

Opinion No. 5/2010 (Israel)

Communication addressed to the Government on 2 February 2010

Concerning Messrs. Hamdi Al Ta'mari and Mohamad Baran

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. According to its methods of work, the Working Group forwarded a Communication addressed to the Government on 2 February 2010. The Government has not requested any extension of the time limit. The Working Group regrets that the Government has not replied within the 90-day deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as follows:
5. Mr. **Hamdi al-Ta'mari**, born on 20 August 1992, a Palestinian citizen, student, usually residing in Bethlehem, West Bank, Occupied Palestinian Territory, was first arrested without a warrant on 25 July 2008 at his family home by Israeli soldiers invoking Israeli Military Order No. 1591. He was released without charge on 13 November 2008, but rearrested on 18 December 2008.
6. On 12 March 2008, Mr. Al-Ta'mari's father, Mr. Baran Shahadeh, along with three other men, were killed in Bethlehem by a suspected Israeli undercover unit. At around 4.00 a.m., on 25 July 2008, Mr. Al-Ta'mari heard loud banging on the front door of the family home in Bethlehem. When the door was opened Israeli soldiers said that they were looking for Mr. Al-Ta'mari. The soldiers tied his hands and legs and made him lie on the floor where he remained for around 15 minutes whilst soldiers pointed their weapons at him. He was then blindfolded and placed on the floor of a jeep. His hands were tied so tight that they became swollen. The jeep drove for about two hours during which Mr. Al-Ta'mari was physically and verbally abused by the soldiers. He was taken to Ofer Interrogation and Detention Centre, near Ramallah in the West Bank, where he was further kicked and beaten by soldiers.
7. On 28 July 2008, three days after his arrest, Mr. Al-Ta'mari was taken for interrogation in handcuffs. The interrogator spoke Arabic and accused him of being a member of "Islamic Jihad". Mr. Al-Ta'mari denied the accusations and stated that he was supporting independent members of "Fateh". The interrogator also asserted that military clothes and a weapon were found at his home, the existence of which he denied. There was no lawyer present during the interrogation which lasted for about one hour.
8. Several days later Mr. Al-Ta'mari was informed that he had been given a three month administrative detention order, which was confirmed by the Military Administrative Detention Court. He was released from administrative detention on 13 November 2008 and never charged with any offence. The source notes that membership of a banned organization and possession of weapons are offences punishable under Israeli Military Order No. 378.
9. At around 2 a.m., on 18 December 2008, Mr. Al-Ta'mari was again arrested, blindfolded, his hands tied, and taken out of the building and put into a truck. About an hour later, Mr. Al-Ta'mari was transferred from the truck to a jeep. Half-an-hour later, the jeep arrived at Etzion Interrogation and Detention Centre in the West Bank, where he remained for 15 days before being transferred to Ofer Interrogation and Detention Centre.

10. There, Mr. Al-Ta'mari was interrogated about visitors he had seen after his release, flags on the roof of the building he lives, and about his activities. He explained that the visitors were neighbours and relatives and that he had no connection with the "Islamic Jihad" of which he was accused. The interrogation was conducted in the absence of a lawyer and lasted for about half an hour. This was only the second time Mr. Al-Ta'mari was interrogated.
11. On 28 December 2008, Mr. Al-Ta'mari was taken before the military Military Administrative Detention Court. He was not represented by a lawyer. The judge told him via an interpreter that a four months administrative detention order had been issued against him on the basis of secret information. The Court confirmed this order.
12. On 15 April 2009, Mr. Al-Ta'mari received a third administrative detention order of four months, which was confirmed by the Military Administrative Detention Court.
13. On 14 August 2009, Al-Ta'mari was issued with a fourth administrative detention order by an Israeli military commander, Colonel Ronen Cohen, Deputy Intelligence Central Command, Judea and Samaria District. This order was confirmed by a military court on 20 August 2009. Mr. Al-Ta'mari has not been charged with any offence. However, his latest administrative detention order describes the reason for his detention as follows: "His activity endangering the security of the area and the public."
14. Mr. **Mohammad Baran**, born on 17 October 1990, a Palestinian citizen, student, usually residing at Beit Ummar, Hebron, West Bank, was arrested without a warrant invoking Israeli Military Order 1591 on 1 March 2008 by Israeli soldiers from the ambulance vehicle that was taking him to hospital.
15. On 1 March 2008, Mr. Baran was at home trying to repair a gasoline heater. The heater exploded injuring Mr. Baran's right hand. Mr. Baran's parents immediately took him to the village clinic where a doctor treated him. An ambulance taking Mr. Baran to the hospital was stopped by Israeli soldiers outside the village. The ambulance driver informed the soldiers that he had an urgent case. One of the soldiers then slapped the ambulance driver in the face and struck him with the butt of his rifle. Mr. Baran was placed on a stretcher and moved to a military ambulance. His parents were not permitted to accompany him.
16. Mr. Baran believes he was taken to Hadassa Ein Karim Hospital in Jerusalem. The next morning Mr. Baran was informed by a doctor that he had undergone a long operation and had lost three fingers from his right hand. Mr. Baran spent the next three days in hospital during which time he was tied to the bed, guarded by three soldiers and not permitted to see any visitors.
17. On the third day, two interrogators came to the hospital to interview Mr. Baran. One of the interrogators accused Mr. Baran of preparing a homemade explosive device. Mr. Baran denied this accusation. The interrogator slapped him on the face and shouted at him that he would be placed in solitary confinement unless he confessed. Mr. Baran continued to deny the accusation. The interrogation lasted for approximately one hour.
18. After three days in hospital, Mr. Baran was transferred to Megiddo Prison, inside Israel, where he remained for two days before being transferred to Telmond Compound, also inside Israel. During the next few weeks Mr. Baran was taken back to hospital several times to have his bandages replaced. Mr. Baran reports having been in a lot of pain during this period against which the prison authorities gave him sedatives. Mr. Baran reports that the sedatives he was given only reduced the pain for around half an hour at a time.
19. Around 10 days after his arrest, Mr. Baran was taken to Ofer Military Court where he was informed that he had been issued with a six-month administrative detention order by the military commander. Mr. Baran was informed that there was a "secret file" regarding

his activities and an accusation that he was a member of “Islamic Jihad”. Mr. Baran’s appeal against this decision was rejected by the Military Administrative Appeals Court.

20. Six days before its expiry Mr. Baran was informed of a new order for another six months being issued against him, which was confirmed in court and his appeal being overruled.

21. Mr. Baran was served with a third administrative order for another six months which was confirmed by the court, but on appeal reduced to three months. The courts, however, then confirmed a fourth administrative detention order of three months issued against him two days before the expiry of third order.

22. On or about 26 August 2009, Mr. Baran was informed that he had been issued with a fifth administrative detention order. He has not been charged with any offence. However, during the interrogation in hospital, Mr. Baran was accused of preparing a homemade explosive device, which he denies.

23. The source asserts that the accusations of being a member of a banned political organization and possession of a weapon in the case of Mr. Al-Ta’ mari, and of preparing a homemade explosive device in the case of Mr. Mohammad Baran constitute offences under Israeli Military Order No. 378. It submits that if the authorities had evidence supporting these accusations, both could have been charged under military orders and tried in military courts.

24. However, Mr. Al-Ta’ mari was interrogated for about half an hour in a manner which would suggest there was a wholly inadequate level of evidence against him. As there is evidence that Mr. Baran was physically abused and threatened during his interrogation, the source suggests that his interrogators knew they had insufficient evidence to secure a conviction in the military courts and therefore needed to obtain a confession. The source maintains that administrative detention must not be used because there is insufficient evidence to support a conviction.

25. Although the administrative detention orders issued by the Israeli military commander are the subject of review and further appeal by a military court, lawyers are not permitted to see the evidence against their clients making this right of review illusory. Further, when Mr. Al-Ta’ mari’s second administrative detention order was reviewed by the military court on 28 December 2008, he was not represented by counsel.

26. The Working Group transmitted the allegations of the source to the Government of Israel on the 2 February 2010 requesting information about the current situation of Mr. Hamdi Al-Ta’ mari and Mr. Mohammad Baran and clarification regarding the legal provisions justifying their detention. On the 26 April 2010 a further letter was sent to the Government informing them that case in question was on the agenda of the fifty-seventh session of the Working Group and a response was required. The Working Group expresses its regrets over the Government’s failure to reply within the 90-day deadline, and to note that the Government did not use the opportunity to request an extension of the time limit under section 16 of the Working Group’s methods of work.

27. Despite the absence of a response from the Government and based on the information it has received, the Working Group believes itself to be in a position to provide an Opinion as one of the measures provided for in section 17 of its methods of work. It is important to take note that the Working Group has been notified of the release of the detainees but in view of the gravity of the case in hand, decides to render an Opinion.

28. The most glaring human rights violation in the instant cases are the fact that the detainees were children as defined by the United Nations Convention on Rights of the Child (CRC) which ought to have offered a further layer of protection to the detainees rather than further vulnerability.

29. It is difficult to accept that the stringent requirements of “absolute necessity” which “threatens the life of the nation” of article 42 of the Fourth Geneva Convention and article 4 of the International Covenant on Civil and Political Rights have been satisfied in Mr. Al-Ta’ mari’s and Mr. Baran’s case.

30. In addition, both have been arbitrarily denied their right to a fair trial guaranteed by article 40, paragraph 2(b) of the Convention on the Rights of the Child, including to be presumed innocent until proven guilty according to law; to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, and to examine or have examined adverse witnesses. Unlike the fair trial guarantees contained in articles 9 and 14 of the International Covenant on Civil and Political Rights, which may, under limited circumstances, be derogated from, no such derogation is permitted pursuant to the Convention on the Rights of the Child. Further, Mr. Al-Ta’ mari’s and Mr. Baran’s detention violates article 37 (b) of the Convention.

31. Although administrative detention orders issued by military commanders under Israeli Military Order No. 1591 are reviewed by the Military Administrative Detention Court and Military Appeals Court, there are no effective means to challenge such orders. Military tribunals are not independent and impartial. They consist of military personnel who are subject to military discipline and dependent on superiors for promotion. In addition, counsel are not allowed to see the “secret evidence” against their clients, collected by the Israeli Security Agency (ISA).

32. The practice of putting Palestinians under administrative detention orders for months, even years, without ever being informed about the reasons or length of their detention, and the practice of routinely informing them of the extension of their detention only within days of the former order expiring reaches a level of unwarranted cruelty in violation of article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

33. Protective provisions contained in international human rights law must be given greater weight than arguments of *lex specialis* of international humanitarian law given the circumstances in the Occupied Palestinian Territory, which has been under military occupation for 42 years.

34. According to the source, 80 per cent of the Israeli prisons where Palestinian children are detained are located inside Israel, and alleges this to be in contravention of article 76 of the Fourth Geneva Convention which provides that an occupying power must detain residents of an occupied territory inside that territory. A practical consequence of this violation is that it makes family visits more difficult, and in some cases, impossible.

35. The Working Group considers that critical ingredients of the right to a fair trial are missing in the case in hand. From the moment of detention and throughout the periods of deprivation of liberty, the two detainees, Mr. Al-Ta’ mari and Mr. Baran, were denied the fundamental rights contained in articles 7, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 9 and 14 of the International Covenant of Civil and Political Rights.

36. Not only have both detainees been denied their rights as stated above, they have been in the hands of adjudication forums (Military Courts) of the occupying Israeli forces invoking Military law (Israeli Military Order 1591). The detention orders are issued on the basis of “secret evidence” collected by the Israeli Security Agency (ISA). Neither the detainee nor their lawyers are given access to this secret evidence. Therefore there is no effective means of challenging the detention as required by international law.

37. The practice of serial administrative detention has assumed alarming proportion among states of all denominations and the Working Group has expressed its grave concern

of the practice. The cases in hand are illustrative of this predicament where Mr. Al-Ta'mari has undergone four (4) periods of administrative detention (25 July to 13 November 2008); before being arrested again (18 December 2008); a third detention in April 2009 for 4 months and a fourth period of detention starting August 2009. Administrative detention is 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 (1949) and art. 4 of the ICCPR). Furthermore, article 37(b) of the Convention on the Rights of the Child provides that "(No) child should be deprived of his or her liberty arbitrarily and detention should only be used as a last resort for the shortest possible time".

38. The case of Mr. Baran is equally replete with violations of a number of fundamental human rights under national and international human rights law. He too was served with four administrative detention orders and has not been formally charged with any offence except accusations that have not been thus far substantiated through evidence. It is important to make the point that where an initial period of administrative detention runs out without formal charges being brought against the detainee and a further period of detention is demanded by the detaining authorities, the threshold of proof for requiring this further detention becomes much higher. The judicial forum before which such subsequent detention is sought is thus obligated under international human rights law to employ stricter rules of determination for arriving at a decision in this regard.

39. The Working Group thus renders the following opinion: the detention of Mr. Al-Ta'mari and Mr. Baran is arbitrary and falls within categories I, II and III of the categories applied by the Working Group.

40. Consequent upon this Opinion being rendered, the Working Group urges the Government of Israel to release Mr. Al-Ta'mari and Mr. Baran forthwith.

41. It also urges the Government of Israel to remedy the situation of Mr. Al-Ta'mari and Mr. Baran, including as minors (initially) held in arbitrary detention, and including reparation for their time in detention.

Adopted on 6 May 2010