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Working Group on Arbitrary Detention

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No. 58/2012 (Israel)

Communication addressed to the Government on 30 July 2012

Concerning Mr. Ahmad Qatamish

The Government has not replied to the communication.

The State is a party to the International Covenant on Civil and Political Rights.

The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed that mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

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 the detainee) (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 International Covenant on Civil and Political Rights (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 for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

Mr. Ahmad Qatamish, born in 1951, a Palestinian man, married, writer and political scientist, usually resides in the Occupied Palestinian Territory.

Mr. Qatamish was arrested on 21 April 2011 at 2 a.m. at his brother's home in Ramallah. The source reports that an hour earlier, approximately 30 heavily armed soldiers from the Israel Defense Forces had, without presenting a search warrant, raided his family home in al-Bireh where his wife, daughter, sister-in-law and niece were staying. The soldiers confiscated all the women's phones and insisted they would not leave or release the family until Mr. Qatamish turned himself in. They then forced his daughter, Haneen, at gunpoint to call her father and demand his surrender. When Haneen reached him, one soldier grabbed the phone and ordered Mr. Qatamish to surrender; threatening to destroy his house and further intimidate his family if he did not comply.

The source also reports that eventually, at 2 a.m., a group of soldiers went to his brother's home to arrest him, again failing to present an arrest warrant, and transferred Mr. Qatamish to Ofer prison, where he was questioned for 10 minutes.

The source states that Mr. Qatamish's detention was first extended on 28 April 2011 for an additional six days until 3 May 2011 at 5 p.m. to allow the investigation in his case to continue. At 8.30 p.m. on 3 May, three and a half hours after his remand expired, the Israeli military authorities informed Mr. Qatamish's lawyer, Mahmoud Hassan, that an administrative detention order had been issued against his client, despite letting him know only hours earlier that Mr. Qatamish would be released that day.

However, according to the source, the copy of the administrative detention order that Mr. Hassan received at 11 p.m. appeared to be a copy of someone else's detention order, which had been tampered with using correction fluid to include Mr. Qatamish's name. In addition, the order was actually an "extension" of an administrative detention, despite the fact that this was Mr. Qatamish's first administrative detention since the mid-1990s. It also contained an erroneous date of birth and stated that Mr. Qatamish was suspected of being a Hamas activist, in direct contradiction to the claims made by the General Security Service (GSS) of Israel at his 28 April 2011 detention extension hearing. Furthermore, although the order appeared to be signed by the Military Commander for the Central Region, Avi Mizrahi, it was stamped by a less senior commander in his office, "Yair Kolam".

The source reports that Israeli military authorities issued a new detention order the following day, 4 May 2011, in an apparent effort to correct the previous one; however it was again stamped by the less senior commander, "Kolam".

On 8 May 2011, the military judge requested that the two previous detention orders be discarded and a new one be presented. The current administrative detention order now states that Mr. Qatamish is being held for posing an unspecified security risk, though no evidence has been revealed.

The review hearing for Mr. Qatamish's administrative detention was scheduled for 12 May 2011, but the GSS, which was due to present the secret evidence against Mr. Qatamish to the judge, failed to appear. The hearing was therefore delayed to 15 May. The military judge, however, did not reach a decision on the administrative detention until 19 May, when she confirmed the detention for a period of four months on the grounds that Mr.

Qatamish posed a "security threat" on account of his alleged connection to the Popular Front for the Liberation of Palestine. The source states that the detention period was reduced from the original six-month period requested by the Military Commander on account of the number of procedural mistakes that had taken place during Mr. Qatamish's detention.

The source reports that an appeal was filed against the judge's decision on 3 June 2011 on the basis of the many errors in his detention orders that have been highlighted above. On the same day, the prosecution also lodged an appeal requesting that Mr. Qatamish be detained for the full six months that it had originally requested.

On 21 June 2011 , a military judge rejected both appeals, claiming that the court of first instance had already dealt with the issue of the detention order errors, notably by reducing the detention period from six to four months.

The source also reports that a new administrative detention order against Mr. Qatamish was issued on 2 September 2011 for an additional period of six months. Although the order was due to be reviewed by a military judge on 5 September, the hearing was postponed at the request of the military prosecution. On 25 September, Mr. Qatamish was brought before the judge but no decision was given regarding the administrative detention order.

Finally on 3 October 2011, the administrative detention order was confirmed for six months, on the grounds that the judge was still convinced, from information contained in the secret file, that Mr. Qatamish posed a threat to security.

On 23 February 2012, his order was renewed once again for another six-month period. The source argues that the circumstances surrounding Mr. Qatamish's imprisonment amount to arbitrary detention, given that his detention has no legal basis and that he has been arbitrarily denied his right to a fair trial spelled out in the Universal Declaration of Human Rights (UDHR) and guaranteed by article 14 of the International Covenant on Civil and Political Rights (ICCPR).

In this respect, the source submits that in the 29 days that Mr. Qatamish was detained before his administrative detention order was confirmed, he was interrogated for only 10 minutes. The source submits that, if the authorities had evidence supporting his administrative detention, then a more substantive interrogation could have taken place and he could have been charged under military orders and tried in the military courts. The source also submits that administrative detention should never be used simply because there is insufficient evidence to support a conviction.

The source points out that the administrative detention order against Mr. Qatamish was issued at least three and a half hours after his remand expired at 5 p.m. (at 8.30 p.m. when his lawyer was first informed that an administrative detention order had been issued) and possibly up to six hours later (at 11 p.m. when his lawyer received a copy of the administrative detention order), meaning that during this time Mr. Qatamish had been held without any legal basis.

The source submits that the first administrative detention order against Mr. Qatamish appeared to be a copy of someone else's order for an "extension" of administrative detention, tampered with correction fluid to include his name. Despite this tampering, it still contained erroneous information regarding his date of birth and the suspicions against him. A corrected order was issued the following day, but was replaced again on 8 May 2011 with an order signed by the appropriate authorities.

The source also submits that although the administrative detention orders issued by the Israeli military commanders under Israeli Military Order No. 1651 are the subject of review and further appeal by a military court, lawyers are not permitted to see the "secret information" against their clients making this right of review illusory.

The source further submits that use of administrative detention orders under international law is strictly limited to situations of absolute necessity which threaten the life of the nation and that it is difficult to accept that this stringent requirement has been satisfied in Mr. Qatamish's case:

(a) When the Israeli prosecuting authorities have provided no evidence for his detention, instead claiming that he poses an unspecified security risk;

(b) In the 29 days that Mr. Qatamish was detained before his administrative detention order was confirmed, he was interrogated for only 10 minutes, casting doubt on the level of threat he really posed to the life of the nation.

Furthermore, the source recalls that, prior to the ongoing administrative detention, Mr. Qatamish had already been arrested and detained without charge in the past, spending almost six years in administrative detention in the 1990s.

He was first arrested in 1992, detained and tortured for more than a year before being placed in administrative detention in October 1993. His detention orders were repeatedly renewed for the next six years, despite a lack of evidence against him and he was finally released in 1998, becoming one of the longest-serving administrative detainees held without charge in an Israeli prison.

Response from the Government

The Working Group regrets that the Government has not responded to the allegations transmitted by the Group.

Despite the absence of any information from the Government, the Working Group considers it is in a position to render its opinion on the detentions of Mr. Qatamish in conformity with paragraph 16 of its methods of work.

Discussion

The Working Group recalls that the provisions of article 14 of the ICCPR on the right to a fair trial are applicable where sanctions, because of their purpose, character or severity, must be regarded as penal even if, under domestic law, the detention is qualified as administrative.[1]

Mr. Qatamish has been imprisoned for more than one and a half years since he was arrested. Given the nature of the sanctions applied to Mr. Qatamish under Military Order 1651, the Working Group considers that the provisions of article 14 of the ICCPR on the right to a fair trial are applicable in his case even though under domestic law his detention is qualified as administrative.

The right to a fair trial includes the right to have access to material on which the charges are based as provided for in article 14, paragraph 3 (b), of the ICCPR (the right to have adequate time and facilities for the preparation of defence). Article 14, paragraph 3 (a), also provides for the right to be informed promptly and in detail of the nature and cause of the charges brought against the person.

In the case under consideration, in violation of article 14, paragraph 3 (b), of the ICCPR, neither the detainee nor his counsel was provided with access to the "secret evidence" upon which Mr. Qatamish has been deprived of his liberty. This violation deprived Mr. Qatamish of the right to have adequate facilities for the preparation of his defence. In violation of

[1] See Human Rights Committee, communication No. 1015/2001, *Perterer* v. *Austria*, para. 9.2; and general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 15.

article 14, paragraph 3 (a), Mr. Qatamish was not informed of the nature and cause of any charges for which he was arrested.

The Working Group also reiterates that protective provisions contained in international human rights law must be given greater weight than arguments of *lex specialis* of international humanitarian law especially given the circumstances in the Occupied Palestinian Territory, which has been under military occupation for more than 40 years. [2]

In this regard, the Working Group recalls the statements and observations of the Human Rights Committee, including its general comment No. 29 (2001) on derogation during a state of emergency and its concluding observations on reports submitted by Israel (CCPR/C/79/Add.93 and CCPR/CO/78/ISR).

In particular, the Human Rights Committee emphasized that the applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including its article 4 which covers situations of public emergency that threaten the life of the nation. Nor, according to the Committee, does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their own territories, including in occupied territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Palestinian Territory, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.[3]

In the 2010 report of the Human Rights Committee concerning Israel (A/65/40, para. 75), the Human Rights Committee expressed concern at the "frequent and extensive use of administrative detention". The Committee emphasized that:

Administrative detention infringes detainees' rights to a fair trial, including their right to be informed promptly and in detail, in a language which they understand, of the nature and cause of the charge against them, to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing, to be tried in their presence, and to defend themselves in person or through legal assistance of their own choosing (arts. 4, 14 and 24).

Accordingly, the Human Rights Committee recommended that the State party

[r]efrain from using administrative detention, in particular for children, and ensure that detainees' rights to fair trial are upheld at all times; and … [g]rant administrative detainees prompt access to counsel of their own choosing, inform them immediately, in a language which they understand, of the charges against them, provide them with information to prepare their defence, bring them promptly before a judge and try them in their own or their counsel's presence.

In previous opinions concerning Israel,[4] the Working Group emphasized that administrative detention was only permitted in strictly limited circumstances and only if "'the security of the State ... make it absolutely necessary' and only in accordance with 'regular procedure' (arts. 42 and 78 of the Fourth Geneva Convention and art. 4 of the Covenant)".[5]

Furthermore, as was noted in the cases concerning Israel, military tribunals are not independent and impartial. They consist of military personnel who are subject to military

[2] See opinion No. 5/2010 (Israel), para. 33.
[3] CCPR/CO/78/ISR, para. 11.
[4] Opinion No. 3/2012 (Israel); opinion No. 5/2010 (Israel).
[5] Opinion No. 3/2012, para. 28.

discipline and dependent on superiors for promotion.[6] Thus, Mr. Qatamish was deprived of his right to a fair hearing by an independent and impartial tribunal as provided for in article 14, paragraph 1, of the ICCPR.

The Working Group considers that Mr. Qatamish was denied the fundamental rights contained in articles 9 and 10 of the UDHR and articles 9 and 14 of the ICCPR. His case, therefore, falls into categories I and III of the categories applied by the Working Group.

Disposition

In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

> The deprivation of liberty of Mr. Qatamish has been arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant on Civil and Political Rights; it falls into categories I and III of the categories applicable to the consideration of the cases submitted to the Working Group.

Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Qatamish and bring it into conformity with the standards and principles set forth in the UDHR and the ICCPR.

The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to release Mr. Qatamish and accord him an enforceable right to compensation in accordance with article 9, paragraph 5, of the ICCPR.

[*Adopted on 20 November 2012*]

[6] Ibid.