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DATE: 29 November 2019

ATO: His Excellency
Mr. Morten Jespersen
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OBJET/SUBJECT: **COMMUNICATION FROM SPECIAL PROCEDURES**

Please find attached a communication sent by the Special Rapporteur on extrajudicial, summary or arbitrary executions.

I would be grateful if this letter could be transmitted at your earliest convenience to His Excellency Mr. Jeppe Kofod, Minister for Foreign Affairs.

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

REFERENCE:
AL DNK 3/2019

29 November 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 possible adoption of measures, announced by the Danish Government, to exclude Danish nationals allegedly associated with the Islamic State of Iraq and the Levant (ISIL) and/or other similar groups, from accessing their right to consular assistance.**

According to the information received:

On 24 October 2019, Denmark adopted legislation that would allow dual-national citizens who joined armed groups, such as the IS, to be stripped of their Danish nationality. The law is said to have been adopted with a fast-track procedure to reduce the risk that Danish ISIL members return to Denmark, in particular in the context of the military operations currently ongoing in the north-eastern part of Syria.

Further, on 16 November 2019, His Excellency the Minister of Foreign Affairs of Denmark announced that the Government would adopt measures to ensure that Danish ISIL fighters would have no right to obtain consular assistance¹.

¹ <https://twitter.com/JeppeKofod/status/1195671612835745792>

His Excellency
Mr. Jeppe Kofod
Minister for Foreign Affairs

It is estimated that about 40,000 foreigners², including an unspecified number of Danish nationals³, may have travelled to Iraq and/or Syria in the past years to join the IS.

Recent elements of background:

In Iraq, the majority of foreign fighters accused of having served in the ranks of the ISIL are prosecuted under the Anti-Terrorism Law no. 13 of 2005. The law contains a definition of terrorism that is vague and overly broad. Pursuant to this law, even petty crimes, such as vandalism, may be considered as a terrorist act. In addition, the law does not require proof of terrorist intent. As a result, an individual can face trial on terrorism charges and can be sentenced to death for a non-violent crime committed without the 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.

Furthermore, concerns have repeatedly been expressed, including by the United Nations Assistance Mission for Iraq (UNAMI) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), 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; allegations of torture and other ill-treatments and the use of forced confessions. In a joint report, UNAMI and OHCHR 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 fair trial⁴.

The accused, as well as their lawyers, are allegedly not given sufficient time to adequately prepare their defence. Defendants who do not speak Arabic are not always given the opportunity to be assisted by an interpreter and may therefore be forced to sign written statements without a translation. The trials are reportedly conducted in an expeditious manner. The hearings allegedly only last a very short time and are held without adversarial procedure. Therefore, the risk that, in Iraq, alleged IS fighters, including Danish nationals, may be subject to torture, sentenced to death and executed, as a result of an unfair trial, is extremely high.

As Special rapporteur on extrajudicial, summary or arbitrary executions, I have also repeatedly denounced the fact that victims of the ISIL as well are deprived of due process and access to justice. Crimes committed by ISIL concern a large number of victims within and beyond Iraq. But victims are not participating in the trials of alleged

² <https://www.un.org/press/en/2017/sc13097.doc.htm>

³ <https://www.euractiv.com/section/politics/news/denmark-to-strip-foreign-fighters-of-danish-citizenship/>

⁴ UNAMI/OHCHR, *Report on the Protection of Civilians in the Armed Conflict in Irak*, 11 December 2014, 30 April 2015, p. 22.

ISIL fighters or present their testimony as witnesses. The trials are largely failing to deliver accountability and reparations to ISIL victims, and do not allow for the crucial process of truth telling.

While I do not wish to prejudge the accuracy of the information above, I would like to refer your Excellency's Government to article 2 of the Universal Declaration of Human Rights and article 6 (1) of the International Covenant on Civil and Political Rights (ICCPR), which respectively guarantee the right of every individual to life and security and provide that these rights shall be protected by law and that no one shall be arbitrarily deprived of his or her life.

Furthermore, I wish to refer to articles 5 and 7 of the UDHR and the ICCPR which spell out the absolute prohibition of torture. The ICCPR sets out specific safeguards to ensure that when not prohibited, the death penalty is applied only in the most exceptional cases and under the strictest limits. The Human Rights Committee has specified that excessively vague definitions of crimes for which the death penalty may be imposed are inconsistent with article 6 (2) of the ICCPR⁵.

Likewise, article 5 of the United Nations Safeguards protecting the rights of those facing the death penalty (1984) provides that capital punishment may only be carried out pursuant to legal procedures which guarantee all necessary safeguards to ensure a fair trial, which must be at least equivalent to those contained in Article 14 of the ICCPR. This is so because only full respect for the most stringent due process guarantees distinguishes capital punishment, as possibly permitted under international law, from an arbitrary execution.

Resolution 2178 of the UN Security Council addressed the issue of "foreign terrorist fighters" and explicitly called on States to ensure that international human rights law is respected in their responses to any threat posed by them. The same principle is stated in the United Nations Global Strategy on Counter Terrorism adopted by consensus by the General Assembly in 2006. Similar calls are also contained in regional anti-terrorism legal instruments and in the Guidance to States on human rights-compliant responses to the threat posed by foreign fighters⁶, which was issued in 2018 by the United Nations Counter-Terrorism Implementation Task Force Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism. In this regard, I should like to observe, however, that Resolution 2178 does not provide for a definition of terrorism or of terrorist acts. This may fuel - and has fueled - the adoption of measures by domestic jurisdictions that rely on vague or overly broad definitions of terrorism and fail to clearly delineate the proscribed conduct. I would like to reiterate that vague or overly broad definitions of terrorism violate the principle of legality, which requires that the imposition of criminal liability is limited to clear and precise provisions with respect for the principle of certainty of the law.

⁵ CCPR/CO/75/VNM, para 7

⁶ <https://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf>

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, adopted on 19 May 2015, demands that State parties ensure that “the implementation of this Protocol... is carried out while respecting human rights obligations...as set forth in the [European] Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights and other obligations under international law”. The Declaration of the Organization for Security and Cooperation in Europe on its role in countering the phenomenon of foreign fighters, adopted on 5 December 2014, also calls on States to respect their obligations under international law, including international human rights law, international refugee law and international humanitarian law, when responding to the phenomenon.

Against this background, I wish to note that Your Excellency’s Government retains a protective surveillance obligation over its citizens abroad to ensure that their rights remain protected under international human rights law. Denmark can therefore invoke consular protection over its nationals that are in a State that fails to conform to international law.

In my latest report to the General Assembly⁷, I argued that, under international human rights law, access to consular assistance is a human right which imposes distinct but complementary obligations on both the prosecuting State and the home State and that the failure of the home State to provide adequate consular assistance amounts to a violation of its responsibility to protect the right to life.

The responsibility of States to protect the right to life may, in fact, be invoked extraterritorially in circumstances where a particular State has the capacity to protect against an immediate or foreseeable threat to life. The determination as to whether a State has acted with due diligence to protect against unlawful death is based on an assessment of: (a) how much the State knew or should have known of the risks; (b) the risks or likelihood of foreseeable harm; and (c) the seriousness of the harm⁸.

Given the known, credible and foreseeable risks faced by alleged ISIL fighters and other associated to that movement in Iraq and possibly in Syria, the failure to provide them with adequate consular assistance can be considered as tantamount to potentially exposing them to torture and/or the unlawful imposition of the death penalty. Thus, in the case of death penalty, a State’s decision to withhold consular assistance, as it was announced by Your Excellency’s Government, could make that State complicit in an arbitrary killing⁹.

I wish to stress that human rights are inherent to all human beings. They cannot be arbitrarily “cancelled”, no matter how repugnant the crime they are accused of may have been. Where a State has committed to uphold the prohibition against the death penalty, that obligation must be applied universally, including with regard to all nationals abroad.

⁷ A/74/318: <https://digitallibrary.un.org/record/3826491?ln=en>

⁸ Ibid., para 34

⁹ Ibid., paras 55-57

Heinous crimes may be the toughest tests of a State's commitment to abolitionism, but to allow such acts to vanquish that commitment corrodes the very foundation of human rights, eating away at the State's human rights guarantees domestically, and, by example, sending a chilling message about the commitment to human rights internationally¹⁰.

Consular assistance should therefore be granted to all nationals abroad without discrimination. Should a State party to the ICCPR like Denmark decide to exclude an individual from the provision of consular assistance based on his/her purported crime, this would violate both the State's obligation to protect the right to life and the prohibition against discrimination¹¹. In fact, foreign nationals detained abroad, who are accused of the most serious or heinous crimes, demand heightened diligence on the part of the home State, not less¹².

In this regard, I also wish to stress that the practice, observed in some States, to strip defendants detained abroad of their citizenship, for the purpose of removing the State's obligation to protect those individuals, may be a breach of the State's obligation to protect these individuals' right to life, when that may have a foreseeable and directly impact on their right to life. This is in fact a highly likely circumstance if the defendants are charged with crimes punishable by death, such as under counter-terrorism provisions¹³, as it is in the present case.

Denmark abolished the death penalty in 1930. It ratified Protocol no. 13 to the European Convention for the protection of human rights and fundamental freedoms, concerning the abolition of the death penalty in all circumstances, in 2002. It also ratified the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, in 1994.

Denmark is a signatory of the Vienna Convention on Consular Relations, and is thus entitled to protect the rights of its own nationals detained in a foreign country, as per Articles 5 (Consular functions) and 36 (Communication and contact with nationals of the sending state).

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

I therefore respectfully recommend to Your Excellency's Government to make sure that adequate consular protection is granted to all Danish nationals in Iraq and/or Syria; to take every possible action to protect them from being tortured and/or arbitrarily deprived of their life; and to repatriate them as soon as possible so that they can be tried in a manner consistent with international law.

¹⁰ Ibid., para 108

¹¹ Ibid., para 61

¹² Ibid., para 62

¹³ Ibid., para 42

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 information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide detailed information on the legislation reportedly adopted by Denmark allowing for the stripping of the Danish nationality in cases of dual-citizens accused of having joined armed groups in Syria or Iraq. Please explain how is that consistent with Denmark's international human rights obligations, particularly in terms of respect for the right to life and the principle of non-discrimination;
3. Please provide detailed information about the procedure envisaged with regard to the implementation of that legislation;
4. Please provide detailed information about measures thus far taken by Denmark to provide consular assistance to Danish nationals in Iraq accused of membership to ISIL, or other similar groups, and please explain how would they be consistent with Denmark's international human rights obligations to protect the right to life and the principle of non-discrimination are concerned.
5. Please provide detailed information about the measures announced by the Government that Danish ISIL fighters would have no right to obtain consular assistance, how these measures will be practically implemented, and on the basis of what criteria;
6. Please provide information, disaggregated to the extent possible by age and sex or gender, on Danish nationals currently known to be in Iraq and/or Syria. Please explain whether they are held in situations of deprivation of liberty, or are awaiting trial, and if so for what charges, or have been sentenced to death. Please indicate whether these information were ever officially sought from the relevant authorities in Iraq and/or Syria.
7. Please explain whether consular protection was thus far extended to any national of Denmark allegedly associated to ISIL, or other similar groups in Iraq and/or Syria, and provide information on the steps taken to ensure full respect of their human rights. If no action was undertaken, please

explain why and how this was consistent with Denmark's international human rights obligations. Please explain whether Denmark has ever tried to seek the extradition of Danish nationals, allegedly associated to ISIL or other similar groups in Iraq and/or Syria, or whether any step was ever taken to facilitate their repatriation.

8. Please provide information as to whether your Excellency's Government may be aware of an alleged agreement or practice, aiming at facilitating the transfer of foreign nationals, held in Northern Syria, to Iraq.
9. Please indicate whether Your Excellency's Government has provided the families of Danish nationals facing trial or execution, or sentenced to death for terrorism in Iraq or Syria, with any information related to their conditions of detention, the trial or the execution.
10. Please explain what is the position of your Excellency's Government on the administration and the functioning of the justice system in Iraq, particularly in terrorism cases.
11. Please explain what is the position of Your Excellency's Government on the possibility of setting up an ad hoc or hybrid international tribunal to prosecute alleged ISIL 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.

I would greatly appreciate a response to this communication at the earliest convenience of Your Excellency's Government, given the importance for the respect of human rights of the new policy reportedly announced by the Government of Denmark. In this regard, I may consider to express my concerns and views publicly. Any public statement on my part will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question. It would also reflect any response received from the Government.

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, we would like to refer your Excellency's Government to Article 3 of the Universal Declaration of Human Rights which states that "Everyone has the right to life, liberty and security of person".

Furthermore, Article 6 (1) of the International Covenant on Civil and Political Rights states that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

Article 6 of the ICCPR also specifies in paragraph 2 that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court".

In this regard, we wish to recall that the Human Rights Committee expressed the view that "the definition of certain acts (...) for which the death penalty may be imposed, are excessively vague and are inconsistent with article 6, paragraph 2, of the Covenant." (CCPR/CO/75/VNM, para 7).

Articles 5 and 7 of the UDHR and ICCPR respectively state that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Circumstances surrounding the actual imposition or execution of the death penalty can also constitute cruel, inhuman or degrading treatment or punishment or even torture. As such, the harshness of the death penalty goes beyond the execution itself. Physical or mental torture or other cruel, inhuman or degrading treatment or punishment may be inflicted on a convict and his or her relatives awaiting execution at different stages of his or her time in detention. (A/67/279, para. 75)

Pursuant to Article 5 of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984, "(c)apital punishment may only be carried out pursuant to a final judgment 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".

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. (...)"

The right to truth about gross human rights violations, including massive violations of the right to life, is an inalienable and autonomous right. The right of victims to access justice and participate in criminal proceedings against perpetrators has also been recognised under international human rights law as well as under the international counter-terrorism framework. Article 12 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁴ insists that "A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law" and that "In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate."

The updated set of principles for the protection and promotion of human rights through action to combat impunity¹⁵ emphasizes as well the meaningful role of victims and other sectors of civil society in transitional justice processes. The right of victims of terrorism to participate to court proceedings has also been recognized in the context of

¹⁴ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

¹⁵ <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx>

counter-terrorism. States ought to provide victims or victims' family with the information necessary to exercise any rights they may have in domestic law to participate in criminal proceedings and to establish a support service to assist victims of terrorism throughout the process¹⁶ (A/HRC/20/14; UNODC Good practices in supporting victims of terrorism within the criminal justice framework.).

¹⁶ A/HRC/20/14: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14_en.pdf; and UNODC Good practices in supporting victims of terrorism within the criminal justice framework: https://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf