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Human Rights Council
Working Group on Arbitrary Detention

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Opinion No. 90/2018 concerning Mohd Redzuan Bin Saibon (Malaysia)

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

2. In accordance with its methods of work (A/HRC/36/38), on 6 August 2018 the Working Group transmitted to the Government of Malaysia a communication concerning Mohd Redzuan Bin Saibon. The Government replied to the communication on 4 October 2018. Malaysia is not 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. Mohd Redzuan Bin Saibon is a Malaysian national. He was arrested on 22 February 2000, at the age of 17, for possession of cannabis. At the time of his arrest, Mr. Redzuan informed the police of two other locations, at which over 30 kg of cannabis was found. Some of the cannabis was found at Mr. Redzuan's family home. As a result, the police arrested his entire family for investigation.

5. According to the source, Mr. Redzuan was remanded in custody for two weeks and charged with three separate counts under section 39B of the Dangerous Drugs Act 1952. The source alleges that Mr. Redzuan was advised to plead guilty to the charges in return for the release of his family members from detention. The lawyer representing Mr. Redzuan during his trial also advised him to plead guilty to the charges.

6. Mr. Redzuan was convicted under section 39B of the Dangerous Drugs Act 1952, which carries a mandatory death sentence.[1] However, given that he was a minor at the time the crime was committed, he was sentenced on 9 October 2001 to detention at the pleasure of the Yang di-Pertuan Agong (the King of Malaysia). Prior to 2001, that sentence was provided under section 16 of the Juvenile Courts Act 1947 as an alternative to the death penalty for minors.[2] The source submits that a sentence of detention at His Majesty's pleasure is indefinite as there is no maximum term of imprisonment.

7. After Mr. Redzuan had served more than a year of his sentence, the Prison Department assisted him in filing an appeal against his sentence to the Court of Appeal. He was not represented by a lawyer or given legal advice and his appeal was subsequently dismissed.

8. The source reports that the Juvenile Courts Act 1947 was repealed and replaced by the Child Act 2001, which came into force on 1 March 2001. Since the introduction of the Child Act, detention at the pleasure of the Yang di-Pertuan Agong has been governed by section 97 of that act. According to the source, the only possibility of release under the act is through the mechanism outlined in section 97 (4). Section 97 provides:

> **Death**
>
> 97 (1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.
>
> (2) In lieu of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of–
>
> (a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or
>
> (b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.
>
> (3) If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act–

[1] The source notes that there is no alternative sentence for a conviction under section 39B of the Dangerous Drugs Act 1952 other than the death penalty. However, minors are sentenced to detention in lieu of the death penalty at the pleasure of the Yang di-Pertuan Agong.

[2] The source has provided an extract of section 16 of the repealed Juvenile Courts Act 1947, which provided:

"Sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a juvenile: but in lieu thereof the Court shall order him to be detained during the pleasure of the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan or during the pleasure of the State Authority if the offence was committed in the State, and, if so ordered, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Yang di-Pertuan Agong or the State Authority may direct, and whilst so detained shall be deemed to be in legal custody."

(a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and

(b) while so detained, be deemed to be in lawful custody.

(4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison–

(a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person,

and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.

9. The source reports that the Board of Visiting Justices is appointed under section 64 of the Prison Act 1995, and that the duties and role of the Board are set out in sections 65 and 66 of that act. According to the source, there is no publicly available information on the Board of Visiting Justices and the framework for its operations. The source submits that, despite the existence of the provisions, Mr. Redzuan's case was not subject to annual review and he did not meet with any representative from the Board of Visiting Justices prior to 2013.

10. The source also reports that Mr. Redzuan has been detained indefinitely since being sentenced on 9 October 2001, with no judicial review of his sentence and no possibility of parole. The source states that Mr. Redzuan filed an appeal for clemency through the Prison Department, but the appeal went unanswered. Mr. Redzuan has now been in detention for more than 18 years since his arrest on 22 February 2000.

11. According to the source, a complaint was filed on behalf of Mr. Redzuan's family with the Human Rights Commission of Malaysia seeking further investigation of the case. In particular, the Commission was requested to investigate the cause of Mr. Redzuan's prolonged detention and the failure to accord him the annual review required under section 97 (4) of the Child Act 2001. Following a visit by the Human Rights Commission to Mr. Redzuan on 11 July 2018, the Prison Department verbally informed the Commission that his case had been sent to the Pardons Board for a pardon application.

Submissions

12. The source acknowledges that Mr. Redzuan's sentence was imposed in accordance with the laws and legislative framework of Malaysia applicable at the time. However, the source raises the following concerns relating to Mr. Redzuan's detention, conviction and sentencing:

(a) Mr. Redzuan was assaulted by a police officer during the early phase of his detention when questioned about his employer;

(b) The police officer in charge of Mr. Redzuan's case warned him to plead guilty to the charges to secure the freedom of his family members;

(c) Mr. Redzuan was not provided adequate legal representation or advice during his trial at the High Court or during his subsequent appeal at the Court of Appeal;

(d) Between 2001 and 2013, Mr. Redzuan was not afforded annual reviews of his case, as provided for under section 97 (4) of the Child Act 2001. The Board of Visiting Justices only reviewed his case in 2013, 2017 and 2018. During those reviews, Mr. Redzuan was only asked about the conditions of his detention and his aspirations following his release;

(e) The sentencing methods under section 97 of the Child Act 2001 result in indefinite detention and constitute psychological torture, in violation of article 37 of the Convention on the Rights of the Child.

Response from the Government

13. On 6 August 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 5 October 2018 about the current situation

of Mr. Redzuan. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention and its compatibility with the obligations of Malaysia under international human rights law.

14. The Government submitted its response on 4 October 2018. In its response, the Government states that Mr. Redzuan was convicted on three separate charges of trafficking dangerous drugs under section 39B of the Dangerous Drugs Act 1952.[3]

15. According to the Government, Mr. Redzuan pleaded guilty to all three offences. On 22 August 2001, the High Court of Malaysia sentenced him to detention in accordance with section 16 of the Juvenile Courts Act 1947. Mr. Redzuan is currently detained at Sungai Buloh Prison, where he is still serving the sentence imposed by the High Court in 2001 for drug trafficking.

16. The Government states that Mr. Redzuan was accorded reviews by the Board of Visiting Justices in 2013, 2017 and 2018. In addition, Mr. Redzuan made three pardon applications to the Pardons Board, in 2006, 2011 and 2017, all of which were approved. Throughout his detention, Mr. Redzuan did not make a request for annual review of his case, nor did he challenge the decisions by the Pardons Board.

17. In relation to the allegation that Mr. Redzuan was assaulted early in his detention, the Government states that the Royal Malaysia Police strictly adheres to a standard operating procedure that prohibits torture and all forms of ill-treatment. Information on the prohibition of force and ill-treatment and on adherence to human rights standards has been incorporated in the training of police personnel. The Government stresses that violations of human rights, such as torture and ill-treatment, are best identified and redressed during domestic proceedings. In that context, it is questionable why Mr. Redzuan did not raise the alleged assault during his court proceedings, when he could have availed himself of appropriate remedies. The Government underlines that there are no provisions in domestic law that decriminalize torture or ill-treatment during detention, nor does the law provide impunity for perpetrators.

18. In relation to the allegation of inadequate legal representation, the Government states that Mr. Redzuan was charged in the High Court with three separate charges that carry a mandatory death sentence. Mr. Redzuan was under 18 years of age when he committed the offences and was considered a juvenile. Mr. Redzuan pleaded guilty and the Court was satisfied that he understood the nature and consequences of his guilty plea. His legal counsel made no mitigation plea and relied entirely on section 16 of the Juvenile Courts Act 1947, which provided that a juvenile shall not be sentenced to death. All due process requirements were met. The Government submits that it is inappropriate for Mr. Redzuan to claim that he was not provided with adequate legal representation and advice.

19. The Government recalls that article 5 of the Federal Constitution of Malaysia sets out the fundamental liberties of all persons in Malaysia, including the right to life and personal liberty. However, there are exceptions provided for in legislation, including in the Dangerous Drugs Act 1952, which empowers law enforcement agencies to detain a person when there have been infringements of the law.

20. In relation to the sentencing methods under the Child Act 2001, the Government acknowledges that it is obliged under article 3 (1) of the Convention on the Rights of the Child to ensure that the best interests of the child are a primary consideration. The Government refers to provisions of the Convention, including articles 40 (2) (a) and (b), as "fundamental procedural rights of children in the administration of criminal justice". In addition, the Government refers to provisions in the Child Act 2001 that require the Court for Children to treat the best interests of the child as paramount, and underlines that the criminal procedure adopted by the Court is designed to provide child offenders with a fair trial.

21. The Government refers to article 37 of the Convention on the Rights of the Child, which sets out the circumstances in which a child may be deprived of liberty. While the

[3] The offences related to: (a) cannabis (2,761.7 grams) found in Mr. Redzuan's possession; (b) cannabis (18,114.1 grams) found in his house; and (c) cannabis (15,106 grams) found in his house.

Government has placed a reservation on that article, it still ensures that official policies and laws are in line with international obligations and the domestic legal framework. Section 97 (2) of the Child Act 2001 empowers the court, after convicting a person who was a child at the time of the commission of an offence punishable with death, to make an alternative order. The power to make such an order is no less than the power of the court to impose a sentence on a child convict, although it is in a different form in the present case (namely, sentencing a child to the care of the Yang di-Pertuan Agong, the Ruler or the Yang di-Pertua Negeri, depending on where the offence was committed). The detention is not unconstitutional, as it is the court that makes the order following its conviction order.

22. In conclusion, the Government emphasizes that the actions taken by the authorities against Mr. Redzuan were conducted pursuant to domestic law, while observing the safeguards provided by law. Measures were taken against Mr. Redzuan in light of the Government's sovereign responsibility within its territory, as recognized by international law, to protect national security, public order, morals, rights and the freedoms of others. Mr. Redzuan's detention was not arbitrary. The laws of Malaysia ensure due process for detained persons, and detention is only sustained when an individual remains at high risk of recidivism.

Further comments from the source

23. On 11 October 2018, the Government's response was sent to the source for further comment. The source responded on 16 October 2018. In its response, the source referred to the Government's submission that Mr. Redzuan had made three pardon applications to the Pardons Board, in 2006, 2011 and 2017, and that all of those applications had been approved. The source emphasizes that that cannot be correct because, if the applications had been successful, Mr. Redzuan would no longer be in indefinite detention at Sungai Buloh Prison.

24. In addition, the source refers to the Government's submission that, throughout Mr. Redzuan's detention, there was no request for annual review of his case, nor did he challenge the decisions of the Pardons Board. The source submits that the Government's response fails to address the fact that section 97 (4) of the Child Act 2001 was not applied to Mr. Redzuan. As the source points out, section 97 (4) provides for a mandatory annual review by the State. The source considers that that position is substantiated by the absence of any additional provisions allowing those detained under section 97 (2) of the Child Act[4] to file an application for annual review under section 97 (4) of the act. Any other interpretation would result in absurdity, as a juvenile offender sentenced under section 97 (2) would be expected to have the capacity to exercise his or her rights in full under the Child Act and to file an application for annual review of his or her case through a non-existent process.

25. The source reiterates that Mr. Redzuan has already served more than 18 years of his indefinite sentence, coming close to the limitation for the sentence of life imprisonment in Malaysia. According to the source, life imprisonment in Malaysia usually involves a detention period of no more than 30 years. In practice it would usually be a shorter period, as good behaviour can result in early parole.

26. In relation to the adequacy of Mr. Redzuan's legal representation at trial, the source states that Mr. Redzuan was not informed of the full repercussions of his lawyer's decision to rely on section 16 of the Juvenile Courts Act 1947. In addition, the source alleges that the lawyer, who was appointed by the court, disregarded the allegation that Mr. Redzuan had been assaulted.

27. Finally, the source takes note of the Government's submissions regarding the allegation that Mr. Redzuan was assaulted by a police officer during the early phase of his

[4] According to the source, section 97 (2) of the Child Act 2001 was challenged in the case of *Kok Wah Kuan v. The Prison Director of Kajang*. The Court of Appeal ruled that the provision was unconstitutional. That decision was reversed by the Federal Court of Malaysia on the ground that the separation of powers doctrine is not a provision of the Malaysian Constitution, and the act did not violate the Constitution for having consigned the Federal Court's judicial power to determine the measure of sentence to be served to the executive. The source provided a copy of the Federal Court's judgment, as well as a copy of the Child Act 2001 (as at 1 February 2018).

detention. According to the source, the Government's stance is untenable, because statutory bodies, such as the Human Rights Commission of Malaysia and the Enforcement Agency Integrity Commission, have conducted extensive investigations in the past and have found evidence of torture and police brutality inflicted by the Royal Malaysia Police.

Discussion

28. The Working Group thanks the source and the Government for their submissions.

29. In determining whether Mr. Redzuan's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented 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. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

30. In the present case, the source alleges that Mr. Redzuan is being detained indefinitely pursuant to section 97 (2) of the Child Act 2001. The source submits that there is no statutory limitation on the length of detention under that provision and that Mr. Redzuan is being held at the pleasure of the Yang di-Pertuan Agong, a sentence that was imposed in lieu of the death penalty. Moreover, the source argues that the only mechanism for Mr. Redzuan's release under the act, namely mandatory annual review by the Board of Visiting Justices under section 97 (4), was not applied in the present case.

31. In considering whether Mr. Redzuan's ongoing detention is arbitrary, the Working Group takes note of the views of the Committee on the Rights of the Child. In its most recent concluding observations on Malaysia, in 2007, the Committee expressed concern regarding the deprivation of liberty of minors at the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri. The sentencing regime was set out in the now repealed Juvenile Courts Act 1947 and has been retained in the current Child Act 2001. The Committee considered that such a sentence results in the undetermined length of deprivation, causing problems in terms of the development of the child, including her/his recovery and social reintegration (CRC/C/MYS/CO/1, para. 103). The Working Group considers that the Committee's observations remain highly relevant, given that they were made after the Child Act came into force in 2001, and the act itself clearly still results in the indeterminate detention of children, as in the present case.

32. In addition, as the Working Group has previously stated, the question of whether detention is arbitrary must be interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[5] The Working Group considers that Mr. Redzuan's detention manifests those elements, particularly in its lack of predictability and due process of law. Mr. Redzuan has been detained for over 18 years since his arrest on 22 February 2000. While the Child Act 2001 improved on the Juvenile Courts Act 1947 by introducing mandatory annual review of a minor's detention by the Board of Visiting Justices under section 97 (4),[6] that provision has not been applied to Mr. Redzuan. The Government confirmed that Mr. Redzuan's case had been reviewed by the Board of Visiting Justices in 2013, 2017 and 2018, but offered no explanation as to why he was not afforded an earlier review, in compliance with the statutory requirements. The Working Group notes that there appears to be no requirement under section 97 (4) that the detainee apply for review.

33. As a result, Mr. Redzuan had no notice of the length of his detention, and was not afforded a review of whether the circumstances that initially justified his detention had

[5] Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, A/HRC/22/44, para. 61. While the Working Group was referring to the arbitrariness of detention under article 9 of the International Covenant on Civil and Political Rights (to which Malaysia is not a State party), the reasoning is equally applicable to the prohibition of arbitrary detention under article 9 of the Universal Declaration of Human Rights.

[6] According to section 97 (4) (a) of the Child Act 2001, the annual reviews are mandatory, as it is stated in that provision that the Board of Visiting Justices "shall" review the case "at least once a year".

changed[7] over the 12 years from the time of his sentencing in 2001 until his first annual review by the Board of Visiting Justices in 2013. That is particularly serious, given that section 97 (4) (a) of the Child Act 2001 requires the Board to review Mr. Redzuan's detention "at least once a year". The Government failed to ensure that the procedure required by national law was observed in the present case. The Working Group considers that the reviews of Mr. Redzuan's case in 2013, 2017 and 2018 cannot remedy this serious violation. There is no way of knowing whether Mr. Redzuan would have been released earlier had his detention been subject to the annual review required under section 97 (4) of the Child Act. Moreover, as the source alleges, and the Government did not deny, Mr. Redzuan was only asked about the conditions of his detention and his aspirations following his release during the three reviews, and the Board does not appear to have made any serious attempt to consider his early release. In the view of the Working Group, that line of questioning by the Board did not amount to a substantive review of the ongoing necessity of Mr. Redzuan's detention, but merely consisted of an enquiry into his conditions of detention.

34. The Working Group finds that Mr. Redzuan has been detained without a legal basis, because the means of determining whether his detention remains appropriate and in accordance with the Child Act 2001, namely mandatory annual review by the Board of Visiting Justices, was not applied throughout his detention. Moreover, the Government did not challenge the source's allegation that Mr. Redzuan's situation was made worse by the fact that his attempts to seek release through other mechanisms, such as an appeal for clemency, received no response from the authorities. Accordingly, Mr. Redzuan's deprivation of liberty violates article 9 of the Universal Declaration of Human Rights and is arbitrary under category I.

35. In addition, the source raises concerns relating to Mr. Redzuan's detention, conviction and sentencing, including that: (a) Mr. Redzuan was assaulted during his detention; (b) Mr. Redzuan was warned that he must plead guilty to secure the freedom of his family members; and (c) Mr. Redzuan was not provided with adequate legal representation or advice during his trial at the High Court and during his subsequent appeal to the Court of Appeal. The Working Group will consider those allegations in determining whether Mr. Redzuan was afforded a fair trial.

36. The source alleges that Mr. Redzuan was assaulted by a police officer during the early phase of his detention in order to obtain information regarding his employer. In its response, the Government stated that the Royal Malaysia Police strictly adhered to procedures prohibiting torture and ill-treatment, and observed that Mr. Redzuan had not raised the alleged assault during his trial proceedings, when he could have sought appropriate remedies.

37. While the Working Group's mandate extends to alleged ill-treatment that negatively affects the ability of detainees to prepare their defence as well as their chances of a fair trial,[8] the Working Group is unable to make such a finding in the present case. In the view of the Working Group, the source did not provide sufficient information to support a prima facie case, including details on the nature of the alleged assault, when and where it allegedly occurred and how it related to Mr. Redzuan's employer. The Working Group requested that the source provide further details in relation to the alleged assault, but the source was unable to obtain further information due to the lapse of time since the incident and because of the fact that the police officer in charge of Mr. Redzuan's case had since retired from service. In reaching that conclusion, the Working Group takes note of its own previous findings that torture and ill-treatment is common in police stations in Malaysia (A/HRC/16/47/Add.2, para. 50), as well as the source's submission that bodies such as the Human Rights Commission of Malaysia and the Enforcement Agency Integrity Commission have found evidence of police brutality in the past. However, those findings cannot substitute for specific details relating to the alleged assault of Mr. Redzuan.

[7] The Working Group recalls that, in 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, detention that was lawful at its inception may become unlawful and arbitrary because the circumstances that initially justified the detention have changed (A/HRC/30/37, para. 12).

[8] See opinions Nos. 47/2017, para. 28, and 29/2017, para. 63, and E/CN.4/2004/3/Add.3, para. 33.

38. Further, the source alleges that the police officer in charge of Mr. Redzuan's case warned him to plead guilty to his charges in order to secure the freedom of his family members. According to the source, some of the cannabis was found at Mr. Redzuan's family home and his family members were arrested for investigation, although they were subsequently released without charge. The Working Group considers that the source has provided sufficient information in relation to the allegation, including that Mr. Redzuan pleaded guilty to the charges against him. The Working Group notes that, although it had the opportunity to do so, the Government did not address that allegation in its submission. Accordingly, the Working Group finds that the source has established a prima facie violation, which has not been rebutted by the Government, of Mr. Redzuan's right not to be compelled to confess guilt, under article 40 (2) (b) (iv) of the Convention on the Rights of the Child. In its general comment No. 10 (2007) on children's rights in juvenile justice, the Committee on the Rights of the Child stated that the term "compelled" in article 40 (2) (b) (iv) of the Convention should be interpreted broadly and not be limited to physical force, and that it included other means of coercion (para. 57). The Working Group considers that the pressure allegedly applied on Mr. Redzuan to plead guilty in order to ensure the liberty of his family members falls within the scope of that provision.

39. Finally, the source alleges that Mr. Redzuan did not have adequate legal representation during his trial and appeal. According to the source, Mr. Redzuan was not informed of the repercussions of his court-appointed lawyer's decision at trial to rely on section 16 of the Juvenile Courts Act 1947, which provided for indeterminate detention in lieu of the death penalty. The source also claims that Mr. Redzuan's lawyer disregarded the allegation that his client had been assaulted.[9] Furthermore, the Prison Department assisted Mr. Redzuan to file an appeal because he had no legal representation at that time. In its response, the Government recalls that Mr. Redzuan's lawyer made no mitigation plea and relied entirely on section 16 of the Juvenile Courts Act 1947, and that due process requirements were met. The Government did not address the source's submissions in relation to Mr. Redzuan's appeal.

40. Having considered all of the available information, the Working Group is not convinced that Mr. Redzuan received inadequate legal representation at trial. The Working Group has taken into account the fact that the case involved a minor who faced a serious penalty of detention at the pleasure of the Yang di-Pertuan Agong in lieu of the death penalty, and that he was defended by a court-appointed lawyer. However, the source did not submit any information to suggest that Mr. Redzuan's legal representation at trial involved incompetence or misconduct that the court failed to remedy.[10] There is no information to suggest that the lawyer's decision to rely entirely on the provisions of the Juvenile Courts Act 1947 amounted to a failure to present an effective defence, and it may have been part of the trial strategy or a matter of professional judgment.[11] Moreover, the source noted in its initial submission that there was no alternative sentence for any conviction under section 39B of the Dangerous Drugs Act 1952 other than the death penalty. It is therefore not clear whether alternative defence options were available to Mr. Redzuan's lawyer, other than relying on the Juvenile Courts Act. Similarly, the alleged failure to inform Mr. Redzuan of the repercussions of the decision and the disregard of Mr. Redzuan's alleged assault are matters between Mr. Redzuan and his lawyer, rather than manifest violations for which the Government can be held responsible.

41. However, the Working Group considers that the Government's failure to ensure that Mr. Redzuan was legally represented during his appeal amounts to a violation of his rights under article 40 (2) (b) (ii) and (iii) of the Convention on the Rights of the Child to have legal

[9] This is a separate claim to the allegation that Mr. Redzuan was assaulted during his detention, which is considered earlier in the present opinion (see para. 37 above). The allegation raised here relates to the disregard by legal counsel of Mr. Redzuan's claim that he had been assaulted, which demonstrates that Mr. Redzuan did not receive adequate legal representation.

[10] The present case may be contrasted with opinion No. 53/2018. In that case, the accused stated at a court hearing that he was being held incommunicado and had been subjected to physical and psychological torture, but the public defender and the presiding judge failed to follow up on those complaints (see paras. 71–73).

[11] The source provided the High Court law report, in which it is stated that the accused's counsel made no mitigation plea and relied entirely on the provisions of section 16 of the Juvenile Courts Act 1947.

assistance in the presentation of his defence and to have the matter determined in the presence of legal assistance. In addition, Mr. Redzuan's right to appeal under article 40 (2) (b) (v) of the Convention was rendered ineffective without the presence of legal representation.

42. The Working Group concludes that the case presented by the source discloses violations of Mr. Redzuan's right not to be compelled to confess guilt and his right to legal representation during his appeal. As a result, Mr. Redzuan's right to a fair trial under articles 10 and 11 (1) of the Universal Declaration of Human Rights was also violated. Those violations are of such gravity as to give Mr. Redzuan's deprivation of liberty an arbitrary character under category III.

Other issues

Review of detention under the Child Act 2001

43. The Working Group wishes to provide its observations on an issue that it considers to be of significance in relation to the detention of minors in Malaysia under the Child Act 2001. The issue was not raised by either the source or the Government in the present case. Accordingly, the Working Group has not taken the issue into account in determining whether the detention of Mr. Redzuan was arbitrary.

44. The Working Group recalls that the Government acceded to the Convention on the Rights of the Child in 1995, but has entered and maintains reservations in relation to certain articles of the Convention, discussed further below. According to article 40 (2) (b) (v) of the Convention, which is not subject to a reservation, a child who is considered to have infringed the penal law has the right to have that decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body, according to law. Section 97 (4) of the Child Act 2001 appears to be inconsistent with that article, because the final decision on whether to release or detain a minor remains entirely at the discretion of the Yang di-Pertuan Agong, who may decide not to follow a recommendation for early release from the Board of Visiting Justices. As the Head of State of Malaysia, the Yang di-Pertuan Agong is effectively a member of the executive,[12] and not a higher competent, independent and impartial authority or judicial body.

45. In those circumstances, the potential benefit of section 97 (4) of the Child Act 2001 as an additional means of keeping a minor's sentence under review may be minimal. Under section 97 (2) and (4) of the act, not only is a minor detained during the pleasure of the Yang di-Pertuan Agong; the Yang di-Pertuan Agong can also effectively overrule a Board determination that the minor should be subject to early release.[13]

46. Given that the Government noted in its response that article 40 (2) (b) (v) of the Convention is one of the "fundamental procedural rights of children in the administration of criminal justice", the Working Group urges it to further consider whether the provisions of section 97 of the Child Act 2001 are in conformity with the obligations of Malaysia under international human rights law. The Working Group considers that an important part of its mandate is to assist States to ensure that deprivation of liberty, even when carried out in conformity with national legislation, is consistent with international human rights law.[14]

[12] In *Kok Wah Kuan v. The Prison Director of Kajang* (see above), the Federal Court noted that, by virtue of article 39 of the Malaysian Constitution, executive authority vests in the Yang di-Pertuan Agong (para. 16 of the judgment). Similar reasoning would apply to the Ruler and the Yang di-Pertua Negeri.

[13] In its response, the Government stated in relation to section 97 (2) of the Child Act 2001 that it was the court that made an order sentencing a child to detention during the pleasure of the Yang di-Pertuan Agong following a conviction. However, it is the Yang di-Pertuan Agong, not a court, who makes the final decision on early release under section 97 (4) of the act.

[14] See opinions Nos. 75/2017, 46/2011 and 13/2007. According to para. 7 of its methods of work, the Working Group may refer to international instruments, including the Convention on the Rights of the Child, in making this determination.

Reservations to the Convention on the Rights of the Child

47. On 19 July 2010, the Government entered a reservation to the Convention on the Rights of the Child, as follows:

> The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1 (a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.[15]

48. The Working Group takes note of that reservation, without making any finding on its validity under international law. However, as the Working Group noted in its opinion No. 37/2018, there are other provisions of the Convention relevant to the detention of minors that are not subject to that reservation. They include the requirement that the best interests of the child be a primary consideration (art. 3 (1)) and the right of every child recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which takes into account the desirability of promoting the child's reintegration (article 40 (1)). As the Government noted in its submission, Malaysia has a legal obligation under article 3 (1) to ensure that any action or decision taken in relation to children is centred on the paramount importance of the child's best interests. The Working Group considers that that standard was not met in Mr. Redzuan's case, given that he has been detained under an indeterminate sentence for an offence that he committed while a minor. Moreover, the Working Group recalls the standards provided in other instruments, such as rule 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and rule 2 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), in which it is stated that deprivation of the liberty of a juvenile shall be a measure of last resort and for the minimum period necessary. Those standards apply to minors regardless of the Government's reservation.[16]

49. In addition, torture is absolutely prohibited as a peremptory norm of international law[17] and under article 5 of the Universal Declaration of Human Rights, and both of those apply to Mr. Redzuan's situation. According to the source, Mr. Redzuan has been placed in a situation of indefinite detention under the Child Act 2001, which constitutes psychological torture. The Working Group will refer the matter to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

50. The Working Group joins the calls from other States and United Nations treaty bodies urging the Government to withdraw its reservations to the Convention.[18] The Working Group also calls upon the Government to review its laws, particularly section 97 of the Child Act 2001, and to bring them into conformity with the Convention on the Rights of the Child.

Detention in the context of drug control

51. Finally, the Working Group notes that Mr. Redzuan was convicted for committing drug offences while he was 17 years of age. The Working Group wishes to reiterate its concern about the use of criminal detention as a measure of drug control following charges for drug use, possession, production or trafficking. The Working Group considers that criminal laws and penal measures imposed in relation to drug control must meet the strict requirements of legality, proportionality, necessity and appropriateness, and that fair trial standards must be upheld in relation to the prosecution of drug-related offences, including the right to ongoing periodic review (A/HRC/30/36, paras. 57–62). In the present case, criminal sanctions for drug offences have resulted in a prolonged and indeterminate sentence being imposed on a minor who has now spent over half of his life in prison. The Working

[15] See treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

[16] See also Basic Principles and Guidelines, principle 18 and guideline 18.

[17] See opinion No. 46/2017, para. 25.

[18] A/HRC/25/10, paras. 146.29, 146.32 and 146.34–146.35. See also CRC/C/MYS/CO/1, paras. 11–12 and 38–39, and opinion No. 37/2018, para. 48.

Group would welcome the opportunity to provide assistance to the Government in ensuring that its drug control laws are consistent with international human rights standards.

52. A significant period of time has passed since the Working Group's last country visit to Malaysia in June 2010. The Working Group considers that it is now an appropriate time to continue its constructive engagement with the Government through another visit, and looks forward to a positive response to its previous request to visit made on 15 April 2015.

Disposition

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

> The deprivation of liberty of Mohd Redzuan Bin Saibon, being in contravention of articles 9, 10 and 11 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and III.

54. The Working Group requests the Government of Malaysia to take the steps necessary to remedy the situation of Mr. Redzuan without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights. The Working Group urges the Government to accede to the International Covenant on Civil and Political Rights, and to withdraw all reservations to the Convention on the Rights of the Child.

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

56. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Redzuan and to take appropriate measures against those responsible for the violation of his rights.

57. The Working Group requests the Government to bring its laws, particularly section 97 of the Child Act 2001, into conformity with the recommendations made in the present opinion and with the commitments made by Malaysia under international human rights law.

58. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

59. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

60. 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 Mr. Redzuan has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Redzuan;

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

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

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

61. 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.

62. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of 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.

63. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has 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.[19]

[*Adopted on 23 November 2018*]

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