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

## **Opinions adopted by the Working Group on Arbitrary Detention at its ninety-second session, 15–19 November 2021**

### **Opinion No. 61/2021 concerning Jamal Afif Suleiman al-Niser (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 42/22.

2. In accordance with its methods of work,<sup>1</sup> on 27 August 2021 the Working Group transmitted to the Government of Israel a communication concerning Jamal Afif Suleiman al-Niser. 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).

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<sup>1</sup> [A/HRC/36/38](#).

## Submissions

### *Communication from the source*

4. Jamal Afif Suleiman al-Niser, born in 1946, is a dual national of the State of Palestine and the United States of America, usually residing in the occupied West Bank city of Al-Bireh.

#### a. Context

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

6. The source notes that under international humanitarian law, Israel as the occupying Power has clear obligations to protect the Palestinian civilian population under its control and has the authority to establish military courts in the territory it has occupied since 1967.<sup>2</sup> However, the source adds that international human rights law and international humanitarian law, which apply to the Occupied Palestinian Territory,<sup>3</sup> restrict the jurisdiction of Israeli military courts and guarantee basic safeguards for a fair trial. Accordingly, individuals should be presumed innocent, they should not be compelled to testify against themselves or confess guilt, and they should be informed promptly and in detail of the charges against them in a language that they understand.<sup>4</sup>

7. The source alleges that despite the fact that Israel has ratified many of the core international human rights treaties, and, as a result, has bound itself to act in accordance with those treaties, Israeli authorities persistently disregard and fail to comply with international law. The source adds that trying civilians in military courts should be exceptional, yet Israeli authorities automatically and systematically prosecute Palestinians, including children, arrested by Israeli military and police in the occupied West Bank in the military court system.

8. The source notes that in situations of international armed conflict, administrative detention is permitted in strictly limited circumstances in only the most exceptional cases for “imperative reasons of security” when there is no other alternative.<sup>5</sup> It also notes that the practice of administrative detention should never be used as an alternative to filing charges or for the sole purpose of interrogation or as a general deterrent for future activity.<sup>6</sup>

#### b. Arrest and detention

9. According to the source, Mr. Al-Niser was arrested by Israeli military on 9 June 2021 during a dawn raid on his home located in the occupied West Bank city of Al-Bireh. The military forces did not show a warrant or other decision by a public authority. The source adds that while no reason for his detention was provided at the time of his arrest, Israeli military prosecutors have generally alleged that he poses an unspecified threat to the security of Israel.

10. The source reports that the detention of Mr. Al-Niser was promptly extended by 72 hours by an Israeli military court judge at the State party’s Ofer military court, and on 13 June 2021, an Israeli military court judge subsequently approved a four-month administrative

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<sup>2</sup> The source refers to the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations), art. 43; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), arts. 64 and 66.

<sup>3</sup> The source notes that the Occupied Palestinian Territory consists of the West Bank, including East Jerusalem, and the Gaza Strip. The source also refers to *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 (paras. 101 and 109–113).

<sup>4</sup> The source refers to article 14 of the International Covenant on Civil and Political Rights; and Human Rights Committee general comment No. 32, para. 22.

<sup>5</sup> Fourth Geneva Convention, art. 78.

<sup>6</sup> The source refers to opinion No. 24/2016.

detention order against Mr. Al-Niser, set to expire on 13 October 2021. The source notes that Mr. Al-Niser appealed the administrative detention order, and on 28 July 2021, the Israeli Military Court of Appeals held a hearing to consider the appeal. The appeal was rejected and the four-month administrative detention order was upheld.

11. The source also reports that Mr. Al-Niser is detained on the basis of Israeli Military Order 1651, which permits administrative detention for a period of up to six months, subject to indefinite renewals.<sup>7</sup> He is detained at Ofer prison, located inside the occupied West Bank, near Ramallah.

12. In terms of domestic remedies, Mr. Al-Niser reportedly appealed the administrative detention order issued against him in the Israeli military court. As noted above, the four-month administrative detention order was upheld, and he still remains detained in Israeli custody. Given the lack of access to an independent and impartial tribunal, no additional domestic measures have been taken by Mr. Al-Niser or his legal counsel.

c. Health condition

13. According to the source, Mr. Al-Niser has diabetes mellitus type II and suffers from hypercholesterolemia, hypertension and ischemic heart disease.

d. Analysis of violations

14. For the reasons stated above, the source submits that Mr. Al-Niser's arrest and detention violate the fundamental guarantees enshrined in international law, falling under categories III and V of the categories applicable to the consideration of cases by the Working Group.

i. Category III

15. The source submits that in depriving Mr. Al-Niser of his liberty, Israeli authorities have violated basic and fundamental due process rights and protections relating to the right to a fair trial that amounts to an arbitrary detention.

Detained without a warrant and not informed of reason for arrest

16. According to the source, all persons deprived of their liberty have the right to be informed of the reason for their arrest. The source refers to articles 9 (2) and 14 (3) (a) of the Covenant, which expressly state that persons deprived of their liberty are to be informed of the reasons for their arrest and promptly informed of the charges against them.

17. The source reports that on 9 June 2021, Israeli forces arrested Mr. Al-Niser at his home in Al-Bireh. No warrant or other decision by a public authority was shown or provided to him or his family, and Israeli authorities provided no reason for his detention at the time of his arrest. The source adds that since his arrest, Israeli authorities have not charged Mr. Al-Niser with any crime and have not informed him, in detail sufficient to challenge his detention, of the nature and cause for his detention, which is a violation of his right to be informed of the reason for arrest.

Right to be tried without undue delay or challenge legality of continued deprivation of liberty

18. The source refers to article 9 (3) and (4) of the Covenant, whereby all persons deprived of their liberty have 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, which protects a person's right to effectively challenge the legality of any continued deprivation of liberty.

19. The source underlines that where administrative detention is used in situations not in contemplation of prosecution on a criminal charge, the practice presents severe risks of

<sup>7</sup> The source makes reference to Military Order 1651, sect. 273(A) (as amended by Military Order 1571).

arbitrary deprivation of liberty. Thus, administrative detention must not last longer than absolutely necessary.<sup>8</sup> The source adds that detention must end as soon as an individual alleged to have posed a real threat to State security stops posing a real threat. The longer administrative detention lasts, the greater the onus on the detaining authority to prove the reasons for the internment remain valid.<sup>9</sup> There must also be prompt and regular review by an impartial and independent court or tribunal.<sup>10</sup> The source further refers to the jurisprudence of the Working Group whereby administrative detention may not be used to circumvent the procedural rights of a person suspected of committing a criminal offence and that a person suspected of a criminal offence has a right to be tried by a regularly constituted, independent and impartial court.<sup>11</sup>

20. The source asserts that Israeli military authorities have not filed formal charges against Mr. Al-Niser and he remains in detention without charge or trial. The source adds that Mr. Al-Niser and his attorney are unable to effectively challenge the legality of his detention because Israeli military authorities have denied them access to the “secret information” relied on by the Israeli military court judges to issue and confirm the administrative detention order against him to date.

21. The source notes that the longer Israeli authorities detain Mr. Al-Niser, the greater the onus on them to establish that the reasons for the internment remain valid and that he remains a present, direct and imperative threat.<sup>12</sup> However, according to the source, despite the burden on Israel to demonstrate that Mr. Al-Niser posed and continues to pose a threat in order to justify his detention without charge, Israeli military authorities have not provided sufficient detailed evidence establishing that he either previously or currently continues to pose a real and imperative threat to State security.

22. The source also submits that failure to provide access to detailed “secret information” relied on by the State to justify the deprivation of liberty prevents any effective challenge concerning the legality of Mr. Al-Niser’s continued detention and results in a violation of his right to have the matter determined without delay.

#### Israeli military courts are not independent and impartial tribunals

23. The source notes that aside from the denial of fundamental due process rights, it is doubtful whether the use of military courts to try civilians can ever satisfy the requirements of international human rights law to a fair trial before an independent and impartial tribunal. Article 14 (1) of the Covenant and international humanitarian law guarantee persons deprived of their liberty the right both to challenge their detention and to be tried by a competent, independent and impartial tribunal.

24. With reference to other cases considered by the Working Group,<sup>13</sup> the source notes that Mr. Al-Niser’s administrative detention orders have been approved by Israeli military court judges that are active duty or reserve officers in the Israeli military, and subject to military discipline and dependent on superiors for promotion.

25. The source thus submits that non-observance by Israel of international norms relating to the right to a fair trial and the documented bias of its military court system demonstrate that Mr. Al-Niser’s detention amounts to arbitrary detention in accordance with category III.

<sup>8</sup> The source refers to Human Rights Committee, general comment No. 35 (2014), para. 15.

<sup>9</sup> The source refers to the International Committee of the Red Cross, “Internment in armed conflict: basic rules and challenges” (Geneva, November 2014), p. 9; opinion No. 24/2016, para. 18; and Human Rights Committee, general comment No. 35, para. 15.

<sup>10</sup> Human Rights Committee, general comment No. 35, para. 15.

<sup>11</sup> Opinion No. 24/2016, para. 17.

<sup>12</sup> The source refers to International Committee of the Red Cross, “Internment in armed conflict: basic rules and challenges”, p. 9; opinion No. 24/2016, para. 18; and Human Rights Committee, general comment No. 35, para. 15.

<sup>13</sup> The source refers to opinions No. 24/2016, No. 58/2012 and No. 3/2012.

## ii. Category V

26. The source also asserts that while Israeli military law gives military courts the authority to try any person located inside the occupied territory as long as they are aged 12 years or older, Jewish settlers who reside within the bounds of 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.

27. The source notes that treaty bodies have expressed concern about the discriminatory arrests and detention of Palestinians. In 2012, the Committee on the Elimination of All Forms of Racial Discrimination urged Israel to end its practice of administrative detention, noting that it was discriminatory and constituted arbitrary detention.<sup>14</sup> The source also notes that with regard to recent reviews of Israel, the Human Rights Committee and the Committee against Torture, in their concluding observations, expressed particular concern about the continued practice of using administrative detention against Palestinians on the basis of secret information.<sup>15</sup>

28. The source submits that the detention of Mr. Al-Niser fits a pattern and practice by Israeli authorities of using administrative detention against Palestinians on the basis of their Palestinian identity to punish rather than prevent an imminent threat where there is not enough evidence to charge and prosecute the individual in the Israeli military courts.<sup>16</sup>

29. The source thus submits that Mr. Al-Niser's detention by Israeli authorities amounts to an arbitrary detention under category V because his deprivation of liberty constitutes a violation of international law for reasons of discrimination based on national, ethnic and social origin.

*Response from the Government*

30. On 27 August 2021, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 26 October 2021, detailed information about the current situation of Mr. Al-Niser and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations under international human rights law, and in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Israel to ensure his physical and mental integrity.

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

32. 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.<sup>17</sup> Indeed, the Government has not provided a substantive response to the Working Group's communications since 2007, nearly 15 years.<sup>18</sup> The Working Group urges the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

<sup>14</sup> CERD/C/ISR/CO/14-16, para. 27.

<sup>15</sup> CCPR/C/ISR/CO/4, para. 10; and CAT/C/ISR/CO/5, para. 22.

<sup>16</sup> The source also refers to opinion No. 86/2017, paras. 43–44.

<sup>17</sup> Opinions No. 8/2021, No. 12/2020, No. 84/2019, No. 73/2018, No. 34/2018, No. 86/2017, No. 44/2017, No. 31/2017, No. 3/2017, No. 24/2016, No. 15/2016, No. 13/2016, No. 43/2014, No. 58/2012, No. 20/2012, No. 3/2012, No. 9/2010, No. 5/2010, No. 23/2001, No. 31/2000, No. 18/2000, No. 17/2000, No. 16/2000, No. 4/1999, No. 11/1998, No. 10/1998, No. 9/1998, No. 8/1998, No. 24/1996, No. 18/1996, No. 17/1996, No. 16/1996, No. 26/1993, No. 18/1993, No. 17/1993 and No. 36/1992. The Government submitted responses to the Working Group's communications in relation to opinions No. 26/2007, No. 3/2004, No. 24/2003 and No. 16/1994.

<sup>18</sup> In relation to opinion No. 86/2017, the Government requested and received an extension of time in which to respond to the Working Group's communication but did not submit a substantive response.

## Discussion

33. 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.

34. In determining whether Mr. Al-Niser's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a prima facie case for breach of international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.<sup>19</sup> In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

35. As a preliminary issue, the Working Group wishes to address the submission by the source concerning the application of the Fourth Geneva Convention to the present case. The Working Group recalls that its mandate is limited to questions relating to arbitrary detention and that, in considering such questions, it is required to make primary reference to international human rights law. The Working Group considers that, in the light of the evidence in the present case, it can reach a conclusion on the arbitrary nature of the deprivation of liberty of Mr. Al-Niser without having recourse to international humanitarian law.<sup>20</sup>

### *Category I*

36. While the source has not argued that the detention of Mr. Al-Niser is arbitrary under category I, the Working Group notes that the source has submitted that on 9 June 2021, Israeli forces arrested Mr. Al-Niser at his home in Al-Bireh. No warrant or other decision by a public authority was shown or provided to him or his family, and Israeli authorities provided no reason for his detention at the time of his arrest. The Working Group notes that the Government has chosen not to contest these allegations although it had an opportunity to do so.

37. The Working Group recalls that a detention is considered arbitrary under category I if it lacks legal basis. As it has previously stated, for a deprivation of liberty to have a legal basis, it is not sufficient that there is a law that may authorise the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.<sup>21</sup> Indeed, the international law on deprivation of liberty includes the right to be presented with an arrest warrant, which is procedurally inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation, under articles 3 and 9, respectively, of the Universal Declaration of Human Rights, and under principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>22</sup> Any form of detention or imprisonment should be ordered by, or be subjected to the effective control of, a judicial or other authority under the law, whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

38. In the present case, Mr. Al-Niser was arrested without such a warrant. In addition, the authorities failed to explain the reasons for his detention in breach of the requirements of article 9 of the Covenant. The Working Group therefore concludes that the detention of Mr. Al-Niser violated article 9 (1) and (2) of the Covenant.

39. Moreover, the Working Group notes the uncontested allegations that since his arrest on 9 June 2021, Israeli authorities have not charged Mr. Al-Niser with any crime and have not informed him of the nature of and cause for his detention. The Working Group therefore concludes that there has been a further breach of article 9 (2) of the Covenant.

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<sup>19</sup> [A/HRC/19/57](#), para. 68.

<sup>20</sup> The Working Group has adopted a similar approach, for example, in opinions No. 52/2020, para. 75; and No. 68/2020, para. 59.

<sup>21</sup> See, e.g., opinions No. 79/2018, No. 35/2018, No. 93/2017, No. 75/2017, No. 66/2017 and No. 46/2017.

<sup>22</sup> Opinions No. 30/2018, para. 39; No. 3/2018, para. 43; and No. 88/2017, para. 27.

40. Finally, although Mr. Al-Niser appeared before a court upon arrest and was subsequently administratively detained on 13 June 2021 by a decision of a military court that he was able to appeal on 28 July 2021, the Working Group notes that Mr. Al-Niser was never provided with the charges against him, as established above. This means that his right to challenge the legality of his detention as provided for in article 9 (4) of the Covenant was also violated.

41. Noting all the above, the Working Group concludes that the arrest and subsequent detention of Mr. Al-Niser was arbitrary and falls under category I as lacking legal basis.

### *Category III*

42. The source further alleges that the Government violated Mr. Al-Niser's 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, as the Human Rights Committee has stated, 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>23</sup>

43. 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>24</sup> Without such an enquiry 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.<sup>25</sup>

44. In its jurisprudence, the Working Group has found that in cases involving excessive length of detention, the individual is to enjoy the same guarantees as in criminal cases, including those under article 14 of the Covenant, even if the detention is qualified as administrative under national law.<sup>26</sup> In the present case, Mr. Al-Niser has been sentenced overall to four months of administrative detention in prison in similar conditions to those serving a criminal sentence. As a result, his 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.

45. In this respect, the Working Group recalls that the Human Rights Committee, in paragraph 15 of its general comment No. 35, made the following statement:

To the extent that States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a

<sup>23</sup> Human Rights Committee, general comment No. 32 (2007), para. 15. See also *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 9.2.

<sup>24</sup> Opinions No. 73/2018, 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.

<sup>25</sup> *A/HRC/37/42*, para. 21.

<sup>26</sup> Opinions No. 49/2020, No. 12/2020, No. 73/2018 and No. 31/2017.

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.

46. The Working Group notes that in the present case the Government has not presented evidence that Mr. Al-Niser posed such a “present, direct and imperative threat”, nor has it chosen to demonstrate the exceptional necessity to detain him.

47. Moreover, the Working Group observes that Mr. Al-Niser, a civilian, had to appear before a military court and indeed, it was a military court that imposed the administrative detention upon him. The Government has chosen not to address these allegations.

48. In relation to the jurisdiction of the military courts, the Working Group in its practice has consistently argued that the trial of civilians by military courts is in violation of the Covenant and customary international law and that under international law, military tribunals can only be competent to try military personnel for military offences.<sup>27</sup> In the present case, the Government had the opportunity to explain the reasons for having Mr. Al-Niser appear before a military court but it failed to do so. The Working Group therefore finds a breach of article 14 (1) of the Covenant.

49. Moreover, the source has submitted, and the Government does not contest that Mr. Al-Niser’s administrative detention orders have been approved by Israeli military court judges that are active duty or reserve officers in the Israeli military, and subject to military discipline and dependent on superiors for promotion.

50. The Working Group recalls that article 14 of the Covenant requires the court to be independent and impartial. In this regard, in its earlier jurisprudence the Working Group has already stated that the military courts of Israel imposing such administrative detention do not satisfy this criterion.<sup>28</sup> In these circumstances, the Working Group finds a violation of Mr. Al-Niser’s rights under article 14 (1) of the Covenant.

51. The source has also argued that Mr. Al-Niser’s detention was based on a secret file to which neither he nor his counsel were given access. Although the Government had the opportunity to respond to these allegations, it has chosen not to do so. The Working Group recalls that, in principle, access to the evidence which is at the heart of the decision to detain a person, must be provided from the outset.<sup>29</sup> Noting this and in the absence of a rebuttal from the Government, the Working Group finds that Mr. Al-Niser’s rights under article 14 (1) and (3) (b) and (e) were also violated.

52. Noting all the above, the Working Group concludes that the violations of Mr. Al-Niser’s right to a fair trial are of such gravity as to give his deprivation of liberty an arbitrary character, falling under category III.

#### *Category V*

53. The source has argued and the Government has chosen not to rebut that the detention of Mr. Al-Niser is arbitrary and falls under category V as detention based on discrimination. In this regard, the source submits that while Israeli military law gives military courts the authority to try any person located inside the occupied territory as long as they are aged 12 years or older, Jewish settlers who reside within the bounds of 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. The source also submits that the detention of Mr. Al-Niser fits a pattern and practice by Israeli authorities of using administrative detention against Palestinians on the basis of their Palestinian identity to punish rather than prevent an imminent threat where there is not enough evidence to charge and prosecute the individual in the Israeli military courts.

<sup>27</sup> A/HRC/27/48, paras. 67–70. See also opinions No. 66/2019, No. 32/2018, No. 28/2018, No. 30/2017 and No. 44/2016.

<sup>28</sup> Opinion 24/2016, para. 21. See also opinions No. 58/2012 and No. 3/2012.

<sup>29</sup> Opinions No. 77/2020, No. 67/2020, No. 29/2020 and No. 78/2019.



54. In the present case, the Working Group notes that Mr. Al-Niser has been administratively detained without any reasons for his detention specified, on the basis of evidence collected in a “secret file”. This resonates with a pattern noted by the Working Group in its jurisprudence whereby the Israeli authorities use administrative detention to detain Palestinians, especially males, on an indefinite basis without charge or trial.<sup>30</sup> In the absence of any explanation from the Government, the Working Group concludes that Mr. Al-Niser, who is Palestinian, was detained on a discriminatory basis, namely his national, ethnic and social origin and his gender. In these circumstances, the Working Group finds that the Government 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 deprivation of liberty of Mr. Al-Niser was arbitrary under category V.

55. 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.

#### *Concluding remarks*

56. The Working Group is disturbed by the detention of Mr. Al-Niser, who is a 75-year-old man and in a precarious health situation. In this regard, the Working Group is obliged to remind Israel that all persons deprived of their liberty must be treated with humanity and with respect to the inherent dignity of the human person in accordance with article 10 of the Covenant. Denial of medical assistance constitutes a violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), in particular rules 24, 25, 27 and 30. The Working Group refers the case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Independent Expert on the enjoyment of all human rights by older persons, for appropriate action.

57. The present case is one of several cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty in 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 indefinite detention through consecutive administrative detention orders without charges or trial (often based on secret evidence and often under military jurisdiction), and with limited or no judicial recourse to review the lawfulness of the detention.<sup>31</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>32</sup>

58. 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. 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**

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

The deprivation of liberty of Jamal Afif Suleiman al-Niser, being in contravention of articles 2, 3, 7, 9, 10 and 11 of the Universal Declaration of Human Rights and articles

<sup>30</sup> Opinions No. 12/2020, No. 73/2018, No. 34/2018, No. 86/2017, No. 44/2017, No. 31/2017 and No. 24/2016. See also [A/HRC/38/15](#), paras. 118.159, 118.162, 118.164 and 119.4.

<sup>31</sup> Opinions No. 12/2020, No. 73/2018, No. 34/2018, No. 86/2017, No. 44/2017, No. 31/2017, No. 24/2016, No. 43/2014, No. 58/2012, No. 20/2012, No. 3/2012, No. 9/2010, No. 5/2010, No. 26/2007, No. 3/2004, No. 23/2001, No. 17/2000, No. 16/2000, No. 11/1998, No. 10/1998, No. 9/1998, No. 8/1998, No. 24/1996, No. 18/1996, No. 17/1996, No. 16/1996, No. 16/1994, No. 18/1993, No. 17/1993 and No. 36/1992.

<sup>32</sup> Opinion No. 47/2012, para. 22.

2, 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

60. The Working Group requests the Government of Israel to take the steps necessary to remedy the situation of Mr. Al-Niser 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.

61. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Al-Niser immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Al-Niser.

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

63. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (a) the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, (b) the Independent Expert on the enjoyment of all human rights by older persons and (c) the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, for appropriate action.

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

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

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

- (a) Whether Mr. Al-Niser has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Al-Niser;
- (c) Whether an investigation has been conducted into the violation of Mr. Al-Niser'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 Israel with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

66. 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.

67. 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.

68. 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>33</sup>

*[Adopted on 17 November 2021]*

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<sup>33</sup> Human Rights Council resolution 42/22, paras. 3 and 7.