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Human Rights Council
Working Group on Arbitrary Detention

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Opinion No. 31/2017 concerning Omar Nazzal (Israel)

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.

1. In accordance with its methods of work (A/HRC/33/66), on 26 January 2017 the Working Group transmitted to the Government of Israel a communication concerning Omar Nazzal. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

2. 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

3. Omar Nazzal is a 54-year-old Palestinian writer and freelance journalist residing in Ramallah. He is the director of Clacket Media and a member of the General Secretariat of the Palestinian Journalists' Syndicate.

4. According to the source, Mr. Nazzal was first held under administrative detention for one year in 1977. He was held again in 1985 and 1988. He was also placed under house arrest in 1986. In 2014, a travel ban was placed on him, which remained effective until his most recent arrest on 23 April 2016.

Arrest and administrative detention

5. Mr. Nazzal was arrested on 23 April 2016, while trying to cross the Allenby bridge into Jordan. The source reports that Mr. Nazzal was on his way to attend a meeting with the European Federation of Journalists in Sarajevo, Bosnia and Herzegovina, as a representative of the Palestinian Journalists' Syndicate.

6. After his arrest, Mr. Nazzal was initially detained at the Etzion detention centre and then transferred to Ofer Prison in the West Bank. On 2 May 2016, an administrative detention order was issued against Mr. Nazzal until 22 August 2016. Since then, the order has been renewed three times. At the time of the submission by the source, Mr. Nazzal remained in administrative detention. The source submits that administrative detention is a procedure that allows the Israeli military to hold detainees indefinitely on secret evidence without charging them or allowing them to stand trial.

7. During a confirmation hearing on 22 November 2016, Mr. Nazzal's administrative detention order was reduced to one and a half months and he was expected to be released on 24 December 2016. However, on 12 December 2016, the order was renewed once again until 20 February 2017. The lawyer of Mr. Nazzal sought to appeal against the administrative detention of his client, but no appeal date had been set at the time of the submission by the source.

8. The source notes that the Israeli military is authorized to issue administrative detention orders against Palestinian civilians on the basis of Military Order No. 1651. Article 285 of that order empowers military commanders to detain an individual for renewable periods of up to six months if they have reasonable grounds to presume that regional security or public security require the detention. On or just before the expiry date, the detention order is frequently renewed. That process can be continued indefinitely. There is no limit to the maximum amount of time an individual may be administratively detained, leaving room for indefinite detention.

9. According to the source, the grounds on which someone can be detained under Military Order No. 1651 are unclear, leaving it up to the military commanders to decide on what constitutes "public security" and "regional security". During the judicial review of a detention order, which is held in a closed hearing before a military judge, the judge can uphold, cancel or shorten the order. According to the source, in most cases, administrative detention orders are confirmed for the same periods as those requested by the military commander. The detainee can appeal the decision through judicial review. However, the source notes that, in practice, the vast majority of appeals are rejected.

10. The source highlights that, although international human rights law permits some limited use of administrative detention in emergency situations, the authorities are required to follow basic rules for such detention. This includes the right to a fair hearing at which the detainee should be allowed to challenge the reasons for his or her detention. The source considers that "as the occupying power in the West Bank, Israel is also bound by the rules governing occupation, which require the use of administrative detention only for 'imperative reasons of security'" (article 78 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949)).

11. According to the source, the first judicial review hearing took place on 8 May 2016 at Ofer Military Court. During the hearing, Mr. Nazzal's lawyer stated that the last

detention of his client under administrative detention took place in 1988 and that he had never been summoned for interrogations or investigations related to national security issues since that time. His lawyer also emphasized that through Mr. Nazzal's work as a journalist and as a representative of the national syndicate to the International Journalists' Network, Mr. Nazzal was required to attend an array of events and meet with a variety of organizations and individuals from different political backgrounds. Mr. Nazzal's lawyer argued that his client had not deviated from his responsibilities as a journalist and that his arrest had been politically motivated, targeting Mr. Nazzal because of his journalistic background.

12. The source notes that, as a journalist, Mr. Nazzal is entitled to the right to freedom of opinion and expression. The source also reports that Mr. Nazzal was arrested on his way to a conference organized by the Government of Bosnia and Herzegovina, at which he would have exposed the practices of the Israeli authorities against Palestinian journalists.

13. The source considers that the arrest of Mr. Nazzal appears to be part of a campaign targeting journalists in an attempt to silence the voices that speak out against the occupation and violations committed against Palestinians. According to the source, in recent months, the Israeli authorities have been targeting Palestinian journalists, human rights defenders and activists, and arbitrarily issuing administrative detention orders.

14. The source asserts that the detention of Mr. Nazzal constitutes an arbitrary deprivation of his liberty under categories I and III of the categories applicable to the consideration of cases by the Working Group.

Absence of legal basis justifying the detention of Mr. Nazzal

15. The source notes that, although administrative detention is permitted under international law, it is specifically meant to be used as a preventative measure and in cases in which the "security of the State makes it absolutely necessary" and in accordance with "regular procedure" (see articles 42 and 78, respectively, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and article 4 of the Covenant). The source highlights that administrative detention should never be used as punishment for lack of collaboration or as retaliation.

16. According to the source, Mr. Nazzal's administrative detention is based upon his alleged participation in events organized by the Popular Front for the Liberation of Palestine. However, the source notes that no evidence has ever been provided to him or his lawyer regarding this allegation. The source considers that the lack of concrete evidence and vague claim that Mr. Nazzal posed a national security threat due to this alleged political participation cannot be a valid legal basis justifying an administrative detention order. The source highlights that, under international law, the use of administrative detention is strictly limited to situations of "absolute necessity" that "threaten the life of the nation".

17. The source submits that there is no legal basis to justify the detention of Mr. Nazzal for the following two reasons:

(a) The authorities have not provided any evidence as to why Mr. Nazzal is a security threat or investigated the claims of his alleged participation in events organized by the Popular Front for the Liberation of Palestine;

(b) The nature of Mr. Nazzal's work as a journalist requires him to engage with a variety of organizations and people. Such engagements, required by his profession, cannot form a legitimate ground for his administrative detention.

Violations of the right to a fair trial

18. According to the source, Mr. Nazzal has been denied the right to a fair trial and in particular: (a) the right to be presumed innocent until proven guilty according to law; (b) the right to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law; and (c) the right to examine or have examined those willing to testify against him.

Response from the Government

19. On 26 January 2017, the Working Group transmitted the allegations from the source to the Government of Israel under its regular communications procedure, requesting the Government to provide detailed information, by 26 March 2017, about the current situation of Mr. Nazzal as well as any comment on the source's allegations.

20. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention and their compatibility with the obligations of Israel under international human rights law, in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Nazzal. The Working Group regrets that it did not receive a response from the Government and that the Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work. The Working Group also regrets the systematic lack of responses by the Government of Israel to the communications sent by the Working Group.

Additional information from the source

21. On 21 February 2017, the source informed the Working Group that Mr. Nazzal had been released after spending 10 months in administrative detention without charge or trial.

22. The Working Group notes that, in accordance with paragraph 17 (a) of its methods of work, it reserves the right to render an opinion, on a case-by-case basis, whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. In the present case, the Working Group is of the view that the allegations made by the source are very serious and it will therefore proceed to deliver its opinion.

Discussion

23. 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.

24. 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.

25. The Working Group notes that Mr. Nazzal is a journalist residing in Ramallah, who is the director of Clacket Media and a member of the General Secretariat of the Palestinian Journalists' Syndicate. He was reportedly arrested on 23 April 2016 and detained at the Etzion detention centre and at the Ofer Prison in the West Bank.

26. The legal basis of the administrative detention orders against Mr. Nazzal was Military Order No. 1651, which authorizes military commanders to issue administrative detention orders against civilians, in particular Palestinians, for renewable periods of up to six months each time, based on security grounds (public security or regional security).

27. Although Mr. Nazzal is a civilian, he was detained on the basis of military legislation and military authority. The Working Group has consistently held the view that, whatever the charges, civilians shall never be tried by military courts, as the latter cannot be considered to be independent and impartial tribunals for the purpose of trying civilians.

28. In its opinions, annual reports and other documents in which it has addressed the issue, the Working Group has relied on the report on the administration of justice through military tribunals, which was submitted to the Commission on Human Rights at its sixty-second session (E/CN.4/Sub.2/2005/9) in 2006, and which contains the draft principles governing the administration of justice through military tribunals. According to principle 4, which deals with the jurisdiction of military courts to try civilians, "military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts".

29. In a recent report, the Working Group addressed the issue of military tribunals and it set out a number of minimum guarantees that military justice must not fail to respect (see A/HRC/27/48, paras. 66-69).

30. The Working Group considers that in cases of excessive length of detention, the individual shall enjoy the same guarantees as in criminal cases, even if the detention is qualified as administrative under national law. In this regard, the Working Group recalls that provisions of article 14 of the Covenant on the right to a fair trial are applicable where sanctions, because of their purpose, character or severity, must be regarded as penal, even if, under national law, the detention is qualified as administrative.

31. The Working Group reiterates that protective provisions contained in international human rights law must be given greater weight than arguments of *lex specialis* of international humanitarian law, especially given the circumstances in the Occupied Palestinian Territories, which has been under military occupation for 50 years.

32. The Working Group concurs with the concerns and recommendations of the Human Rights Committee related to the practice of administrative detention of Palestinians. In its concluding observations on the fourth periodic report of Israel in 2014, the Committee requested the State to "end the practice of administrative detention and the use of secret evidence in administrative detention proceedings, and ensure that individuals subject to administrative detention orders are either promptly charged with a criminal offence, or released" (see CCPR/C/ISR/CO/4, para. 10).

33. The Working Group did not receive any information related to the efforts of the Government of Israel to provide Mr. Nazzal with the formal charges and evidence against him while in detention. The Working Group notes that this is inconsistent with the obligation of the State of Israel to inform Mr. Nazzal promptly and in detail of the nature and cause of the charge against him, and in violation of paragraph 14 (3) (a) of the Covenant.

34. In view of the foregoing, 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 Israel, is of such gravity as to give the deprivation of liberty of Mr. Nazzal an arbitrary character, falling under category III.

35. The Working Group notes that Military Order No. 1651 authorizes military commanders to issue renewable administrative detention orders against civilians for up to six months at a time, based on security grounds (public security or regional security). However, in practice, administrative detention on the basis of the order is particularly directed against Palestinians.

36. The Working Group thus considers that the deprivation of liberty of Mr. Nazzal constitutes a violation of article 2 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant on the grounds of discrimination based on national origin that aimed towards, and resulted in, ignoring the equality of human beings. His deprivation of liberty is arbitrary and falls under category V.

37. The Working Group, bearing in mind its previously adopted opinions, has identified a pattern of systematic arbitrary detention of Palestinians in the Occupied Palestinian Territories. The Working Group therefore requests the Government of Israel to adopt all necessary measures to comply with such opinions and to ensure the right of every person under its jurisdiction not to be arbitrarily deprived of liberty. The Working Group would also like to urge the Government of Israel to consider favourably its request to undertake a visit both to Israel and the Occupied Palestinian Territories in order to engage in a constructive dialogue with relevant authorities, with a view to identifying adequate and effective measures to eradicate arbitrary deprivation of liberty by the authorities, including in the Occupied Palestinian Territories.

Disposition

38. Although Mr. Nazzal has been released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to

whether or not the deprivation of liberty was arbitrary, notwithstanding the release. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Omar Nazzal, being in contravention of articles 2, 9, 10 and 11 of the Universal Declaration of Human Rights and of articles 2, 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories III and V.

39. The Working Group requests the Government of Israel to take the steps necessary to remedy the situation of Mr. Nazzal without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

41. 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 for appropriate action.

Follow-up procedure

42. 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 compensation or other reparations have been made to Mr. Nazzal;

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

(c) 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;

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

43. 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.

44. 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.

45. 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.[1]

[*Adopted on 26 April 2017*]

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