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HAUT COMMISSARIAT DES NATIONS UNIES
AUX DROITS DE L'HOMME

PROCEDURES SPECIALES DU
CONSEIL DES DROITS DE L'HOMME

Mandates of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on extrajudicial, summary or arbitrary executions; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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20 August 2013

Dear Mr. al-Sabah,

We have the honour to address you in our capacity as Chair-Rapporteur of the Working Group on Arbitrary Detention; Special Rapporteur on the independence of judges and lawyers; Special Rapporteur on extrajudicial, summary or arbitrary executions; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 15/18, 17/2, 17/5, and 16/23.

In this connection, we would like to draw your attention to information we have received regarding the risk of executions in the next weeks in the Gaza Strip, in particular the risk of execution of Mr. **Hani Mohammed Abu Aliyan**, as well as regarding the case of Mr. **Faraj Abed Rabu**, and the execution in June 2013 of Messrs. **Emad Mahmoud Abu Ghalyoun** and **Husein Youssef Mohammad El Khatib**.

The imposition of the death penalty in the Gaza Strip in violation of international human rights standards, including the cases of Messrs. Ehab Diab Mustafa Abu al Amreen, Jamil Zakariya Juha and Usama Zidan Jaber al-Ghoul, were the subject of a previous communication sent to your attention on 17 August 2012. We regret that no reply from your side has been yet received to this communication.

According to the new information received:

On 1 August 2013, the de facto authorities in Gaza, namely the Attorney General of the Hamas de facto administration, stated that public executions would be carried out in the next weeks, either after the end of the Muslim festival of Eid al-Fitr, or before the end of August 2013. It is reported that similar statements have been made on many occasions in the recent past.

Mr. Hani Mohammed Abu Aliyan, aged 28, is reported to be particularly exposed to the risk of execution in this context. Reportedly, Mr. Abu Aliyan was convicted

in May 2010 in two separate cases by the Khan Younis Court of First Instance. In the first case, he was allegedly found guilty of an unintentional homicide in 2009, and sentenced to life imprisonment. It is alleged that after having committed this killing, Mr. Abu Aliyan went to the Kahn Younis police station to report the act.

In the second case, Mr. Abu Aliyan was reportedly sentenced to 14 years and life imprisonment for the alleged crimes of rape and killing of a six-year-old child in 2000. It is reported that Mr. Abu Aliyan was a minor at the time of the alleged offence.

Mr. Abu Aliyan was reportedly subjected to torture and ill-treatment during the interrogation regarding the first case, which resulted in his confession to the crimes allegedly committed in the second case as well. As a consequence, the lawyer of Mr. Abu Aliyan requested that the defendant's confession is not accepted before the court. It is reported that this request was however dismissed.

Following appeal from the prosecution against the sentences of the first instance court, the Appeal Court reportedly ruled on 16 September 2012 to convict Mr. Abu Aliyan to murder in both cases, and by consequence, sentence him to death. The Court of Cassation reportedly upheld this decision on 14 July 2013.

We are also informed of the case of Mr. Faraj Abed Rabu, aged 23, sentenced to death and currently detained in al-Katiba prison in Gaza City. On 24 March 2013, he was sentenced to death by the Central Military Court in Gaza City, under charges of collaboration with an enemy entity. It is reported that the defendant was however acquitted from the charges of murder. His appeal proceedings are currently on-going, the next court hearing being scheduled for 21 August 2013.

Allegedly, Mr. Faraj Abed Rabu was forced to sign his confession after having been tortured, including by having been beaten, hung by his wrists and ankles and subjected to electric shocks during the interrogation process. After the confession, he allegedly had bruises on his entire body, including on his head, face, arms and legs. Moreover, his confession allegedly contained factual errors and inconsistencies, such as inter alia the fact that he had been engaged since 2010, while in reality the defendant had been married since 2008. Mr. Faraj Abed Rabu allegedly appeared before the court with bruises on his face and crying.

Furthermore, it is also reported that two men, namely Mr. Emad Mahmoud Abu Ghalyoun, aged 49, and Mr. Husein Youssef Mohammad El Khatib, aged 41, were reportedly executed on 22 June 2013 at the Jawazat police compound in Gaza, following sentences to death on charges of "collaborating with the enemy".

Mr. Abu Ghalyoun was allegedly subjected to torture during the interrogations, and was not brought before the military prosecutor in a timely manner. It is also reported that he was not permitted to meet his court-appointed lawyer at the stage

of the investigations and trial against him. Mr. Abu Ghalyoun was allegedly able to meet his lawyer only during the court hearings.

In the case of Mr. El Khatib, it is reported that he was allegedly subjected to torture and ill-treatment with the aim of forcing him to confess. Reportedly, he had been hung by his wrists, beaten and subjected to electric shocks. Moreover, Mr. El Khatib allegedly signed his statement of confession while not being able to read it due to his illiteracy.

Allegedly, at least 35 individuals are currently at the risk of execution in the Gaza Strip. It is also reported that the de facto authorities in the Gaza Strip have executed at least 16 individuals since 2009. Eight defendants were convicted and executed under charges of “collaboration with an enemy entity”, while other eight individuals were convicted and executed under charges of murder.

It is further alleged that the death sentences in the Gaza Strip are frequently imposed by military courts, the procedures of which do not comply with international human rights standards of fair trial and due process. Civilians are reported to be frequently tried in military courts.

Without prejudging the accuracy of the information made available to us, we would like to express concern that the death penalty may be imposed and carried out in the Gaza Strip in contravention of a series of international human rights standards regarding the imposition of the capital punishment. We are particularly concerned about the imposition of the death penalty after proceedings that did not comply with fair trial and due process safeguards and after subjecting the defendants to torture or ill-treatment.

In view of the urgency of the matter and of the irreversibility of the death penalty, we request halting any execution scheduled to take place in the Gaza Strip, which would be in contravention of international human rights standards. We fully support the call made by the High Commissioner for Human Rights in this regard.

In light of these allegations, we wish to stress that the political and legal situation in the State of Palestine, in particular the Gaza Strip, should not have the effect of depriving defendants facing the death penalty of their fundamental due process guarantees. We wish to recall that non-State actors that exercise government-like functions and control over a territory have the duty to respect human rights norms when their conduct affects the human rights of the individuals under their control. As expressed in a joint report by the Special Rapporteur on extrajudicial, summary or arbitrary executions and three other mandate-holders, “[a]lthough ... non-State actor[s] cannot become a party to ... human rights treaties, it remains subject to the demand of the international community, first expressed in the Universal Declaration of Human Rights, that every organ of society respect and promote human rights It is especially appropriate and feasible to call for an armed group to respect human rights norms when it ‘exercises significant control over territory and population and has an identifiable political structure’” (A/HRC/2/7, para. 19; E/CN.4/2005/7, para. 76). We further note that

Hamas has made public statements expressing its commitment to respect international human rights (A/HRC/8/17, paras. 8-9).

With respect to the allegations referred to above, we wish to underline that the right to life is a fundamental right protected by article 3 of the Universal Declaration of Human Rights (UDHR). It is widely recognized that no one shall be arbitrarily deprived of his or her life.

International law provides that, in countries which have not yet abolished the death penalty, capital punishment must be regarded as an exception to the fundamental right to life, and must as such be applied in the most restrictive manner. In this regard, we wish to refer to 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. In particular, Safeguard 3 prohibits the imposition of the death penalty against persons below 18 years of age at the time of the commission of the crime.

With regard to the imposition of the death penalty for the alleged crime of “collaboration with an enemy entity”, we would like to stress that Safeguard 1 states that “in countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences”. The most serious crimes provision has been widely interpreted under international human rights law to refer only to offences of intentional killing. Hence, under international human rights law, the death penalty may not be imposed for crimes that do not involve intentional killing.

We wish also to particularly underline that a sentence imposed by means of summary procedures in which the due process of law, in particular the minimum procedural guarantees set out in human rights standards, are either curtailed or not complied with, amounts to an arbitrary deprivation of life. Only full respect for stringent fair trial and due process guarantees distinguishes capital punishment as permitted under international law from a summary execution, which violates international human rights standards. Safeguard 5 notably stipulates that “[c]apital punishment may only be carried out pursuant to a final judgement 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 International Covenant on Civil and Political Rights [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.” Safeguard 4 also provides that capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

With regard to the imposition of the capital punishment by military courts, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated in his report to the General Assembly that “military or other special jurisdictions should not have the authority to impose the death penalty”. (A/67/275, paragraph 121)

Regarding the use of military courts and the alleged lack of due process, we would like to recall Principle 5 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. This Principle states: “Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

In this connection, we would like to refer to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and in particular:

- principle 1, which states: “All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings”;

- principle 5, which states: “Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.”

- principle 8, which states: “All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.”

With regard to the allegations of torture and ill-treatment of Messrs. Abu Aliyan, Abed Rabu, Abu Ghalyoun and El Khatib, we would like to draw the attention of your Excellency’s Government to paragraph 1 of Human Rights Council Resolution 16/23 which “Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all States to implement fully the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment.”

In this regard we would also like to refer your Excellency's Government to paragraph 2 of Resolution 16/23 of the Human Rights Council, which “Condemns in particular any action or attempt by States or public officials to legalize, authorize or acquiesce to torture and other cruel, inhuman or degrading treatment or punishment under any circumstances, including on grounds of national security or through judicial decisions, and urges States to ensure accountability for all such acts;”

Regarding allegations of use of evidence obtained through torture or other cruel, degrading and inhuman treatment, we would like to refer your Excellency's Government to the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, and in particular guideline 16, which states: "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice."

In this context, we also recall that paragraph 7c of Human Rights Council Resolution 16/23 urges States "To ensure that no statement established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made, and calls upon States to consider extending that prohibition to statements made as a result of cruel, inhuman or degrading treatment or punishment, recognizing that adequate corroboration of statements, including confessions, used as evidence in any proceedings constitutes one safeguard for the prevention of torture and other cruel, inhuman or degrading treatment or punishment;"

Without expressing at this stage an opinion on the facts of the case and on whether the detention of the abovementioned persons is arbitrary or not, we would like to appeal to you to take all necessary measures to guarantee their right not to be deprived arbitrarily of their liberty and to fair proceedings before an independent and impartial tribunal, in accordance with articles 9 and 10 of the UDHR.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken to not to execute the above-mentioned persons and safeguard their rights in compliance with the above international instruments.

Moreover, it is our responsibility under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the summary of the cases accurate?
2. Please provide information concerning the legal grounds for the arrest and detention of the abovementioned persons and how these measures are compatible with international norms and standards as stated, inter alia, in the Universal Declaration of Human Rights.

3. Please provide detailed information on each stage of the legal proceedings against the said individuals, and indicate how they comply with the requirement and guarantees of a fair trial and due process.
4. Please provide information concerning the legal grounds for the imposition of the death penalty against the said defendants, and indicate how they comply with the international human rights law provisions, prohibiting the imposition of the capital punishment against juvenile offenders, as well as for crimes which are not considered as most serious under international law.
5. Please provide the details, and where available the results, of any investigation, medical examinations, and judicial or other proceedings carried out in relation to the information on torture or ill-treatment in the said cases. If no inquiries have taken place, or if they have been inconclusive, please explain why.

We undertake to ensure that your response to each of these questions is accurately reflected in the report we will submit to the Human Rights Council for its consideration.

While waiting for your response, we urge you to take all necessary measures to guarantee that the rights and freedoms of all individuals on the death row in the Gaza Strip are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also request that you adopt effective measures to prevent the recurrence of these acts.

Finally, we would like to inform you that we have addressed a communication of the same contents to H.E. Ambassador Ibrahim Khraishi, Permanent Observer Mission of Palestine to the United Nations Office at Geneva.

Please accept, Mr. al-Sabah, the assurances of our highest consideration.

El Hadji Malick Sow
Chair-Rapporteur of the Working Group on Arbitrary Detention

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Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers

Christof Heyns
Special Rapporteur on extrajudicial, summary or arbitrary executions

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