

OPINION No. 26/2007 (Israel)**Communication addressed to the Government on 2 April 2007.****Concerning Mr. Issam Rashed Hasan Ashqar.****The State is a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 14/2007.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 15/2007.)
4. In the light of the allegations made the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source and received its comments.
5. The Working Group believes that it is in a position to render an opinion on the facts and circumstances of the cases, in the light of the allegations made and the response of the Government thereto, as well as the observations by the source.
6. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:
7. Mr. Issam Rashed Hasan Ashqar (hereinafter Issam Ashqar), born on 16 June 1958, holds a Palestinian identity card issued by the Israeli Civil Administration of the West Bank. He is a lecturer of physics at An-Najah National University in Nablus and author of scientific publications. His usual place of residence is in Nablus in the Al-Ma'ajeen neighbourhood.
8. Issam Ashqar was arrested by Israeli military forces at his home in Nablus on 2 March 2006. The arrest warrant had been issued by the Israeli Defence Forces' (IDF) Military Commander of the West Bank. His family was not informed about where he was taken and unsuccessfully searched for him. However, the International Committee of the Red Cross (ICRC) later on found out and informed them that he had been detained for four days at the Howara Military Camp. Thereafter, due to high blood pressure and breathing problems, he was taken to Belinson Hospital in Betah Tikva, from where he was subsequently transferred to Ofer Military Prison. Due to continuing medical problems Issam Ashqar has been repeatedly transferred to hospital.
9. The Military Commander of the West Bank issued a six month administrative detention order on 14 March 2006. On 27 March 2006, a session of the military court was held in the presence of the military judge, the prosecutor, the detainee and his defence counsel. Issam Ahqar was accused of supporting terrorism. His lawyer requested details of the activities supporting terrorism Issam Ashqar was charged with, but the prosecution objected, stating that the evidence of these activities had to

remain confidential. The military judge held a closed session only with the prosecutor, excluding Issam Ashqar and his lawyer, to review the evidence.

10. Thereafter, the military judge issued a decision confirming the six months detention order on the ground that Issam Ashqar poses a danger for the security of the territory and the public, stating however that it ran from 2 March 2006 (the date of arrest) until 1 September 2006. In his decision, the military judge stated that in order to protect public security none of the confidential material he had been shown should be disclosed. He explained that credible intelligence material proved that the detainee was involved in terrorist activities within the Hamas organization. The military judge concluded that he was thus persuaded that “it is necessary and right to put the said detainee in administrative detention so as to defend the security of the territory and the safety of the public in addition to neutralizing the potential future danger associated with the said detainee.”

11. The findings and conclusions of the military judge were upheld by the appeals judge in a decision of 30 April 2006.

12. The administrative detention order was renewed at the beginning of September 2006 and Issam Ashqar continues to be detained.

13. The source alleges that the detention of Issam Ashqar is arbitrary. While the Israeli authorities claim that administrative detention is a preventive measure, it is in fact a form of punishment for Palestinians who are suspected of committing security violations. This punishment nature of administrative detention is proven by the duration such detention can take. The source mentions the case of Waleed Khaled Husni Ali of the village Shaka in Salefeet District, who has been detained on the basis of three-month administrative detention orders since 30 July 2001.

14. The source argues that, therefore, articles 9, paragraph 2, and 14 of the International Covenant on Civil and Political Rights) should be applied to these cases. These articles are, according to the source, patently violated, inter alia, by:

(a) The non-public nature of the hearings before the military judge, which can be attended only by the detainee, his lawyer, the judge, the military district attorney and sometimes intelligence officers;

(b) The failure of the authorities to provide the detainee with prompt and sufficient information about the reasons for his arrest;

(c) The fact that the judge decides on the basis of secret evidence, which prevents the detainee from being able to effectively challenge the grounds for his detention.

15. According to the source, the Israeli authorities claim that this form of administrative detention is in accordance with article 78 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention), which reads:

“(1) If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

(2) Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in

accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

(3) ...”

16. At the same time, however, the Israeli Government denies that the Fourth Geneva Convention is applicable to the territories occupied by Israel in 1967. Moreover, even assuming article 78 of the Fourth Geneva Convention was applicable, Israel could not rely on it to justify its administrative detention practice, because the high number of Palestinian administrative detainees (810 as of May 2006) is incompatible with the exceptional nature of the deprivation of liberty allowed by article 78. Furthermore, detention lasting for several years cannot be justified as a “safety measure”, which is “necessary, for imperative reasons of security”. Its duration belies the label “safety measure” and reveals the punitive nature. As a consequence, the guarantees applicable to criminal proceedings should apply.

17. In its response the Government emphasizes the struggling with terrorism and the growing numbers of terrorist attacks targeting Israeli civilians. It states that where sufficient and admissible evidence exists against an individual, that individual is brought to justice. However, sometimes, for reasons of confidentiality and protection of intelligence sources, evidence cannot be presented in court. In these circumstances, administrative detention provides an effective and lawful counter measure against terrorist attacks. According to the Government this measure may only be used when the evidence in existence is clear, concrete and reliable, but cannot be presented as evidence in ordinary criminal proceedings for the reasons stated above.

18. The Government recalls that the use of administrative detention measures against detainees who pose a danger to public security is recognized by international law and is in full conformity with article 78 of the Fourth Geneva Convention. The Government further notes that an administrative detention order is limited to six months and subject to judicial review. Its extension requires a re-evaluation of the relevant intelligence material as well as further judicial review.

19. Local legislation governing the process grants individuals the right to appeal to the Military Court of Appeals for judicial review of the order. Petitioners may be represented by counsel of their choice at each and every stage of these proceedings. Additionally, all individuals have the right to petition the Israeli High Court of Justice for a repeal of the order. The judicial organs scrutinize these orders, carefully examining in each case whether the criteria outlined in case law and legislation are fully met.

20. The Government confirms that an administrative detention order against Mr. Ashqar was first issued in 15 March 2006, for a period of six months, on grounds of endangering the public security in the area. On 16 March 2006 and again on 27 March 2006, the administrative detention order was judicially reviewed and approved by the Military Court which examined the confidential material upon which the administrative detention order had been based. The Military Court held that Mr. Ashqar was involved in distinct military activity within the Hamas terrorist

organization, and further pointed to the still existent danger posed by him, and ruled that the detention order would remain effective until its expiration date of 1 September 2006.

21. Mr. Ashqar appealed this decision on 30 April 2006. The Military Court of Appeals, which examined the confidential material, stated that it was reliable and held that its exposure would cause damage to the security of the area. The Court concluded that securing the safety of the area and the public requires that Mr. Ashqar remains in custody and approved the decision of the lower court.

22. On 16 July 2006 Mr. Ashqar submitted a petition to the Supreme Court against the Military Court of Appeals' decision. The petitioner claimed that there was no evidence justifying his administrative detention and that the detention was derived from alien considerations. In addition, he claimed that he had a severe medical condition and that his detention caused damage to students under his supervision in AI Najah University in Nablus, where he served as a physics professor.

23. Following an examination of the confidential material, the Supreme Court informed the petitioner that the respondent agreed to consider allowing the petitioner to exit the country for a period of three years as an alternative to administrative detention. Beyond that, the Court did not find any reason for intervention in the respondent's decision. Accordingly, the petitioner requested to strike off his petition.

24. On 30 August 2006, the military commander ordered the extension of the administrative detention for additional six months on grounds of endangering the public security in the area. On 5 September 2006, the Military Court again examined the confidential material and re approved the detention order. Mr. Ashqar appealed to the Military Court of Appeals against the lower court's decision to re approve the extension of his administrative detention. On 27 September 2006, the Court of Appeals rejected the appeal and approved the decision of the lower court.

25. On 21 December 2006, Mr. Ashqar petitioned the Military Court of Appeals' decision to the Supreme Court. The petitioner denied the accusations against him and claimed that the extension of his administrative detention was not proportional since he has no criminal or security record and because of his severe medical condition. The State reiterated that administrative detention was the only way to protect the public and the security of the region against the severe danger expected from the petitioner. Following the recommendation of the Supreme Court, Mr. Ashqar requested to strike off his petition on 7 February 2007. Since then, Mr. Ashqar's administrative detention has been periodically renewed and is to expire on 27 October 2007.

26. In its comments on the observations of the Government, the source maintains its previous allegations and put forward the following arguments to support the assertion that the deprivation of liberty of Mr. Ashqar is arbitrary:

(a) The Israeli Government informed that administrative detention is sometimes used to maintain undisclosed secret intelligence information. The available statistics show that the total number of Palestinians administratively detained in Israeli prisons range from 9,000 – 10,000 detainees, including children and women. This means that the Israeli authorities often resort to administrative

detention rather than sometimes which contradicts the principle according to which administrative detention was enacted in article 78 of the Fourth Geneva Convention.

(b) Regarding the statement of the Government that such kind of detention provides efficient and legal means in confronting terrorist attacks, the source recalls that the Israeli judiciary already permitted torture of Palestinian detainees during interrogation periods under the pretext of what is called “the human ticking bomb” despite the fact that the international law does not, in any way, tolerate torture as well as the arbitrary detention.

(c) Referring to the Israeli claim that administrative detention is limited to a six-month period and that the extension of the detention period is subject to review of the intelligence information and a judiciary review as well, the source indicates that this claim is only true in theory. In reality, hundreds of Palestinians have been administratively detained for three to four years. This proves that the judiciary and intelligence review of the files every six months is only formalistic and is simply a way to legalize the administrative detention. As the lawyer is not aware of the evidence and proof against his client, and he is not allowed to question the witnesses, in most of the cases, the courts reject the presented disapproval and support the detention extension decisions based on the same secret information presented. Issam Ashqar is confronted with exactly the same situation.

27. The Working Group notes that the Government claims that Mr. Ashqar’s prolonged (more than 20 months) administrative detention is in full conformity with article 78 of the Fourth Geneva Convention. The Working Group recalls that the Fourth Geneva Convention makes it explicitly clear that internment and assigned residence are the most severe measures of control that a detaining authority or Occupying Power may take with respect to protected persons against whom no criminal proceedings have been initiated. In both cases it is stipulated that recourse to these measures may be had only if the security of the Occupying Power renders it “absolutely necessary” (article 42) or for “imperative reasons of security” (article 78). The Working Group notes, however, that according to documented information, administrative detention against Palestinians of the Occupied Territories is not used as an exceptional measure by Israel.¹¹

28. In addition the Working Group notes that although the Government bases Mr. Ashqar’s administrative detention on a provision of the Geneva Conventions, he continues to benefit from the protection afforded by international human rights norms, namely those of the International Covenant on Civil and Political Rights as undertaken by Israel.¹² Accordingly, Mr. Ashqar’s detention should not only be in

¹¹ See the concluding observations of the Human Rights Committee on the second periodic report of Israel (CCPR/CO/78/ISR3, para.12). See also the report to the Human Rights Council of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard (A/HRC/4/17, 2007, para. 43).

¹² In relation to this observation the Working Group recalls that the Human Rights Committee has clarified, in its general comment No. 31 (2004), paragraph 1, that “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable.” Before the adoption of this general comment, the Committee had expressed its view, in its concluding observations on the second periodic report of Israel where it is said that “that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation.” (CCPR/CO/78/ISR, para. 11). Similarly, the

conformity with article 78 of the Fourth Geneva Convention but also with relevant provisions of the International Covenant. In the review proceedings regarding his detention, Mr. Ashqar should thus benefit from all procedural guarantees with the exception of those derogated from in full conformity with article 4 of the International Covenant on Civil and Political Rights.¹³

29. According to the Government, Mr. Ashqar is suspected of terrorist activities; however, for reasons of confidentiality and protection of intelligence sources, evidence against him cannot be presented in court and, under these circumstances, administrative detention provides an effective and lawful counter measure against terrorist attacks. The Working Group disagrees and stresses that administrative detention is not a measure that is meant to replace criminal proceedings and it should not be used as a means of circumventing the criminal justice system and avoiding the due process safeguards it provides.

30. The Working Group has already clarified that “individual liberty cannot be sacrificed for the Government’s inability either to collect evidence or to present it in an appropriate form”.¹⁴ The Working Group recalls that a person suspected of a criminal offence, whether during an armed conflict or in any other situation, has the right to benefit from strict judicial guarantees set up by humanitarian and/or human rights law for individuals charged with criminal offences. These guarantees apply regardless of whether or not such suspicions have been formalized in criminal charges.

31. It appears from the facts as described above that Mr. Ashqar, irrespective of the nature and the motives of the accusations against him, has been denied his right to a fair trial, and in particular the rights that any person deprived of his freedom must enjoy, namely to be promptly informed of the reasons for his arrest and of any charges against him, to be brought promptly before a judge or other judicial authority, to take proceedings before a court so that the latter may decide on the lawfulness of his detention, and the right to be tried within a reasonable time or be released. These rights are guaranteed by articles 9, paragraph 2, 9, paragraph 3, 9, paragraph 4 and 14, paragraph 3 (a), (c) and (d) of the International Covenant on Civil and Political Rights to which Israel is a party.

International Court of Justice (ICJ) has concurred with the Committee’s opinion on two occasions: In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the Court stressed that “the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency” (I.C.J. Reports 1996 (I), p. 239, para. 24). This was confirmed in the Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, para. 105.

¹³ As Israel has derogated from article 9 of the International Covenant, the Working Group, concurring with the position taken by the Human Rights Committee in its general comments No. 29 (2001), has already expressed its view that “the right to personal liberty and security [... must i]n all circumstances, [...] conform to and be continuously evaluated in accordance with the fundamental principles of necessity, proportionality, humanity and non-discrimination”, see the report of the Working Group on Arbitrary Detention (E/CN.4/2005/6/Add.1), Opinion No. 3/2004 (‘Abla Sa’adat, Iman Abu Farah, Fatma Zayed and Asma Muhammad Suleiman Saba’neh/Israel, para. 32).

¹⁴ See the report of the Working Group on Arbitrary Detention (E/CN.4/1995/31/Add.2), Decision No. 16/1994 (Sha’ban Rateb Jabarin/Israel, page 18, para. 11).

32. The Working Group concludes that the authority given to the Executive power, by law, to place a person in administrative detention for a six-month period which may be renewed indefinitely, the only alternative given by the authorities in the case under consideration being that Mr. Ashqar leaves the country for three years, constitutes in itself an abuse of power conferring on the detention an arbitrary character. The possibility provided to the detained person to appeal against this measure cannot attenuate its arbitrary character, since the appeals are heard by a military judge sitting in camera, who examines evidence in the absence of the detainee or his lawyer.¹⁵ Accordingly, this constitutes a violation of the right to a fair trial of such gravity that it confers on the detention, once again, an arbitrary character.

33. In the light of the foregoing, the Working Group renders the following Opinion:

The deprivation of liberty of Mr. Issam Rashed Hasan Ashqar is arbitrary, being in contravention of articles 9 and 14 of the International Covenant on Civil and Political Rights to which Israel is party, and falls within category III of the categories applicable to the consideration of the cases submitted to the Working Group.

34. Consequent upon the Opinion rendered, the Working Group requests the Government to take the necessary steps to rectify the situation and bring it into conformity with the standards and principles set forth in the International Covenant on Civil and Political Rights.

Adopted on 27 November 2007

¹⁵ In this respect, the Working Group recalls the concluding observations of the Human Rights Committee on the second periodic report of Israel (CCPR/CO/78/ISR, para. 12), where it is stated that the Committee is concerned “about the frequent use of various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclosure of full reasons of the detention”. The Committee considers that: “[t]hese features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9 more extensively”.