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Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017

Opinion No. 3/2017 concerning a minor whose name is known by the Working Group (Israel)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/33/66), on 20 January 2017 the Working Group transmitted to the Government of Israel a communication concerning a minor (whose name is known by the Working Group). The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. 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 him or her) (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 Covenant (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. The minor, whose name is known by the Working Group, was born in 2003. He holds an Israeli identity document and has Palestinian origins. He lives in Semiramis, a Palestinian neighbourhood in East Jerusalem.

5. According to the source, on 30 December 2015, at 3 p.m., the minor was standing at on street No.1 in Semiramis waiting for the bus to take him home after school. As a video recording of the events subsequently acquired by his lawyer attests, some Israeli settlers heard him speaking in Arabic with his friends and called the police. Soon after the call, some officers from Yasam, the special patrol unit of the Israeli police, in military uniforms arrived and arrested him. They searched him but could not find anything on him. As the video recording shows, the minor was immobilized with an electric taser, although he was not resisting arrest, and beaten up so badly by the Yasam officers that his face bled. He was then brought to a police van where he was reportedly stripped naked, had cold water poured over him and was threatened.

6. The source reports that the minor was subsequently taken to Moscovia detention centre in West Jerusalem, where he was held for four days. There, he was reportedly subjected to beatings again and interrogated. Under threat of indefinite detention in a secret place and death, he was forced to confess that he had a knife with him when he was arrested.

7. According to the source, the minor was not allowed to call his lawyer nor his family until the end of his interrogation and his forced confession. Only on 31 December 2015 was his lawyer allowed to visit him. On that same day, the Magistrates' Court decided that the minor should be transferred to the juvenile detention centre in Al-Marsa, in northern Israel.

8. On 2 January 2016, the minor was referred to the Central Criminal Court of Israel. The following day, the Court charged him with attempting to kill and possessing a knife, among other offences. According to the source, the minor was subsequently transferred to the Al-Marsa juvenile detention facility pursuant to the decision of the Magistrates' Court of 4 January 2016. He received the first visit from his family on 5 January 2016. He was reportedly held in pretrial detention at the facility until September 2016.

9. The source further reports that, on 7 September 2016, the Prosecutor of the Central Criminal Court changed the minor's charge of attempting to kill to attempting to injure. On 4 January 2017, the minor was sentenced by the Court to two years' imprisonment.

10. The minor remains detained in Al-Marsa juvenile detention facility. According to the source, he is harassed, including by other older inmates. Additionally, he is reportedly not allowed to access the detention centre's open air spaces and to contact his family by telephone, although he can receive their visits as well as visits by his lawyer once a week. However, the long distance between the juvenile detention centre and the family house makes it very difficult for his parents to visit him.

11. The source submits that the detention of the minor falls under categories III and V of the categories applicable to the consideration of cases submitted to the Working Group.

Category III: non-observance of international fair trial norms

12. The source submits that the violations of fair trial rights suffered by the minor are of such gravity as to give his deprivation of liberty an arbitrary character.

Excessive use of force during arrest

13. The source alleges that the minor was arrested by Yasam officers employing excessive use of force, as a video attests, while he was simply waiting at a bus stop. He was in fact immobilized with a taser by a Yasam officer, an act that the source finds difficult to justify given that it was perpetrated against a 12-year-old unarmed boy. Additionally, the minor was reportedly badly beaten, was stripped naked, had cold water poured over him and was threatened with death. The source submits that such treatment, especially

considering the very young age of the victim, constitutes inhuman and degrading treatment, if not torture, and is therefore a violation of article 7 of the Covenant and article 37 (a) of the Convention on the Rights of the Child.

Violations occurring during the pretrial detention phase

14. According to the source, the minor was subjected to further beatings and threats while interrogated in the Moscovia interrogation centre and was forced to confess. The source contends that such treatment amounts to cruel, inhuman or degrading treatment, if not torture, in violation of article 7 of the Covenant and articles 37 (a) and 40 (2) (b) (iv) of the Convention on the Rights of the Child, the latter of which provides that children shall not be compelled to give testimony or to confess guilt. Additionally, the fact that the minor was interrogated without his lawyer or at least one of his parents being present, as provided by the Israeli youth law and by the jurisprudence of the Committee on the Rights of the Child, represents a violation of his right to a defence, as enshrined in article 14 (3) (b) and (d) of the Covenant.

15. The source also recalls the concerns expressed by the Committee against Torture regarding such violations of the legal safeguards of minors and notes that, following its review of Israel in May 2016, the Committee expressly recommended that the authorities redouble their efforts with a view to systematically ensuring that all minors deprived of liberty are afforded all the basic legal safeguards from the very outset of the deprivation of liberty; that they have a lawyer and/or a trusted adult present at every phase of the proceeding, including during interrogations; and that evidence obtained without observing these provisions are inadmissible in court (see CAT/C/ISR/CO/5, para. 29 (b)).

Violations of fair trial guarantees during the trial phase

16. Moreover, the source submits that the fact that the minor was brought before the Central Criminal Court goes against international humanitarian law. The source argues that, according to article 66 of the Fourth Geneva Convention, the occupying power, Israel, may hand over accused persons of the occupied territory, Palestine, to courts sitting in the occupied territory only. As the Court sits in Jerusalem, that provision has been violated.

17. According to the source, the minor remains detained in Al-Marsa, a juvenile detention facility situated in Israel, which is also a violation of the applicable international humanitarian law. Article 76 of the Fourth Geneva Convention prohibits the transfer of a person of the occupied territory accused of an offence, in this case a Palestinian, by the occupying power, Israel, on its own territory. In the case of the minor, he should be detained in the Occupied Palestinian Territories and article 76 of the Fourth Geneva Convention has therefore been violated.

Category V: arbitrary detention for reasons of discrimination

18. The source submits that the minor has been subjected to arbitrary detention on the grounds of discrimination, for being Palestinian. In that respect, the source argues that the rights of Israeli citizens of Jewish origin are usually respected, whatever the crime they are accused of.

19. The minor was reportedly arrested while he was simply waiting for a bus after school, following the telephone call of some Israeli citizens to the Yasam. As no other reason can be invoked to justify his detention, the source submits that discrimination based on his origins as a Palestinian is the sole reason for his detention.

20. In that regard, the source recalls that, more generally, in the Occupied Palestinian Territories discrimination arises through the application of Israeli military law to Palestinian children but not to the Israeli settlers living in the West Bank, whereas in East Jerusalem the guarantees provided by Israeli civil law and applicable to all nationals are simply not applied to Palestinians.

21. The source refers to the 2013 concluding observations of the Committee on the Rights of the Child, in which the Committee noted that the implementation of two separate legal systems and institutions amounted to de facto segregation and led to inequality

between Israeli and Palestinian children in the enjoyment of their rights. In those same concluding observations, the Committee recommended that Israel guarantee that juvenile justice standards apply to all children without discrimination and that trials be conducted in a prompt and impartial manner, in accordance with minimum fair trial standards, and that it take immediate measures to prohibit and eradicate policies or practices that severely and disproportionately affect the Palestinian population (see CRC/C/ISR/CO/2-4, paras. 21-22 and 74). The source adds that the Committee's recommendations were subsequently endorsed by the Working Group in its opinion No. 13/2016.

22. The source notes that arbitrary arrest and detention of children has even been recognized as a discriminatory practice by the Committee on the Elimination of Racial Discrimination, which, in its most recent review on Israel, expressed its concerns over worrying reports of an increase in the arrest and detention of children and of the undermining of their judicial guarantees (see CERD/C/ISR/CO/14-16, para. 27).

23. The source points to a well-established pattern of arbitrary arrest and detention of Palestinian minors. Indeed, as of April 2016, 414 Palestinian minors had reportedly been detained as security prisoners or detainees, the highest number since 2008. According to the source, it is also common for Palestinian children who are arrested and detained by Israeli authorities to be subjected to an unnecessary use of force, to not be informed of and not to benefit from their right to have a lawyer and to not be tried within the juvenile system but before military tribunals.

24. In the light of the above, the source submits that the minor has been arbitrarily detained and that his detention falls within categories III and V of the categories applicable to the consideration of cases submitted to the Working Group.

Response from the Government

25. On 20 January 2017, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 20 March 2017, detailed information about the current situation of the minor and any comments on the source's allegations. It also requested the Government to clarify the legal provisions justifying the minor's continued detention, as well as its compatibility with the obligations of Israel under international human rights law and, in particular, with regard to the treaties ratified by the State.

26. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

27. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

28. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

29. The source has submitted and the Government of Israel has not challenged the allegation that the minor was arrested on 30 December 2015 without any information provided to him as to the reason for his arrest and without his family being notified. The minor, who was 12 years of age at the time, was tasered and beaten up so badly that his face bled. He was taken to a detention centre, where he was interrogated without a lawyer being present and where he was forced to confess that he had a knife on him at the time of the arrest. He was not allowed to contact his family. These facts reveal prima facie serious violations of article 9 (2) of the Covenant (on the right to be informed of the reason for one's arrest). The Working Group is also concerned that the minor was 12 years old at the time of arrest, making it obvious to the arresting authorities that they were not dealing with

an adult. As stipulated by article 37 (b) of the Convention on the Rights of the Child, which Israel ratified in 1991, a child should be arrested only as a measure of last resort.

30. Moreover, the authorities clearly used disproportionate force when arresting the minor. The use of a taser on an unarmed, non-violent individual, let alone a child, is an extremely serious abuse of power, entirely lacking in necessity and proportionality, constituting a prima facie breach of article 37 of the Convention on the Rights of the Child.

31. Furthermore, the minor was denied legal assistance prior to and during his interrogation, which constitutes a violation of article 37 (d) of the Convention on the Rights of the Child, article 14 (3) (b) of the Covenant, principle 17.1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

32. The Working Group further notes that the failure to allow the minor to notify his family of his whereabouts violates principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. All of the above also constitutes a flagrant violation of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), in particular rules 7 and 10.

33. The Working Group is particularly concerned by the submission that the minor was forced to sign a confession, as this constitutes a violation of article 40 (2) (b) (i) and (iv) of the Convention on the Rights of the Child and article 14 (2) of the Covenant. The Working Group further notes that the use of a confession extracted through ill-treatment that is tantamount if not equivalent to torture may also constitute a violation by Israel of its international obligation under article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment specifically prohibits taking undue advantage of the situation of detained or imprisoned persons for the purpose of compelling them to confess or incriminate themselves (see principle 21).[1]

34. The source has also submitted and the Government of Israel has not challenged the allegation that the minor was held in pretrial detention from 4 January to 7 September 2016, in other words for over eight months, and that he was not sentenced until 4 January 2017. Bearing in mind his young age, the time spent in pretrial detention fails to meet the requirement of international law enshrined in article 37 (b) of the Convention on the Rights of the Child according to which children should always be detained as a measure of last resort and for the shortest possible time. This is a well-established principle enshrined also in rule 13 of the Beijing Rules and in principle 18 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

35. Taking into consideration all the above, the Working Group concludes that the 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 State of Israel, is of such gravity as to give the deprivation of liberty of the minor an arbitrary character (category III).

36. The source has also submitted and the Government of Israel has not challenged the allegation that the minor was reportedly arrested while he was simply waiting for a bus after school, following the telephone call of some Israeli citizens to the Yasam. As no other reason can be invoked to justify his detention, the source submits and the Government of Israel has not challenged the allegation that discrimination based on his origins as a Palestinian is the sole reason for his detention.

37. The Working Group finds it hard to disagree with the number of international human rights bodies, including the Working Group itself, cited by the source to support this proposition (see paras. 21-22 above). The Working Group concurs with the views expressed by the Human Rights Committee in 2014 that, while noting positive

[1] See also opinion No. 48/2016, para. 52.

developments in the administration of juvenile military justice, including the increase in the age of majority in the military courts from 16 to 18 years and the adoption of a number of military orders providing for guarantees and safeguards for children, it remains concerned that such reforms appear not to be effectively implemented in practice and that Palestinian children are still exposed to arbitrary arrest and detention and often do not enjoy full procedural rights (see CCPR/C/ISR/CO/4, para. 19).

38. The Working Group is of the view that the present case is yet another example of the pattern of cases involving the arrest and detention of Palestinian children for no other reason than their nationality.[2] This is a deprivation of liberty in clear violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability or any other status, that aims towards or can result in ignoring the equality of human beings. The Working Group concludes that such deprivation of liberty is arbitrary and falls within category V.

39. Noting the pattern of cases involving the arrest and detention of Palestinian children on the basis of their nationality, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.

40. Finally, the Working Group would welcome the opportunity to visit to Israel in order to engage with the Government in a constructive manner and to offer its assistance in addressing its serious concerns relating to instances of arbitrary deprivation of liberty.

Disposition

41. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of the minor, being in contravention of articles 2, 9 and 11 of the Universal Declaration of Human Rights and of articles 2, 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories III and V.

42. Consequent upon the opinion rendered, the Working Group requests the Government of Israel to take the steps necessary to remedy the situation of the minor without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

43. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release the minor immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

44. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.

Follow-up procedure

45. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether the minor has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to the minor;

(c) Whether an investigation has been conducted into the violation of the minor's rights and, if so, the outcome of the investigation;

[2] See opinions No. 13/2016 and No. 24/2016.

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Israel with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

46. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

47. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

48. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken. [3]

[*Adopted on 19 April 2017*]

[3] See Human Rights Council resolution 33/30, paras. 3 and 7.