyers were only able to see him 40 days after his arrest. On 1 September 2021, Mr. Abdul Hadi submitted a complaint against the State-appointed lawyer to the Iraqi Bar Association. In a decision issued on 1 March 2022, the lawyer was suspended for two months on the grounds of "illegal representation" and violation of article 19 of the Constitution of Iraq.

83. Mr. Al-Hares was presented before the investigating judge for the first time 14 days after his arrest. The State-appointed lawyer was present but could not assist his client during the hearing and Mr. Al-Hares was not allowed to speak to him. Mr. Al-Hares was only able to benefit from the assistance of a lawyer of his choosing when his trial took place at Al-Russafa Criminal Court on 5 January 2022. However, his lawyer did not have access to his client's case file until the day of his pleading.

84. Furthermore, the trials and retrials of Messrs. Khudair, Al-Hares and Abdul Hadi consisted of only one hearing, which included the passing of the sentencing. The defendants

¹⁷ Basic Principles on the Role of Lawyers, principle 7.

¹⁸ Ibid., principle 1; and *Gridin v. Russian Federation* (CCPR/C/69/D/770/1997), para. 8.5.

¹⁹ Basic Principles on the Role of Lawyers, principle 22.

²⁰ Ibid., principle 21.

²¹ UNAMI, Human rights in the administration of justice in Iraq, August 2021, p. 13.

²² Ibid., p. 14.

were not able to present arguments, the lawyers were unable to speak with them separately before the hearings, and the court did not investigate the allegations of torture.

85. The rights of Messrs. Khudair, Al-Hares and Abdul Hadi to equality of arms were strongly limited by the following circumstances: their legal counsels did not have access to their case files, the three victims were unable to adduce and challenge evidence and to cross-examine witnesses, and the precarious detention conditions to which they were subjected are likely to have negatively affected and weakened them as defendants, undermining their right to a fair trial.²³

(b) Response from the Government

86. On 3 May 2023, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure, requesting a reply by 3 July 2023. The Working Group regrets that the Government did not submit a reply within the established time frame,²⁴ nor did it seek an extension in accordance with paragraph 16 of the Working Group's methods of work. Consequently, the Working Group cannot accept the reply as if it had been presented within the time limit.

2. Discussion

87. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

88. In determining whether the detention of Messrs. Khudair, Al-Hares and Abdul Hadi is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.²⁵ In the present case, the Government did not, in a timely manner, challenge the *prima facie* credible allegations made by the source.

(a) Category I

89. The source argues that the detention was arbitrary under category I because the three individuals were not presented with arrest warrants at the time of their arrests, and they were not arrested in *flagrante delicto* which would obviate the need for warrants.

90. Article 9 (1) of the Covenant requires, *inter alia*, that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. This means that procedures for carrying out legally authorized deprivation of liberty should be established by law and States parties should ensure compliance with them, including by specifying when a warrant is required.²⁶

91. Article 9 (2) of the Covenant provides that “anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”. The Working Group has previously stated that, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law which may authorize the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case.²⁷ This is typically²⁸ done through an arrest warrant or arrest order (or equivalent document). The reasons for the arrest must be provided immediately upon arrest²⁹ and must include not only the general legal basis of the arrest, but also enough factual

²³ A/HRC/4/40, para. 66.

²⁴ The Government replied to the communication on 29 August 2023, after the opinion had been adopted.

²⁵ A/HRC/19/57, para. 68.

²⁶ Human Rights Committee, general comment No. 35 (2014), para. 23.

²⁷ In cases of *flagrante delicto*, the opportunity to obtain a warrant will typically not be available.

²⁸ Opinions No. 30/2018, para. 39; No. 3/2018, para. 43; and No. 88/2017, para. 27.

²⁹ Human Rights Committee, general comment No. 35 (2014), para. 27; and opinion No. 30/2017, paras. 58 and 59.

specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.³⁰

92. The Working Group notes the source's argument that none of the detainees was presented with an arrest warrant. It has also reviewed the summary of facts provided by the source, which has not been refuted by the Government, and considers that these facts support the source's submission that the lack of arrest warrants rendered the detention arbitrary in the circumstances. In particular, Mr. Khudair was arrested after being taken to the office of the head of Committee No. 29, in connection with a demonstration at the bank where Mr. Khudair worked concerning alleged corruption by the bank's newly appointed manager. There is no indication on the facts that Mr. Khudair was arrested in circumstances in which it was impossible to provide a warrant, such as *flagrante delicto*. Similarly, Mr. Al-Hares was arrested when he had gone to attend a meeting at the Office of the Prime Minister and there is no indication why an arrest warrant could not have been provided to him. Finally, the source asserts that Mr. Abdul Hadi was arrested without a warrant by members of Committee No. 29 at Baghdad Airport, and there is no indication that a warrant could not have been provided. Given the lack of any response by the Government to these claims, the Working Group considers that they have been established. The Working Group finds that the failure to provide warrants led to the detention of the three individuals being arbitrary.

93. The source argues that the arrests and the detention or imprisonment were not carried out by those authorized to do so. It notes that the Federal Court of Iraq issued a decision abolishing Executive Order No. 29 on 2 March 2022 and that this order had served as the basis for Committee No. 29. It notes that Committee No. 29 itself was not mentioned in article 39 of the Criminal Procedure Code, which explicitly lists the members of the judicial police force that have the authority to conduct arrests.

94. Article 9 (1) of the Covenant requires, *inter alia*, that procedures for carrying out legally authorized deprivation of liberty should be established by law and States parties should ensure compliance with their legally prescribed procedure, and compliance with domestic rules that define the procedure for arrest by identifying the officials authorized to arrest.³¹ Similarly, article 17 (2) (b) of the International Convention for the Protection of All Persons from Enforced Disappearance requires that the authorities should "indicate those authorities authorized to order the deprivation of liberty".

95. The Working Group takes note of the source's unchallenged allegation that Messrs. Khudair, Al-Hares and Abdul Hadi were arrested by members of Committee No. 29. Given the unchallenged assertion that these members were not authorized to effect arrests, the Working Group considers that this constitutes a violation of article 9 (1) of the Covenant.

96. The source additionally argues that the detainees were sentenced on the basis of resolution No. 160/1983 of the dissolved Revolutionary Command Council. However, the source does not develop this argument to explain how sentencing on the basis of this resolution constitutes a violation of international human rights law. Moreover, given that a draft law aimed at repealing this resolution remains pending before Parliament, the Working Group considers that it does not have sufficient information regarding the issue to address this claim.

97. The source argues that the detainees were not brought promptly before a judicial officer to verify that there was a proper basis for their arrests.

98. According to article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge is to be brought promptly before a judge to exercise judicial power. As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge or other officer authorized by law following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.³² Additionally, the Criminal Procedure Code attributes the primary responsibility for the interrogation of suspects to the investigating judge or to the judicial

³⁰ Opinion No. 85/2021, para. 69.

³¹ Human Rights Committee, general comment No. 35 (2014), para. 23.

³² *Ibid.*, paras. 32 and 33.

investigator under the supervision of the former, and stipulates that the interrogation must happen within 24 hours.³³ The Human Rights Committee has specified that the authority that reviews detentions is required to be independent, objective and impartial in relation to the issues dealt with, and needs to decide whether the individual in question should be released, or remanded in custody to await trial or to be further investigated.³⁴ Articles 51 and 123 of the Criminal Procedure Code and principles 11 (1) and 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment all support the contention that detainees have the right to be brought before a judge promptly for an independent, objective and impartial review of the basis for their detention.

99. The uncontested facts show that none of the detainees was brought before a judicial officer within 48 hours. Mr. Khudair was presented to the investigating judge six days after his arrest, Mr. Al-Hares 14 days after his arrest and Mr. Abdul Hadi 27 days after his arrest. There is no indication that these delays were a result of any exceptional circumstances which could justify exceeding the normal 48 hours.

100. Moreover, the detainees were brought before investigating judges rather than independent judicial officers. The source notes that UNAMI considers that the right to independent, objective and impartial review of arrest cannot be guaranteed by the investigating judge, given the role of the latter in Iraq as the investigating authority which has control over the defendant. In this regard, the Working Group recalls that the Human Rights Committee, in its general comment No. 32 (2007), stated that the requirement of competence, independence and impartiality of a tribunal in the sense of article 14 (1) of the Covenant was an absolute right that was not subject to any exception.³⁵ An investigating judge who has been involved in charging an accused person cannot be said to be independent for the purpose of reviewing the basis of the detention.³⁶

101. On the basis of the uncontested facts, the Working Group considers that the failure to bring the detainees before judicial officers within 48 hours and the failure to provide them with an independent, objective and impartial review of their detention violated article 9 (3) of the Covenant.

102. The source submits that the detainees were held incommunicado and that this rendered their detention arbitrary. It submits that this impeded their ability to challenge the legality of their detentions by making them unable to access legal counsel. It adds that unlawful restrictions on the right of contact with the outside world, particularly when prolonged, may constitute ill-treatment or even torture.

103. The Working Group recalls that holding persons incommunicado prevents prompt presentation before a judge, as set forth in article 9 (3) of the Covenant,³⁷ and violates the right under article 9 (4) to challenge the lawfulness of the detention before a court.³⁸ Judicial oversight of detention is a fundamental safeguard of personal liberty³⁹ and is essential in ensuring that detention has a legal basis. Moreover, prohibiting contact with the outside world may violate rule 58 of the Nelson Mandela Rules⁴⁰ and principles 15, 16 (1) and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

104. All three detainees had their contact with the outside world significantly restricted after their detention. Mr. Khudair was not allowed visits or phone calls for approximately four months after his arrest. His lawyer was only allowed to see him to sign a proxy representation document, before the trial of February 2021 and the retrial of June 2022, but was not allowed to speak with him. Mr. Al-Hares' family was not able to contact him until

³³ See arts. 51 and 123 of the Criminal Procedure Code.

³⁴ See the Committee's general comment No. 35 (2014), para. 32.

³⁵ See para. 19.

³⁶ Opinion No. 76/2018.

³⁷ Human Rights Committee, general comment No. 35 (2014), para. 35.

³⁸ Opinions No. 25/2021, No. 45/2019, No. 44/2019, No. 9/2019 and No. 35/2018.

³⁹ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, para. 3; and [CAT/C/VNM/CO/1](#), para. 24.

⁴⁰ Opinions No. 35/2018, para. 39; No. 44/2019, paras. 74 and 75; and No. 45/2019, para. 76.

two weeks after his arrest and his lawyer was not able to contact him before the end of his trial. Mr. Abdul Hadi's family and lawyer were only able to visit him 40 days after his arrest.

105. The Working Group considers that these circumstances demonstrate that the incommunicado nature of the detention was contrary to rule 58 of the Nelson Mandela Rules⁴¹ and principles 15, 16 (1) and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and that it violated their right to challenge their detention under article 9 (3) of the Covenant and principles 11 (1) and 32 of the Body of Principles. Given that the three individuals were unable to challenge the lawfulness of their detention, their right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated. The Working Group also recalls that the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴²

106. Furthermore, the Working Group considers that the detainees were subjected to enforced disappearance, in breach of article 9 (1) of the Covenant. The family of Mr. Khudair and of his close relative did not know their whereabouts after their arrests on 7 September 2020. Despite searching for them and reporting the disappearance to the police and the High Commission for Human Rights, they were only told on 13 September 2020 to check with the Office of the Prime Minister, as that was where Mr. Khudair had last been seen, and then on 17 September 2020 they found out through the media that Mr. Khudair and his close relative had been arrested. Enforced disappearances are prohibited by international law and constitute a particularly aggravated form of arbitrary detention.⁴³ They are also inherently arbitrary, as they place the person outside the protection of the law, in violation of article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.

107. The source submits that it is not clear that any basis for pretrial detention was established by the investigating judge. It notes that Mr. Al-Hares' pretrial detention exceeded the normal maximum period of six months.

108. Article 9 (3) of the Covenant provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody". The Working Group recalls the Human Rights Committee's view that pretrial detention should be an exception and be as short as possible, and must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. Courts must examine whether alternatives to pretrial detention, such as bail or other conditions, would render detention unnecessary in the particular case.⁴⁴

109. The Working Group considers that, given the lack of any government submission to the contrary, there is no indication that individualized determinations of the circumstances of Messrs. Khudair, Al-Hares and Abdul Hadi were conducted. As a result, their detention lacked a legal basis and was ordered in violation of article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

110. In the light of the above, the Working Group concludes that their deprivation of liberty is arbitrary under category I.

(b) Category III

111. The source submits that Messrs. Khudair, Al-Hares and Abdul Hadi were tortured in the detention centre of the Investigations Directorate of the Anti-Terrorism Service at Baghdad Airport. They signed statements under duress, and these statements were used

⁴¹ Ibid.

⁴² A/54/44, para. 182 (a).

⁴³ Opinions No. 5/2020, No. 6/2020, No. 11/2020 and No. 13/2020. See also Human Rights Committee, general comment No. 35 (2014), para. 17.

⁴⁴ See the Committee's general comment No. 35 (2014), para. 38.

against them in court, in violation of the rule of non-admission in any proceedings of evidence obtained by torture or ill-treatment.

112. The Working Group notes that, according to the uncontested submissions, the three detainees were subjected to severe forms of mistreatment. As noted above, this included beatings, and electrocution of sensitive body parts, along with foot whipping with the hands and feet tied (*falqa* method), deprivation of sleep and food, and threats that family members would be raped and subjected to extortion. In these horrific circumstances, they signed statements, which were used against them in court.

113. The Working Group is concerned about the above-mentioned unrefuted allegations of torture and ill-treatment and of extraction of confessions under duress. It recalls that the admission into evidence of a statement allegedly obtained through torture or ill-treatment renders any trial proceedings inherently unfair, regardless of whether other evidence was available to support the verdict. These matters were raised during trial, such as when Mr. Al-Hares requested to be examined by a medical committee for his injuries resulting from the torture but the judge rejected his request. The Working Group considers that such acts contravene the absolute prohibition of torture and the right to a fair trial guaranteed under articles 5, 10 and 11 of the Universal Declaration of Human Rights, articles 7 and 14 of the Covenant and principles 6 and 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In the light of the severity of the treatment suffered by the three detainees, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

114. The source submits that two of the detainees, Messrs. Khudair and Abdul Hadi, were not tried before a competent, independent and impartial tribunal established by law, as the Central Anti-Corruption Criminal Court in Karkh did not meet those criteria (Mr. Al-Hares' trial took place at Al-Russafa Criminal Court).

115. The Working Group recalls that under article 14 (1) of the Covenant, everyone has the right to be tried by a competent, independent and impartial tribunal. It notes that Messrs. Khudair and Abdul Hadi were sentenced by the Central Anti-Corruption Criminal Court in Karkh, which had been established by the Supreme Judicial Council, according to the source in violation of article 95 of the Constitution of Iraq which provides that "the establishment of special or extraordinary courts is prohibited". The Working Group also notes the source's uncontested submission that the hearings for Mr. Khudair's trial, held in the Federal Court of Cassation preceding the 9 November 2022 decision, were presided over by the same judges who presided at the Central Anti-Corruption Criminal Court during the retrial.

116. On the basis of these uncontested allegations, the Working Group is satisfied that Messrs. Khudair and Abdul Hadi were not tried before a competent, independent and impartial tribunal, in violation of article 10 of the Universal Declaration of Human Rights and article 14 of the Covenant. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers.

117. The source submits that the three individuals' rights to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their choosing were undermined at key stages of the legal proceedings, in contravention of article 14 (3) of the Covenant, principles 15 to 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

118. The Working Group recalls that access to counsel is a right enshrined under article 14 (3) of the Covenant and principles 11 (2), 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. All persons deprived of their liberty have the right to legal assistance by counsel of their choosing at any time during their detention, including immediately after their apprehension, and such access

is to be provided without delay.⁴⁵ The right to legal assistance is essential element of the right to fair trial, as it serves to ensure that the principle of equality of arms is duly observed.⁴⁶ Moreover, a person who has had charges brought against them has the right to adequate time and facilities for the preparation of their defence, as guaranteed under article 14 (3) (b) of the Covenant.

119. The Working Group considers that these rights were violated in several respects during the proceedings against the three detainees. It has already noted that the three detainees were deprived of effective access to counsel during the pretrial period, and that this undermined their rights to challenge the basis for their detention under article 9 (3) of the Covenant. Additionally, the Working Group notes the source's unrefuted assertion that Mr. Khudair's family was only able to appoint a lawyer to represent him two days before his trial and sentencing on 9 February 2021. As noted, the lawyer was then only able to visit Mr. Khudair in prison to obtain his signature for the power of attorney and was not allowed to speak with him or to receive a copy of his case file before the trial hearing of 9 February 2021.

120. Mr. Abdul Hadi was presented before the investigating judge for the first time outside official working hours and without the knowledge of his lawyers. A State-appointed lawyer who was present made no interventions on his behalf. Later, after Mr. Abdul Hadi made a complaint against the State-appointed lawyer, the lawyer was suspended for two months by the Iraqi Bar Association for his violation of article 19 of the Constitution of Iraq.

121. Mr. Al-Hares had a State-appointed lawyer at his initial hearing, but the lawyer could not assist him and Mr. Al-Hares was not allowed to speak to him. Ultimately, Mr. Al-Hares only benefited from the assistance of a lawyer of his choosing at his trial at Al-Russafa Criminal Court on 5 January 2022, but even that lawyer did not have access to the case file until the day of his pleading.

122. The Working Group notes that the trials and retrials of Messrs. Khudair, Al-Hares and Abdul Hadi consisted of only one hearing, which included the passing of the sentencing. At the trials, the defendants could not present arguments, their lawyers could not speak with them separately before the hearings, and the court did not investigate the allegations of torture. Moreover, Messrs. Khudair, Al-Hares and Abdul Hadi were not permitted to adduce and challenge evidence and to cross-examine witnesses.

123. The Working Group considers that these facts constitute violations of article 14 (3) of the Covenant, principles 15 to 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

124. The Working Group thus concludes that the numerous violations of the rights of Messrs. Khudair, Al-Hares and Abdul Hadi to a fair trial and due process, mentioned above, were of such gravity as to render their deprivation of liberty arbitrary under category III.

3. Disposition

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

The deprivation of liberty of Adel Attia Khudair, Raad Mohsin Ghazi Al-Hares and Bahaa Abdul Hussein Abdul Hadi, being in contravention of articles 3, 6, 8, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 2, 9, 14 and 16 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

126. The Working Group requests the Government of Iraq to take the steps necessary to remedy the situation of Messrs. Khudair, Al-Hares and Abdul Hadi without delay and bring

⁴⁵ United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9 and guideline 8; Human Rights Committee, general comment No. 35 (2014), para. 35; [A/HRC/48/55](#), para. 56; and [A/HRC/45/16](#), paras. 50–55. See also [A/HRC/27/47](#), para. 13.

⁴⁶ See, for example, opinion No. 35/2019.

it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

127. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Messrs. Khudair, Al-Hares and Abdul Hadi immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law.

128. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Messrs. Khudair, Al-Hares and Abdul Hadi and to take appropriate measures against those responsible for the violation of their rights.

129. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

130. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

4. Follow-up procedure

131. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Messrs. Khudair, Al-Hares and Abdul Hadi have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Messrs. Khudair, Al-Hares and Abdul Hadi;
- (c) Whether an investigation has been conducted into the violation of the rights of Messrs. Khudair, Al-Hares and Abdul Hadi and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Iraq with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

132. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

133. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as of any failure to take action.

134. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.⁴⁷

[Adopted on 28 August 2023]

⁴⁷ Human Rights Council resolution 51/8, paras. 6 and 9.