

Opinion No. 13/2010 (Palestinian Authority)

Communication addressed to the Palestinian Authority on 3 February 2010

Concerning: Mr. Mohammad Abu-Shalbak

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group regrets that the Palestinian Authority has not replied within the 90-days deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. According to the source, Mr. Mohammad Abu-Shalbak, aged 46 years, a Palestinian usually residing at Othman bin Affan Street, Al-Berih city, West Bank, Occupied Palestinian Territory, was arrested on 19 July 2009 at around 2 p.m. at his parents' home of the same address by forces of the Palestinian General Intelligence Service. His arrest had been ordered by the Head of the Military Judiciary Committee on the same day. The order was presented to a court, but neither Mr. Abu-Shalbak nor his family was informed about its contents or the reasons for his arrest.
5. His mother is the only witness of the arrest carried out. She was sitting outside and saw an officer of the General Intelligence Service in plain clothes waiting in a white car in front of the house. When Mr. Abu-Shalbak arrived he was approached by the officer and requested to show his ID. Thereafter, Mr. Abu-Shalbak was orally informed that he was wanted by the General Intelligence Service and was not permitted to enter the house to inform his relatives. He could only shout to his mother on the street that he was being arrested. When his family arrived on the scene he had already been taken away.
6. Since his arrest, Mr. Abu-Shalbak has been detained by the General Intelligence Service at its building in Al-Ersal Street, Ramallah, West Bank. No reasons for his detention have been communicated to Mr. Abu-Shalbak or his family as the case file is classified and kept secret. Furthermore, his family was unaware about his place of detention for 15 days. Mr. Abu-Shalbak's family learned about his place of custody only through an unofficial source and was not allowed to visit him for 80 days. He has to date not been allowed access to his lawyer and no reasons for his arrest and detention for more than six months have been communicated by Palestinian authorities or are otherwise recognizable.
7. The first visit of Mr. Abu-Shalbak's relatives took place on 21 September 2009 and was supervised by an investigating officer. He permitted a visit of 10 minutes only, and ordered the family not to discuss anything related to the reasons for Mr. Abu-Shalbak's arrest or the conditions of his detention.
8. When Mr. Abu-Shalbak entered the office of the investigating officer, he was in bad condition, wearing dirty clothes, and having had lost about half his weight. He had a pale face, appeared to be afraid and had difficulties to stay focused. During the visit the investigating officer repeatedly interrupted the conversation so that his family could in fact only talk for two out of 10 minutes.
9. On 4 October 2009, the Palestinian High Court of Justice issued a judicial decision stating that "after review of the documents of this case, we noticed that the detainee is a civilian person and has been detained based on an order by the Head of the Military Judiciary Committee on 19 July 2009, and has not been produced before the civilian prosecution within 24 hours of arrest. As this case is not under the mandate of military prosecution as identified in the Basic Law, article 101(2), therefore the court found that the decision of the Head of Military Judiciary Committee is considered as an abuse of his

authority and violated the right to liberty of the detainee. Therefore, the arrest of this civil civilian was unlawful and the court decided to release him immediately”.

10. Following this order, Mr. Abu-Shalbak was released on 7 October 2009, but rearrested eight hours later under a new arrest order issued by the Head of the Military Judiciary Committee. It is not known on what grounds Mr. Abu-Shalbak was rearrested, however, it is reported that in comparable cases different charges are put forward. Mr. Abu-Shalbak was returned to the detention centre at the General Intelligence Service in Al-Ersal Street, Ramallah.

11. During the few hours of his release, Mr. Abu-Shalbak informed his family about the conditions of detention he had been subjected to. He spent 43 days standing on his feet with his eyes blindfolded and his legs tied in a small and unhealthy cell, with one hour of rest daily. He was allowed to use the bathroom only once a day and was wearing the same clothes for two months without having been allowed to take a shower. His cell is hot in summer and cold in winter. Mr. Abu-Shalbak has suffered from abdominal cramps, anal fissures and toothaches as his front teeth were broken. The abdominal cramps became so severe that Mr. Abu-Shalbak was taken to the military medical services. Although the doctor ordered an abdominal ultrasound examination, the family was informed at a later visit that it had not been carried out.

12. Following his rearrest, his family contacted the Office of President Mahmoud Abbas; however, it has not received a response.

13. Since his rearrest, his family has tried to visit Mr. Abu-Shalbak every weekend. Most of the times they were denied access by the detaining authorities.

14. The Working Group notes that Mr. Mohammad Abu-Shalbak was arrested on 19 July 2009 at his father's home located in Al-Berih. No arrest warrant was shown to him by the captors pertaining to the Palestinian General Intelligence Service. Only he was told that his detention had been ordered by the Head of the Military Judiciary Committee. Neither he nor his relatives were informed on the reasons for his detention.

15. The Working Group further notes that Mr. Mohammad Abu-Shalbak is a civilian. On 4 October of the same year, the Palestinian High Court of Justice attended to his condition as a civilian and ordered his immediate release. Abu-Shalbak was released but eight hours later he was rearrested again under orders of the Head of the Military Judiciary Committee.

16. In several Opinions, the Working Group has considered that the deprivation of liberty of a civilian person ordered by a military tribunal is a violation of the right of a civilian to be tried by an impartial and independent tribunal. In the present case the High Court considered that it “noticed that the detainee is a civilian person and has been detained based on an order by the Head of the Military Judiciary Committee on 19 July 2009, and has not been produced before the civilian prosecution within 24 hours of arrest”.

17. According to the Working Group, the nature and composition of the tribunal is a fundamental element to consider in the guarantees of impartiality and independence established by article 10 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights. The universal experience is that military judges are, in reality and before all, military people acting as judges. The essential element which a court or judge must show is independence. In a military person, the main value is his or her obedience to and his or her dependence on his or her superiors in the command chain. Consequently, a military tribunal cannot guarantee the conditions of a fair trial or the guarantees or due process.

18. A similar opinion was expressed by the Human Rights Committee at its General Comment No. 32 of 2007 on article 14 of the International Covenant on Civil and Political

Rights on the right to equality before courts and tribunals and to a fair trial (see CCPR/C/GC/32 (2007)). According to the Committee, “While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of military or special character of the court concerned”.

19. The Committee also notes that “the trial of civilians in military or special courts may raise serious problems as far the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show than resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.

20. The Working Group notes that the Head of the Military Judiciary Committee did not order to respect the right of Mr. Abu-Shalbak to not be arbitrarily deprived of his liberty and to enjoy the guarantees established in article 14 of the International Covenant on Civil and Political Rights. An arrest warrant was not issued; he was not brought without undue delay before a judicial authority; he was not promptly subjected to interrogation nor charged; he was not allowed to consult a defence lawyer; his family was not informed about his arrest; he was held in incommunicado detention; he was not given the possibility to prepare his defence. And when a Court found that these fundamental guarantees had been violated and, consequently, ordered his release, this judicial order was ignored and Mr. Abu-Shalbak was rearrested.

21. The conditions on which Mr. Abu-Shalbak is maintained in detention during more of nine months are also very serious: He is being held in incommunicado detention; he has not the right to receive visits; he has not the most elemental means to assure his subsistence while in detention.

22. Consequently, the Working Group considers that the arrest and detention of Mr. Mohammad Abu-Shalbak is arbitrary. He has been deprived of his right to a fair trial. Authorities have failed to produce Mr. Abu-Shalbak before the – competent – civilian prosecution within 24 hours of arrest.

23. The unlawfulness of Mr. Abu-Shalbak’s detention was confirmed by the High Court of Justice. Despite the order for his release he was rearrested and remains in detention.

24. The Working Group issues the following Opinion:

The privation of liberty of Mr. Mohammad Abu-Shalbak is arbitrary, because it is contrary to articles 9 and 10 of the Universal Declaration of Human Rights and correspond to categories I and III of the categories applicable by the Working Group in its consideration of individual cases.

25. Consequently with this Opinion, the Working Group requests the Palestinian Authority to remedy the situation of Mr. Mohammad Abu-Shalbak according to the principles enshrined in the Universal Declaration of Human Rights. In the circumstances of the case and taking into account the time he has been arbitrarily deprived of his liberty and the very bad conditions of his detention, the adequate remedies could be:

- (a) The immediate unconditional release of Mr. Mohammad Abu-Shalbak;
- (b) Alternatively, his immediate release on bail and trial before and independent and impartial tribunal with all the guarantees of due process, human rights and the norms of international law;

(c) To give him an adequate and effective reparation for the damage occasioned by his arbitrary detention.

26. The Working Group requests the Human Rights Council to consider adopting the Draft Principles governing the administration of justice through military tribunals elaborated by the expert of the former Sub-Commission on Human Rights, Emmanuel Decaux.

Adopted on 7 May 2010