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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session, 22-26 August 2016

Opinion No. 24/2016 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. The Human Rights Council assumed the mandate in its decision 1/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013.

2. In accordance with its methods of work (A/HRC/30/69), on 16 June 2016 the Working Group transmitted a communication to the Government of Israel 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 International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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(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 concerned (whose name is known by the Working Group) is a 16-year-old Palestinian child from a village near Ramallah. According to the source, on 28 February 2016, the minor's mother was woken at 2 a.m. when the house doors were blown in by Israeli security forces, who raided the house and entered the bedrooms. The source reports that they pointed their weapons at the family members, including the children. They asked the minor and his 12-year-old brother to get off their beds with their hands above their heads. The younger brother was unable to move from fear, until his mother reassured him and told him to get out of bed. At the same time, two soldiers allegedly took the minor to another room.

5. The source claims that no arrest warrant or any other decision by public authority was shown to the mother of the minor at the time of his arrest. Allegedly, the officer in charge of the operation explained to the mother that her son should be in prison, since his father had killed a number of soldiers. The source reports that the father had been arrested in 2003 and had received seven life sentences.

6. It is reported that a six-month administrative detention order was issued against the minor by the military commander of the West Bank, starting on 28 February 2016 and ending on 27 August 2016, on the basis of articles 31 and 285 of Military Order 1651 (2009). The military prosecution claimed that the minor had been active in an illegal organization and that he had participated in activities, including of a military nature, affiliated with the same organization. The source reports that the minor was brought to Ofer military prison under the authority of the Israeli Prison Service, where he is still detained.

7. On 9 March 2016, a judge confirmed the detention order relating to the minor, while reducing it to four months. The source submits that, despite the absence of any official charges and information justifying the minor's arrest, the judge claimed that he had received information of a dangerous nature and that detention was required in the case because the minor posed a "threat to the security of the State". On 24 June 2016, the detention order was extended for a further four months.

8. Furthermore, the source claims that the minor had no effective means within the Israeli military court system of challenging his detention, which might, in practice, continue indefinitely. The source explains that, although administrative detention orders issued by military commanders under Israeli Military Order No. 1651 are reviewed by the Court of Administrative Detainees and the Administrative Detainees Appeals Court (both part of the Israeli military court system) and can be appealed before the Israeli High Court of Justice, the minor's legal counsel was reportedly not permitted to see any of the alleged evidence against the minor and had no means of effectively challenging his detention. As a general rule and practice, lawyers are allegedly not permitted to see the "secret information" against their clients, which makes the right to challenge administrative detention illusory.

9. The source argues that the circumstances surrounding the imprisonment of the minor amount to arbitrary detention falling within categories I and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. According to the source, the minor has been arbitrarily denied his right to a fair trial, which is guaranteed by article 14 of the Covenant, including the right to be presumed innocent until proven guilty according to the law; to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to the law; and to examine or have examined adverse witnesses.

10. Referring to articles 42 and 78 of the Fourth Geneva Convention of 1949 and article 4 of the Covenant, the source recalls that, although administrative detention is permitted under international law in strictly limited circumstances, it is permissible only if the security of the State “makes it absolutely necessary” and only in accordance with “regular procedure”. The source also draws attention to the concluding observations adopted by the Committee against Torture in 2009¹ and the latter’s concerns in relation to the extensive use of administrative detention by Israel.

11. According to the source, it is difficult to accept that this stringent requirement has been satisfied in the minor’s case, as the Israeli prosecuting authorities have supplied no open evidence justifying his detention, instead claiming that he poses an unspecified security risk. The source submits that imprisonment of the minor amounts to arbitrary detention and claims that, if the authorities had evidence supporting his administrative detention, then he could have been charged under military orders and tried in the military courts. The source points out that administrative detention should never be used as a substitute for criminal prosecution in cases where there is insufficient evidence to obtain a conviction. The source submits that this case confirms that the occupation authorities use the policy of administrative detention against children as a punishment in order to keep them in prison as long as possible, even when the prosecution fails to provide clear charges against them.

12. In this context, the administrative detention courts cannot be viewed as independent or impartial, as they are staffed by military personnel who are subject to military discipline and dependent on superiors for promotion. Moreover, military court judges and prosecutors are colleagues in the same division in the Israeli army and report to the same commander.

13. In addition, the source reports that the minor had been deprived of his liberty by the Israeli army on 28 August 2015. He was arrested without being presented with any charge, held in detention for 20 days in Moskobiyyeh interrogation centre and subsequently released without being charged with any offence. The source reports that, during his detention at that time, he was subjected to a very tough interrogation without any consideration for his young age or the principle that he should not be subjected to any kind of torture or ill-treatment.

Response from the Government

14. The Working Group regrets that the Government has not responded to the allegations transmitted by it on 16 June 2016.

Discussion

15. 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.

¹ See CAT/C/ISR/CO/4, para. 17.

16. 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. In the present case, the Government has chosen not to challenge the allegations made by the source, which are, prima facie, credible.

17. The Working Group recalls that, pursuant to article 78 of the Fourth Geneva Convention, if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures, it may subject persons to internment (administrative detention). However, internment may not be used for the sole purpose of interrogation or intelligence-gathering.² Nor can it be used to circumvent the procedural rights of a person suspected of committing a criminal offence. A person who is suspected of committing a criminal offence has the right to benefit from additional stringent judicial guarantees, which include the right to be tried by a regularly constituted, independent and impartial court.³

18. In the present case, the minor has been detained since 28 February 2016, and the detention order was extended for a further four months on 24 June 2016. In this regard, the Working Group recalls that internment should have ceased as soon as the individual had stopped posing a real threat to State security:⁴ it should not last indefinitely. The longer internment lasts, the greater the onus on the detaining authority to prove that the reasons for the internment remain valid.

19. As to the alleged connection between the detention of the minor and the deeds of his father, the Working Group recalls that internment may not be used as a general deterrent to the future activity of another person.⁵

20. Furthermore, the Working Group recalls that article 37(b) of the Convention on the Rights of the Child provides that “(no) child shall be deprived of his or her liberty ...arbitrarily” and that detention should be used “only as a last resort and for the shortest appropriate period of time”.

21. The Working Group also concurs with the position of the International Committee of the Red Cross that the review of the lawfulness of internment must be carried out by an independent and impartial body.⁶ In the case under consideration, the review was conducted by a military tribunal. In previous cases concerning Israel, the Working Group has already emphasized that military tribunals are not independent or impartial. They consist of military personnel who are subject to military discipline and dependent on superiors for promotion.⁷

22. The Working Group reiterates that the rights of internees should be given even greater weight in the light of the circumstances in the Occupied Palestinian Territory, which has been under military occupation for 49 years.⁸

² International Committee of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges* (Geneva, November 2014), p. 9.

³ Pejic, Jelena, “Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence”, *International Review of the Red Cross*, vol. 87, No. 858 (June 2005), p. 381.

⁴ *Ibid.*, p. 382, with reference to article 132 of the Fourth Geneva Convention and article 75(3) of Additional Protocol I to the Geneva Conventions.

⁵ See International Committee of the Red Cross, *Internment in Armed Conflict* (note 2 above).

⁶ *Ibid.*, p. 9; Pejic, “Procedural principles and safeguards”, pp. 386-387 (note 3 above).

⁷ See opinions No. 58/2012 and No. 3/2012.

⁸ See, for instance, opinions No. 58/2012 and No. 5/2010.

23. The Working Group is aware of the concerns of the United Nations Children's Fund related to the detention of Palestinian children by Israeli armed forces: "Each year approximately 700 Palestinian children aged 12 to 17, the great majority of them boys, are arrested, interrogated and detained by Israeli army, police and security agents. In the past 10 years, an estimated 7,000 children have been detained, interrogated, prosecuted and/or imprisoned within the Israeli military justice system – an average of two children each day".⁹

24. The Committee of the Rights of the Child also expressed concerns regarding the detention of Palestinian children and violation of the rights of children living in the Occupied Palestinian Territory by subjecting them to military orders.¹⁰

25. The Working Group considers that the non-observance of the international norms relating to the right to a fair trial and to liberty and security, established in article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant, is of such gravity in this case as to confer an arbitrary character on the deprivation of liberty of the minor. Thus, the deprivation of his liberty falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Disposition

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

The deprivation of liberty of the minor is arbitrary, being in contravention of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights; it falls within category III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Follow-up procedure

27. 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;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

28. The Government is further invited to inform the Working Group of any difficulties which 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.

⁹ United Nations Children's Fund, *Children in Israeli Military Detention: Observations and Recommendations* (February 2013). Available from www.unicef.org/oPt/UNICEF_oPt_Children_in_Israeli_Military_Detention_Observations_and_Recommendations_-_6_March_2013.pdf

¹⁰ See CRC/C/ISR/CO/2-4, para. 73.

29. 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 undertake its own action in follow-up to the present 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 the progress made in implementing its recommendations, as well as of any failure to take action.

30. The Working Group recalls that the Human Rights Council has called for all States to cooperate with the Working Group, 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.¹¹

[Adopted on 22 August 2016]

¹¹ See Human Rights Council resolution 24/7, para. 3.