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**Human Rights Council**  
**Working Group on Arbitrary Detention**

## **Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018**

### **Opinion No. 73/2018 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. 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 31 May 2018, 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, is a Palestinian student who usually resides in the village of Kafr Ein, located north-west of Ramallah, in the occupied West Bank. The minor is the holder of an identity card issued by the Palestinian Authority. At the time of his arrest, the minor was 17 years old and in his final year of secondary school.

### Arrest and administrative detention

5. The source reports that the minor was arrested on 20 September 2017 at around 2 a.m. in his family's home in the occupied West Bank. While he was sleeping, an Israeli soldier started to shout at him and ordered him out of bed. An intelligence officer asked for the minor's identification card to confirm his name and details, and the minor was ordered to put on his shoes because he was being arrested. The minor was taken out of the house. The source alleges that the soldiers did not show or provide a warrant or other evidence of a decision by a public authority to the minor or his parents, and they did not give any reasons for his arrest.

6. Once outside, the minor was forced to walk alongside the soldiers for about two minutes to an Israeli military vehicle. The source alleges that the minor was blindfolded, his hands were tied with a single plastic cord, and he was pushed inside the military vehicle. He was forced to sit on the metal floor while he was transferred to the nearby Nabi Saleh military checkpoint, a drive that lasted around 10 minutes. According to the source, the minor was slapped repeatedly on his face and the back of his neck for the duration of the drive.

7. When the vehicle arrived at the checkpoint, an officer took the minor out of the vehicle and removed the blindfold. Another soldier asked the minor general questions about his health and checked his pulse. He was blindfolded again and returned to the vehicle, where he was allowed to sit on the bench seat.

8. The minor spent about two hours in the vehicle as it travelled to the Israeli police station in Geva Binyamin (Adam), located north of Jerusalem in the occupied West Bank. The source alleges that, upon arrival, the minor was detained, tied up, blindfolded and left alone inside a 10-by-13-foot container until the morning. The soldiers occasionally opened the door to check on him, but he was not provided with any food or water and his requests to use a toilet were denied.

9. According to the source, the minor was removed from the container around sunrise and placed in a private car, and his blindfold was removed by a soldier. He was subsequently transferred to Ofer Prison inside the Ofer military compound in the occupied West Bank. Upon arrival, he was strip-searched and brought to an interrogation room. Before the interrogation began, the minor was allowed to speak briefly with a lawyer by telephone. However, the source alleges that the interrogator did not inform the minor of his rights, including his right to remain silent, and did not provide any documentation stating his rights.

10. The interrogator asked the minor general questions about whether he had ever thrown stones, which is a "security offence" under Israeli military law. The minor denied these allegations. The minor was asked if he had seen other individuals throwing stones, which he also denied. The minor was questioned again on whether he went out at night to throw stones at Israeli soldiers and he again stated that he had not.

11. The source reports that the minor remained tied up for the duration of the interrogation, which lasted around 30 minutes. An audiovisual recording was not made of the interrogation. The interrogator typed on a computer as he questioned the minor. At the end of the interrogation, the interrogator printed out a statement in both Hebrew and Arabic and made the minor sign it. The minor was fingerprinted and photographed and taken to the same private car.

12. The source states that the minor was driven a short distance to Ofer Military Court where he appeared before a military court judge for the first time. At this initial hearing, his detention was extended for a 72-hour period to allow an administrative detention order to be issued. This was the first time that the minor had any knowledge of an impending

administrative detention order against him. Following the hearing, he was sent back to Ofer Prison.

13. The minor arrived back at Ofer Prison at around 4 p.m. According to the source, he was strip-searched, given brown prison clothes to wear and detained in the juvenile section. The source alleges that the minor was not provided with any food or water for the approximately 14-hour period between the time of his arrest and his arrival at the juvenile section of Ofer Prison.

14. The source reports that the first administrative detention order against the minor was issued on 26 September 2017 and was based on “secret information” not shared with his legal counsel. On 2 October 2017, the minor appeared in Ofer Military Court for a hearing relating to the first administrative detention order, which resulted in a decision confirming the order on 8 October 2017. The decision was appealed and a hearing was held in Ofer Military Court on 26 October 2017, but the appeal was denied in a decision released the same day.

15. The Israeli military authorities issued a second administrative detention order against the minor on 19 January 2018, the day the prior order was set to expire, for another four-month period lasting until 18 May 2018, with the possibility of renewal. During a hearing on 22 January 2018 concerning his second detention order, the minor’s legal counsel demanded details of the secret information against his client. The source alleges that the Israeli military authorities failed to provide any detailed information and stated generally that the secret information against the minor included information that he allegedly: (a) planned to carry out a military attack against Israel; (b) “had a connection to weapons”; and (c) used his social media account to support terrorists.

16. During the hearing, the presiding military court judge asked the minor if he planned an attack in response to the killing in July 2017 of his adult cousin, specifically referencing a picture that the minor had posted of his cousin on social media. The minor denied that he had planned or was planning an attack. He stated that he had only posted his cousin’s picture on social media because they were relatives, not because he was planning an attack.

17. At the same hearing, in an attempt to challenge the grounds of the administrative detention order without having access to the secret information against the minor, his legal counsel noted that the Palestinian Authority had briefly detained the minor in August 2017. At that time, the minor had been interrogated about alleged weapons possession and planning an attack after his cousin had been killed by Israeli forces. The minor had been released and had not been charged with any criminal offence. The legal counsel noted that the minor had allegedly been subjected to physical violence amounting to torture during his time in the custody of the Palestinian Authority and argued that any statements made by the minor in that context had been due to force or coercion.

18. Without disclosing any details about the secret information used against the minor, the presiding military judge found, after reviewing the case, that there was information other than statements made to the Palestinian Authority officials to justify the administrative detention order. The military court of appeals subsequently approved the second four-month administrative detention order against the minor. The decision was appealed and a hearing was held in Ofer Military Court on 13 February 2018, but the appeal was denied.

19. According to the source, the minor appealed both administrative detention orders issued against him in the Israeli military courts. Both appeals were denied. Given the lack of access to an independent and impartial tribunal, no additional domestic measures have been taken by the minor or his legal counsel.

20. On 17 May 2018, the Israeli authorities issued a third four-month administrative detention order against the minor, which was originally scheduled to expire on 18 September 2018. The order was later changed so that it was due to expire on 1 August 2018.

#### Background information and context

21. According to the source, Palestinian children in the occupied West Bank face arrest, prosecution and imprisonment under an Israeli military detention system that denies them basic rights. Military law has applied to Palestinians in the West Bank since 1967, when Israel occupied the territory following the Six-Day War.

22. The source reports that, while Israeli military law gives military courts the authority to try any person located inside the Occupied Palestinian Territory, as long as they are 12 years of age or older, Jewish settlers who reside within the West Bank, in violation of international law, are subject to the Israeli civilian legal framework. Accordingly, Israel operates two separate and unequal legal systems in the same territory. While no Israeli child comes into contact with the Israeli military court system, Israel prosecutes an estimated 500 to 700 Palestinian children in military courts each year.

23. In October 2015, Israel renewed the practice of administrative detention against Palestinian children in the occupied West Bank for the first time in four years. At the time of the source's submission, 26 Palestinian minors had been detained pursuant to administrative detention orders since then.

24. Under Israeli military law, the primary military order relevant to the arrest and detention of Palestinian children is Military Order No. 1651 (2009) regarding security provisions, which permits administrative detention for a period of up to six months, subject to indefinite renewals. According to the source, Military Order No. 1651 addresses a range of issues, and gives authority to arrest and imprison Palestinians for "security offences", such as causing death, assault, personal injury or property damage, kidnapping, and harming a soldier. Throwing stones is included as a specific offence under Military Order No. 1651 (chap. G, sect. 212). Throwing an object, including a stone, at a person or property with the intent to harm the person or property carries a maximum penalty of 10 years' imprisonment. Throwing an object, including a stone, at a moving vehicle with the intent to harm it or the person travelling in it carries a maximum penalty of 20 years' imprisonment.

25. The source emphasizes that children deprived of their liberty are at a heightened risk of violence and that being in custody may negatively impact their health and development. As a result, international juvenile justice norms, enshrined in the Convention on the Rights of the Child, are built around two fundamental principles: the best interests of the child must be a primary consideration in making decisions that affect children (art. 3); and children must only be deprived of their liberty as a last resort and for the shortest appropriate period of time (art. 37 (b)).

26. The source notes that, in situations of international armed conflict, administrative detention is permitted in strictly limited circumstances and only in the most exceptional cases for "imperative reasons of security", when there is no other alternative.<sup>1</sup> The practice should never be used as an alternative to filing charges, for the sole purpose of interrogation or as a general deterrent to future activity.

27. The minor was in detention without charge for nearly one year following his arrest on 20 September 2017, during which time he was held in the juvenile section of Ofer Prison. The source emphasizes that the detainee in this case was a minor, and his detention presented a serious threat to his health, including his physical and psychological integrity. According to the source, the minor's continuous detention was compounded by the fact that the detaining entity was the Government of Israel, the occupying Power under international humanitarian law.

28. The source submits that the minor's deprivation of liberty was arbitrary under categories II, III and V.

#### Category II: exercise of fundamental rights

29. According to the source, the general summary of secret information against the minor alleges that he used his social media account to support terrorists. When questioned during the review of his detention order on 22 January 2018, the minor explained that he had shared a picture of his adult cousin who had been killed by Israeli forces. However, he explicitly denied that he was planning an attack and stated that he had no intention to plan or carry out an attack in response to his cousin's killing.

30. The source submits that the minor's detention was improper, as it was carried out under the pretext that the minor posed a threat to security based on his alleged sharing of an

<sup>1</sup> Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 78.

image of his cousin. Sharing an image on a social media platform falls within the minor's right to freedom of expression. According to the source, the Israeli authorities have failed to provide details of specific conduct or activity by the minor that is sufficiently egregious to meet the high threshold needed to justify his internment under an administrative detention order.

31. In addition, the source submits that the Israeli authorities have not provided detailed information to substantiate the allegation that the minor used his social media account to support terrorists. In the absence of additional evidence, sharing an image on social media cannot be considered a serious, direct political or military threat to the entire nation of Israel.

32. The source concludes that the minor's deprivation of liberty violated article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant and thus falls within category II.

#### Category III: due process rights

33. The source submits that the Government of Israel has violated the minor's due process rights and his right to a fair trial and that his deprivation of liberty falls within category III.

#### Detention without a warrant and failure to provide the reasons for arrest

34. The source refers to articles 9 (2) and 14 (3) (a) of the Covenant and article 40 (2) (b) (ii) of the Convention on the Rights of the Child, which expressly require that children deprived of their liberty be informed of the reasons for their arrest and promptly informed of the charges against them. The source reiterates that no warrant or evidence of a decision by a public authority was shown or provided to the minor or his parents, and the Israeli authorities provided no reason for the minor's detention at the time he was detained. From the time of the minor's arrest until his release, the Israeli authorities never charged him with a crime and never informed him, in sufficient detail to challenge his detention, of the nature and cause of his detention.

#### Denial of the right to be tried without undue delay and to challenge the deprivation of liberty

35. The source submits that children deprived of their liberty have the right to have their matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law. This protects a child's right to challenge effectively the legality of any continued deprivation of liberty in accordance with article 9 (3) and (4) of the Covenant and article 40 (2) (b) (iii) of the Convention on the Rights of the Child.

36. In addition, the source notes that when administrative detention is used to hold persons rather than to prosecute them on a criminal charge, there are severe risks of arbitrary deprivation of liberty.<sup>2</sup> The source recalls that administrative detention must not last longer than absolutely necessary, and that it must end as soon as an individual alleged to have posed a real threat to State security no longer poses such a threat. The longer administrative detention lasts, the greater the onus on the detaining authority to prove that the reasons for the internment remain valid.<sup>3</sup> There must also be prompt and regular review by an impartial and independent court or tribunal.

37. In the present case, the Israeli military authorities have not filed formal charges against the minor, and he spent nearly one year in detention without charge or trial. The minor and his legal counsel were unable to challenge effectively the legality of his detention because the Israeli military authorities denied them access to the secret information relied upon by the Israeli military court judges to issue and confirm the various administrative detention orders against the minor. The source submits that the failure to provide access to detailed secret information violated the minor's right to have the matter determined without delay.

<sup>2</sup> Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 15.

<sup>3</sup> Opinion No. 24/2016, para. 18.

38. Furthermore, the source asserts that the longer the Israeli authorities detained the minor, the greater the onus was on them to establish that the reasons for the internment remained valid and that the minor remained a present, direct and imperative threat. However, despite the burden on the Government to demonstrate that the minor posed a threat, in order to justify his detention without charge, the Israeli military authorities did not provide sufficiently detailed evidence establishing this threat to State security.

#### Failure to try the minor before an independent and impartial tribunal

39. The source argues that it is doubtful whether the use of military courts to try civilians, and particularly minors, can ever satisfy the right to a fair trial before an independent and impartial tribunal. Article 14 (1) of the Covenant and articles 37 (d) and 40 of the Convention on the Rights of the Child, and also international humanitarian law, guarantee a person deprived of liberty the right to challenge his or her detention and to be tried by a competent, independent and impartial tribunal. The source recalls that the Committee on the Rights of the Child has declared that conducting criminal proceedings against children within the military justice system should be avoided (CRC/C/OPAC/USA/CO/1, para. 30 (g)).

40. In the present case, the minor's administrative detention orders were approved by Israeli military court judges who are active duty or reserve officers in the Israeli military, subject to military discipline and dependent on their superiors for promotion. The source submits that the non-observance of international norms relating to the right to a fair trial by Israel and the documented bias of its military court system demonstrate that the minor's deprivation of liberty was arbitrary and falls within category III.

#### Category V: discrimination

41. The source submits that the detention of the minor fits a pattern and practice of the Israeli authorities of using administrative detention against Palestinian children on the basis of their Palestinian identity to punish rather than prevent an imminent threat when there is not enough evidence to charge and prosecute the child in the Israeli military courts. Accordingly, the source submits that the minor's deprivation of liberty falls within category V because it constitutes a violation of international law for reasons of discrimination based on national, ethnic and social origin.

#### *Response from the Government*

42. On 31 May 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 30 July 2018 about the minor's current situation. The Working Group also requested the Government to clarify the legal provisions justifying his detention, as well as its compatibility with the State's obligations under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of the minor.

43. The Working Group regrets that it did not receive a response from the Government to its communication. 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.

#### *Further information from the source*

44. The source notified the Working Group that the minor was released from detention on 6 August 2018.

#### **Discussion**

45. The Working Group welcomes the release of the minor from detention. According to paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion on whether the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. Given that the present case involves a minor who was held under successive administrative detention orders for nearly a year, the Working Group considers that it is important to render an opinion.

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

47. 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 (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.

48. The source alleges that the minor was arrested on 20 September 2017, without a warrant or evidence of a decision by a public authority being provided to him or his parents, and that the Israeli authorities provided no reasons for the minor's arrest and have not charged him with a crime. The Government has not challenged these allegations. The arrest of the minor in these circumstances constitutes a violation of the right to be informed of the reasons for arrest and to prompt notification of the charges under article 9 (2) of the Covenant and article 40 (2) (b) (ii) of the Convention on the Rights of the Child, to which Israel is a State party. In addition, as the Human Rights Committee noted in its general comment No. 35, when children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents (para. 28), a procedure that was not observed in the present case. The Working Group considers that, by failing to present a warrant, to provide reasons for the arrest and to promptly inform the minor of any charges, the Israeli authorities did not invoke a legal basis for the arrest and detention of the minor.<sup>4</sup> Moreover, it is not clear to the Working Group what legal basis the Israeli authorities intended to invoke when they arrested the minor, given that the minor was initially questioned in relation to throwing stones and later suspected of vastly different offences relating to planning an attack, possession of weapons and supporting terrorism.

49. The source also alleges that the Israeli authorities denied the minor access to secret information relied upon in issuing three administrative detention orders against him. As a result, the minor was not informed of the nature and cause of his detention in sufficient detail to be able to challenge it. The Government had the opportunity to address this allegation but has chosen not to. As the Human Rights Committee emphasized in its general comment No. 35, disclosure to the detainee of at least the essence of the evidence on which the decision is taken to issue an administrative detention order is necessary to ensure that the requirements of article 9 of the Covenant are met (para. 15).<sup>5</sup> Accordingly, the Working Group finds that the minor was held in administrative detention for nearly one year without the ability to challenge effectively the lawfulness of his detention, contrary to article 9 (3) and (4) of the Covenant and article 37 (d) of the Convention on the Rights of the Child.<sup>6</sup> It is essential for detained children to have prompt and effective access to an independent and child-sensitive process to determine the legal basis of their detention and to receive appropriate and accessible remedies without delay.<sup>7</sup> Without such access, the minor's detention was arbitrary, and he was denied an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

50. It is also essential that the review of the lawfulness of detention be carried out by an independent and impartial authority.<sup>8</sup> In the case of detained children, this is a requirement

<sup>4</sup> See, e.g., opinions No. 36/2018, No. 35/2018, No. 46/2017 and No. 45/2017.

<sup>5</sup> The Human Rights Committee has also expressed concern specifically in relation to the use of administrative detention by Israel based on secret evidence (CCPR/C/ISR/CO/4, para. 10).

<sup>6</sup> The Working Group has made similar findings in recent cases involving Israel concerning detention based on evidence not made available to the detainee (see, e.g., opinions No. 34/2018, No. 86/2017 and No. 44/2017).

<sup>7</sup> See 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 (A/HRC/30/37, annex), principle 18 and guideline 18.

<sup>8</sup> *Ibid.*, guideline 4, para. 55. See also International Committee of the Red Cross, "Internment in armed conflict: basic rules and challenges", opinion paper, November 2014, p. 9.

of article 37 (d) of the Convention on the Rights of the Child.<sup>9</sup> In the present case, the minor's detention orders were reviewed and approved by a military court, rather than by a court specifically equipped to deal with juveniles within the civilian legal system. In previous cases concerning Israel, the Working Group has emphasized that military courts and tribunals are not independent or impartial because they are composed of military personnel who are subject to military discipline and dependent on superiors for promotion.<sup>10</sup> The Working Group has also set out minimum guarantees pertaining to military justice, including that military tribunals should only be competent to try military personnel for military offences (A/HRC/27/48, para. 69). The Working Group considers that the right to an independent review should be given greater weight in the Occupied Palestinian Territory, which has been under military occupation, and in which military law has been applied to Palestinians, for more than 50 years – since 1967.

51. Furthermore, the minor was subject to three administrative detention orders pursuant to Military Order No. 1651 and was placed in detention following his arrest on 20 September 2017 without charge or trial. The Working Group concurs with the statement by the Human Rights Committee in its general comment No. 35 that security detention (also known as administrative detention or internment) not in contemplation of prosecution on a criminal charge presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention, as other effective measures of addressing the threat, including the criminal justice system, would be available. Administrative detention must therefore be exceptional. As the Human Rights Committee points out:

If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases.<sup>11</sup>

52. In the present case, the Government of Israel had the opportunity but failed to demonstrate that the minor posed a present, direct and imperative threat to State security and how that threat persisted during his detention for nearly one year. Importantly, the Working Group takes note of the fact, admitted by the source and acknowledged by the minor's legal counsel during the hearing concerning the second administrative detention order, on 22 January 2018, that the minor was briefly detained by the Palestinian Authority in August 2017, one month prior to his arrest by the Israeli authorities on 20 September 2017. Despite being interrogated by the Palestinian Authority about alleged possession of weapons and planning an attack (allegations that could, if proven, pose a significant threat to State security), the minor was released and not charged with any criminal offence. In these circumstances, the Working Group concludes that the Government of Israel has not met its burden to show that the minor posed a threat to State security, and his detention therefore lacked a legal basis.

53. For these reasons, the Working Group finds that there was no legal basis for the minor's arrest and detention. His deprivation of liberty was arbitrary under category I.

54. In addition, the source alleges that the minor was detained for exercising his freedom of expression by sharing an image on social media of his adult cousin who was killed by Israeli forces in July 2017. The Israeli authorities appear to have used the posting of this image as part of the secret evidence that the minor was supporting terrorists. While the minor admitted that he had posted his cousin's picture on social media because they were relatives, he denied that he had planned or was planning an attack. The posting of this image on social media was clearly a factor that resulted in the administrative detention of the minor, given

<sup>9</sup> As stated by the Committee on the Rights of the Child in its general comment No. 10 (2007) on children's rights in juvenile justice, children must have the legality of their detention reviewed within 24 hours of arrest (para. 83).

<sup>10</sup> See, e.g., opinions No. 24/2016, No. 58/2012 and No. 3/2012.

<sup>11</sup> General comment No. 35, para. 15.



that the presiding military court judge made specific reference to the image when questioning the minor during the hearing on 22 January 2018 concerning his second detention order.

55. The Working Group recalls that the freedom of expression protected under international human rights law includes the right to seek, receive and impart information and ideas of all kinds and through all means of dissemination, including Internet-based modes of expression.<sup>12</sup> In the present case, the minor's posting of an image on social media clearly falls within the boundaries of the freedom of expression. The Government of Israel did not demonstrate that the minor's conduct was violent or incited others to commit acts of violence, or indeed that there was any connection whatsoever between the posting of the image and the minor's alleged support of terrorists. While the killing of the minor's cousin by Israeli forces would likely have generated strong resentment within the Palestinian community, the posting by the minor of his cousin's image is not sufficient in itself to prove that the minor intended to incite a response to the killing and represented a real security threat to Israel.

56. Moreover, the Working Group considers that the permitted restrictions on the freedom of expression under article 19 (3) of the Covenant do not apply in the present case. The Government did not present any argument or evidence to invoke any of these restrictions, nor did it demonstrate why holding a 17-year-old secondary school student in administrative detention for nearly one year was a legitimate, necessary and proportionate response to the posting of an image on social media. In any event, the Human Rights Council in its resolution 12/16 calls on States to refrain from imposing restrictions under article 19 (3) of the Covenant that are not consistent with international human rights law, including using counter-terrorism as a pretext to restrict the right to freedom of expression (para. 5 (o) and (p)).

57. The Working Group concludes that the minor was detained for exercising his right to freedom of expression under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. His deprivation of liberty was therefore arbitrary under category II.

58. The source further alleges that Israel violated the minor's due process rights and his right to a fair trial. The Working Group notes that this is a case of administrative detention, which does not involve charges or trial within the criminal justice system, and that the fair trial guarantees in article 14 of the Covenant would not normally apply. However, the Human Rights Committee has stated in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (para. 15) that the nature of the sanction must be considered, regardless of its classification under domestic law, in determining whether the fair trial guarantees in article 14 apply in each case:

Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.<sup>13</sup>

59. The Working Group has adopted this reasoning in its jurisprudence, noting that the provisions of article 14 of the Covenant on the right to a fair trial are applicable where the sanctions imposed, because of their purpose, character or severity, must be regarded as penal, even if, under national law, the detention is qualified as administrative.<sup>14</sup> Without such an inquiry into the nature of the sanction imposed, States could effectively circumvent their obligations under the Covenant simply by characterizing their detention regime as administrative under domestic law. This is particularly significant in the context of administrative detention orders imposed in Israel, which appear to be used as a substitute for criminal proceedings, rather than to prevent an imminent threat, when there is not enough evidence to charge and prosecute an individual (A/HRC/37/42, para. 21).

<sup>12</sup> Human Rights Committee, general comment No. 34 (2011) on freedoms of opinion and expression, paras. 11–12. The Working Group has also found that publishing material on social media platforms falls within the right to freedom of expression (see, e.g., opinions No. 82/2017 and No. 44/2016).

<sup>13</sup> See also *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 9.2.

<sup>14</sup> See, e.g., opinions No. 31/2017, No. 43/2014, No. 58/2012, No. 45/2012, No. 20/2012 and No. 3/2012. See also A/HRC/37/42, para. 17; and A/HRC/22/44, paras. 68–69.

60. In its jurisprudence, the Working Group has found that in cases involving excessive length of detention the individual should enjoy the same guarantees, including those under article 14 of the Covenant, as in criminal cases, even if the detention is qualified as administrative under national law.<sup>15</sup> In the present case, the minor was held for nearly one year in a prison in similar conditions to those serving a criminal sentence. As a result, the minor's detention must be regarded as penal in nature, and the Working Group will therefore consider whether his detention met the requirements of article 14 of the Covenant and other relevant provisions. In doing so, the Working Group reiterates that the Government did not challenge any of the allegations made by the source.

61. The Israeli military courts issued and confirmed three administrative detention orders against the minor. As noted earlier, the Working Group does not consider that Israeli military courts meet the standards of an independent and impartial tribunal for the purposes of considering matters involving civilians. Moreover, the Working Group has consistently held the view that civilians must never be brought before military courts, and that to do so violates the Covenant and customary international law (A/HRC/27/48, paras. 66–71). Accordingly, the Working Group finds that the minor was deprived of the right to have the matter determined in a fair hearing by a competent, independent and impartial tribunal under article 14 (1) of the Covenant and article 40 (2) (b) (iii) of the Convention on the Rights of the Child.

62. In addition, the minor was in detention for nearly one year without charge or trial. If there was insufficient evidence to charge and prosecute the minor within a reasonable time, he was entitled to release under article 9 (3) of the Covenant. Moreover, his rights to be promptly informed of any charges against him and to be tried without undue delay under article 14 (3) (a) and (c) of the Covenant and article 40 (2) (b) (ii) and (iii) of the Convention on the Rights of the Child were violated.

63. Prior to his interrogation, the minor was allowed to speak briefly with a lawyer by telephone, but the interrogator did not inform the minor of his rights, including his right to remain silent, and did not provide any documentation stating his rights. The Working Group considers that this brief contact was not sufficient to afford the minor his right to communicate with counsel of his choosing,<sup>16</sup> which was further vitiated by the fact that the Israeli authorities did not inform the minor of his rights. Moreover, when the minor was subsequently legally represented before the Israeli military courts, neither the minor nor his legal counsel was provided with access to the secret evidence upon which the administrative detention orders were based. For these reasons, the minor was deprived of his right to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing under article 14 (3) (b) of the Covenant, and of his right to prompt access to legal and other appropriate assistance under article 37 (d) of the Convention on the Rights of the Child.

64. Furthermore, the manner in which the minor was interrogated was wholly unacceptable according to international standards. The minor, who had just been removed from his home in the middle of the night, was tied up for the duration of the 30-minute questioning. No safeguards, such as the presence of the minor's parents or his lawyer,<sup>17</sup> or audiovisual recording, were put in place to ensure independent scrutiny of the interrogation.<sup>18</sup> The source alleges that the minor was "made" to sign a statement in Hebrew and Arabic. In those circumstances, the minor's statement was unlikely to have been given freely. The Working Group recalls that the burden is on the Government to prove that the statement was voluntary.<sup>19</sup> In the absence of a response from the Government, the Working Group finds that the minor's right not to be compelled to confess guilt guaranteed by article 14 (3) (g) of the

<sup>15</sup> See, e.g., opinion No. 31/2017, para. 30, in a case involving administrative detention for 10 months.

<sup>16</sup> See United Nations Basic Principles and Guidelines, principle 9, para. 12. The right to legal assistance applies at any time during the detention, including immediately after the moment of apprehension.

<sup>17</sup> In its general comment No. 10, the Committee on the Rights of the Child said that "legal or other appropriate assistance must be present" during the interview or interrogation of the child (para. 52).

<sup>18</sup> In its general comment No. 10, the Committee stated that such safeguards had to be put in place to avoid compulsory self-incrimination (paras. 58 and 62). See also United Nations Children's Fund, *Children in Israeli Military Detention: Observations and Recommendations* (Jerusalem, 2013), p. 11.

<sup>19</sup> See Human Rights Committee, general comment No. 32, para. 41.

Covenant and article 40 (2) (b) (iv) of the Convention on the Rights of the Child was violated. It is not clear to what extent this statement influenced the decisions to impose and renew the administrative detention orders against the minor, but it should be removed from the minor's records and regarded as having no probative value other than as evidence that coercion occurred.

65. Apart from these violations of the right to a fair trial, the Working Group considers that the minor was detained under three consecutive administrative detention orders in violation of the State's obligations under the Convention on the Rights of the Child. According to article 3 of the Convention, the best interests of the child must be a primary consideration in all actions concerning children. Furthermore, according to article 37 (b) of the Convention, children must only be deprived of their liberty as a last resort and for the shortest appropriate period of time. Article 37 (c) of the Convention also clearly requires that every child deprived of liberty be treated with humanity and respect for their inherent dignity. These obligations were completely disregarded in the minor's case, which is yet another reason why his detention was arbitrary. However, this is not an isolated case. Between 1 November 2016 and 30 September 2017, the United Nations Children's Fund (UNICEF) documented 135 cases of children in Israeli detention, including three under administrative detention (A/HRC/37/42, para. 33). In 2013, UNICEF also reported that:

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.<sup>20</sup>

66. The Working Group concludes that these violations of the right to a fair trial were of such gravity as to render the minor's deprivation of liberty arbitrary under category III.

67. In addition, the source alleges that the minor's deprivation of liberty constituted discrimination based on national, ethnic and social origin. In its jurisprudence, the Working Group has noted an emerging pattern by the Israeli authorities of using administrative detention to detain Palestinians, including children, on an indefinite basis without charge or trial.<sup>21</sup> The Working Group also takes note of the source's submission, which the Government did not address, that while no Israeli child comes into contact with the Israeli military courts, Israel brings a significant number of Palestinian children before the military courts each year.<sup>22</sup> In the absence of an explanation from Israel, the Working Group concludes that the minor, who is Palestinian, was detained on a discriminatory basis, namely his national, ethnic and social origin. The Working Group considers that he was also detained on the basis of his gender, as there is a clear pattern of targeting young males for detention. In these circumstances, the Working Group finds that Israel has violated articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and that the minor's deprivation of liberty was arbitrary under category V.

68. The Working Group wishes to express its serious concern about the alleged treatment of the minor during his arrest and initial hours of administrative detention. These allegations include that the minor was blindfolded, tied up, pushed inside a military vehicle and repeatedly slapped on the face and neck while being taken into custody. Although the minor was given a brief medical check, he was allegedly left alone in a container, not provided with food or water or allowed to use the toilet for approximately 14 hours, strip-searched on several occasions and required to wear prison clothing. Such treatment falls short of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). Moreover, the prolonged administrative detention of the minor in the absence of any charges, known evidence or trial may have itself amounted to ill-treatment (A/HRC/37/42, para. 17). The Working Group refers the present case, including the allegations that the minor was tortured while in the custody of the Palestinian Authority in

<sup>20</sup> UNICEF, *Children in Israeli Military Detention*, p. 9.

<sup>21</sup> See, e.g., opinions No. 34/2018, No. 86/2017, No. 44/2017, No. 31/2017 and No. 24/2016.

<sup>22</sup> The Secretary-General of the United Nations has made similar observations (A/HRC/34/38, paras. 38–39).

August 2017, to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

69. The present case is one of several cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons by Israel. The Working Group notes that many of the cases involving administrative detention in Israel and the Occupied Palestinian Territory follow a familiar pattern of arrest without warrant; failure to provide reasons for the arrest; indefinite detention through consecutive administrative detention orders without charges or trial (often based on secret evidence and often under military jurisdiction); no avenue of judicial recourse to review the lawfulness of the detention; limited access to legal counsel; and, in the case of children, failure to prioritize the best interest of the child.<sup>23</sup> The Working Group recalls that under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law may constitute crimes against humanity.<sup>24</sup>

70. Given the serious allegations made in the present case, as well as the pattern of arbitrary administrative detention found in other cases brought before the Working Group, the Working Group has decided to refer the matter to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967. In addition, the Working Group considers that the overall situation regarding Palestinians arbitrarily deprived of their liberty is so serious as to warrant bringing the case to the attention of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.

71. Furthermore, the Working Group notes with concern the silence of the Government in not availing itself of the opportunity to respond to the allegations made in the present case and in other communications from the Working Group.<sup>25</sup> Indeed, the Working Group regrets that the Government has not provided a substantive response to its communications since 2007, or for over 10 years.<sup>26</sup> The circumstances of the present case demanded a compelling justification for the minor's arrest and detention, which the Government has not provided.

72. Finally, the Working Group would welcome the opportunity to work constructively with the Government in addressing the arbitrary deprivation of liberty. On 7 August 2017, the Working Group sent a request to the Government to undertake a country visit, including to the Occupied Palestinian Territory, and awaits a positive response from the Government as a sign of its willingness to enhance its cooperation with the special procedures of the Human Rights Council. In this context, the Working Group recalls the invitation dated 12 September 2014 extended to it by the Permanent Observer Mission of the State of Palestine to the United Nations Office and other international organizations in Geneva to conduct an official visit to the Occupied Palestinian Territory.

### Disposition

73. 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, 3, 7, 8, 9, 10, 11 (1) and 19 of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

<sup>23</sup> See, e.g., opinions Nos. 34/2018, 86/2017, 44/2017, 31/2017, 24/2016, 43/2014, 58/2012, 20/2012, 3/2012, 9/2010, 5/2010, 26/2007, 3/2004, 23/2001, 17/2000, 16/2000, 11/1998, 10/1998, 9/1998, 8/1998, 24/1996, 18/1996, 17/1996, 16/1996, 16/1994, 18/1993, 17/1993 and 36/1992.

<sup>24</sup> See, e.g., opinion No. 47/2012, para. 22.

<sup>25</sup> See opinions Nos. 34/2018, 86/2017, 44/2017, 31/2017, 3/2017, 24/2016, 15/2016, 13/2016, 43/2014, 58/2012, 20/2012, 3/2012, 9/2010, 5/2010, 23/2001, 31/2000, 18/2000, 17/2000, 16/2000, 4/1999, 11/1998, 10/1998, 9/1998, 8/1998, 24/1996, 18/1996, 17/1996, 16/1996, 26/1993, 18/1993, 17/1993 and 36/1992. The Government submitted a response to the Working Group's communications in relation to opinions Nos. 26/2007, 3/2004, 24/2003 and 16/1994.

<sup>26</sup> In opinion No. 86/2017, the Government requested and received an extension of the time limit in which to respond to the Working Group's communication, but did not submit any substantive response.

74. 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 relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

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

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

77. The Working Group requests the Government to bring its laws, particularly Military Order No. 1651, which permits indefinite administrative detention, into conformity with the recommendations made in the present opinion and with the commitments made by Israel under international human rights law.

78. 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 and the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, for appropriate action.

79. The Working Group will submit the present case to the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.

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

#### **Follow-up procedure**

81. 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 the minor;
- (b) Whether an investigation has been conducted into the violation of the minor'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.

82. 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.

83. 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.

84. 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.<sup>27</sup>

*[Adopted on 20 November 2018]*

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<sup>27</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.