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Human Rights Council
Working Group on Arbitrary Detention

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Opinion No. 68/2022 concerning Bashir Khairi (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 51/8.

2. In accordance with its methods of work,¹ on 8 July 2022, the Working Group transmitted to the Government of Israel a communication concerning Bashir Khairi. 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).

¹ [A/HRC/36/38](#).

Submissions

Communication from the source

4. Bashir Khairi is a national of the State of Palestine born in 1943. He is the holder of a national identity card issued by the Palestinian Authority on 25 June 2020. Mr. Khairi usually resides in Ramallah, State of Palestine. He is a retired lawyer and human rights defender.

5. Prior to his current administrative detention, Mr. Khairi was arrested and charged with committing security-related offences. In that regard, the source adds that he has been targeted by Israeli military authorities repeatedly for his political and legal advocacy and that he was arrested and tried in military courts for multiple charges, in 1969, 1988, 2003 and 2011.

a. Context

6. According to the source, Palestinians face arrest, prosecution and imprisonment under an Israeli military detention system that denies them basic rights. Administrative detention has reportedly gone hand in hand with the Israeli military occupation of the West Bank since 1967. The Israeli military commander of the West Bank is authorized to issue military orders that are binding on the occupants of the West Bank and retains “all legislative, executive and judicial powers” in the West Bank region. The source notes that it is under that power that Israel has implemented its practice of administrative detention, i.e. detention based on an alleged security threat, rather than an allegation of wrongdoing. The source asserts that use of administrative detention by Israel over the past 55 years of military occupation has subjected thousands of Palestinians to arbitrary detention in violation of international law.² As at 4 April 2022, over 500 Palestinians allegedly languish in Israeli prisons under administrative detention orders with no certainty as to when or if they will ever be released.

7. International humanitarian law requires that Israel maintain public order and safety³ and permits it, as an occupying Power, to intern persons under its control for “imperative reasons of security”.⁴ Importantly, international humanitarian law requires that Israel “ensure the protection, security and welfare of the people living under occupation and guarantee that they can live as normal a life as possible”. While it has the power to administratively detain individuals, that measure is among the most severe measures permitted against a civilian population under occupation and should not be used as a substitute for criminal charges where the evidence is insufficient to charge an individual with a crime. However, the source alleges that Israel has previously used administrative detention to lock up Palestinians as a punitive measure and in cases where it lacks enough evidence to prosecute.⁵

8. The source notes that international human rights law provides for additional safeguards and, inter alia, an independent judiciary and a fair trial.⁶ Trying civilians in military courts should be done on an exceptional basis, yet Israeli authorities reportedly systematically prosecute Palestinians, including children, arrested by Israeli military forces and the police in the occupied West Bank in the military court system. According to the source, Israeli military courts lack fundamental impartiality and fair trial standards; the prolific use of secret evidence, which neither detainees nor their lawyers may access, further impinges on detainees’ rights, because it prevents them from effectively mounting a defence.

b. Arrest and detention

9. The source reports that, on 29 October 2021, 15 Israeli soldiers stormed into Mr. Khairi’s house in Ramallah and arrested him at approximately 3 a.m. He was reportedly neither presented with a warrant nor told what charges he faced at that time. They transferred him directly to Ofer military prison.

² See opinions No. 8/2021, No. 86/2017, No. 20/2012 and No. 9/2010.

³ Convention respecting the Laws and Customs of War on Land; and the Regulations concerning the Laws and Customs of War on Land, art. 43.

⁴ Convention relative to the Protection of Civilian Persons in Time of War, art. 78.

⁵ See opinion No. 86/2017.

⁶ Article 14 of the Covenant.

10. The source indicates that, more than two weeks later, on 15 November 2021, Israeli authorities formally charged Mr. Khairi with security-related offences under section 85 of the Defence (Emergency) Regulations of 1945, under which attending any meeting of an unlawful organization is prohibited. Israeli authorities alleged that he attended meetings in 2000 and 2007 of the central political bureau of the Popular Front for the Liberation of Palestine, which is an unlawful organization under Israeli law, and that, beginning in 2000, he was involved in the leadership of at least one organization, the Health Work Committees, with alleged ties to the Popular Front for the Liberation of Palestine.

11. The Ofer military court reportedly extended Mr. Khairi's initial detention three times and then the military court ordered Mr. Khairi's release on bail, owing to his advanced age, on 21 November 2021. The military prosecutor appealed that ruling and requested an extension of Mr. Khairi's detention, which was granted. On 6 December, the court again ordered Mr. Khairi to be released on bail. The following day, however, the Israeli Military Commander of the West Bank, at the request of the military prosecutor, issued an administrative detention order against Mr. Khairi, for six months' duration from his initial detention on 29 October, on the grounds that he posed an imminent security threat to the region. Evidence to support that order was reportedly never made available to Mr. Khairi or his lawyer. The source notes that the legal basis for Mr. Khairi's subsequent administrative detention is section 285 of military order No. 1651, which allows a commander of the Israel Defence Forces to issue an administrative detention order for an individual if the commander has reasonable grounds to believe that the individual poses a threat to regional security.⁷

12. A confirmation hearing for the administrative order was reportedly scheduled for 9 December 2021 but was postponed to 14 December 2021. The following day, Mr. Khairi announced that he would boycott all military court proceedings, in protest of his administrative detention and what he deemed to be the oppressive nature of the Israeli military judiciary system.

13. On 26 December 2021, in a confirmation hearing held without the presence of Mr. Khairi or his lawyer, a military judge reviewed the validity and duration of the administrative detention order, and confirmed it on the same day, noting that secret evidence had allegedly established that Mr. Khairi was an active member of the Popular Front for the Liberation of Palestine and posed a threat to the security of the region.

14. Following multiple postponements,⁸ a court hearing was held in Ofer on 28 February 2022, for a formal reading of the defence counsel's arguments, followed by another hearing on 21 March.⁹ A third court hearing, originally scheduled for 5 April, was postponed until 30 May.

15. The administrative detention order against Mr. Khairi was set to expire on 28 April 2022, but the Israeli Military Commander renewed it for an additional six months. In that regard, the source adds that administrative detention orders are subject to renewal indefinitely.¹⁰

16. As at the time of the source's submission, Mr. Khairi had spent 184 days in detention, including 144 days in administrative detention. He is currently detained at Ofer prison, located near Ramallah.

17. The source submits that the deprivation by Israel of Mr. Khairi's liberty through the use of administrative detention is arbitrary, falling within categories I, III, and V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

⁷ Military order No. 1651, section 285.

⁸ The original date of the hearing was 2 December 2021. It was postponed to 9 February 2022 and again to 28 February 2022.

⁹ The second court hearing was originally scheduled for 8 March 2022.

¹⁰ Military order No. 1651, section 273.

c. Category I

18. The source notes that a detention is arbitrary when it is clearly impossible to invoke any legal basis justifying the deprivation of liberty. In order to establish a legal basis, authorities must invoke a national law, usually through notice of the reasons for arrest and charges, the presentation of a duly issued arrest warrant and regular judicial review to justify the particular instance of detention.¹¹

19. The source submits that Mr. Khairi's deprivation of liberty under the administrative detention order amounts to arbitrary detention, because Israeli authorities failed to present or provide a list of charges to clarify the reasons for his detention at the time or subsequently, and his deprivation of liberty has not been subject to regular judicial review.

i. Denial of the right to be presented with charges or reasons for administrative detention

20. According to the source, Mr. Khairi's administrative detention order was issued upon the request of the military prosecutor after a military court ordered his release on bail. At the time of the issuance of the administrative detention order, he was reportedly not informed of the reasons for his administrative detention. Article 14 of the International Covenant on Civil and Political Rights, which states that detainees must be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them. It adds that failure to do so is also a violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant. With reference to the Working Group's jurisprudence,¹² the source asserts that those violations render Mr. Khairi's detention arbitrary under category I.

ii. Lack of proper judicial review of detention

21. The source notes that a fundamental component of a legal basis for detention is regular judicial review. It adds that Mr. Khairi's administrative detention order was approved by a judge in a hearing at which Mr. Khairi did not have knowledge of the reasons for his detention, or access to the evidence against him, therefore severely limiting his ability to challenge the legality of his detention.¹³ The source adds that, because military order No. 1651 permits the use of secret evidence, the judges in most cases at those hearings can take their decision only by familiarizing themselves with a summary of the evidence and without examining the information's authenticity. In the concluding observations of the Human Rights Committee on the second periodic report of Israel, the Committee referred to those features of the system of review of administrative detention orders, namely, that the restrictions on access to counsel and to full reasons of the detention limited the effectiveness of judicial review.¹⁴

iii. Administrative detention used as a substitute for pretrial detention

22. The source submits that the military prosecutor appears to have sought Mr. Khairi's administrative detention as a direct response to the court's decisions ordering his release on bail. According to the source, that demonstrates that Mr. Khairi's detention was effectively aimed at circumventing the order for his release. The source adds that administrative detention may never be used as a substitute for criminal proceedings simply because there is insufficient evidence to convict and that no legal basis can be invoked to justify a detention where, as in the present case, an administrative order is issued to circumvent a judicial decision ordering the detainee's release.

d. Category III

23. According to the source, the protections of due process and fair trial are a net woven from the rights protected by the Covenant, the Universal Declaration of Human Rights and

¹¹ Article 14 of the Covenant and articles 3 and 9 of the Universal Declaration of Human Rights.

¹² See opinions No. 13/2015, No. 35/2018 and No. 63/2018; and [A/HRC/30/37](#), annex, para. 9.

¹³ Opinion No. 60/2021, para. 45.

¹⁴ [CCPR/CO/78/ISR](#), para. 12. See also opinion No. 20/2012.

customary international law. The source adds that the protective strands include the presumption of innocence,¹⁵ certain procedural rights,¹⁶ the ability to present a meaningful defence¹⁷ and detention being used only for the purposes of the administration of justice.¹⁸ Where those threads are substantially or totally cut, detention becomes arbitrary in character. The source notes that the Human Rights Committee and the Working Group have recognized that those protections apply as equally to administrative detention as they do to formal criminal proceedings.¹⁹

i. Denial of the right to be informed of the reasons for detention

24. The source asserts that Mr. Khairi was not presented with charges or made aware of the reasons for his detention at the time of the issuance of the administrative detention order. In addition to undermining the legal basis for his detention under category I, that failure also violated Mr. Khairi's fair trial rights, namely, the right to be informed of the reasons for his deprivation of liberty, amounting to a violation under category III.

ii. Denial of the right to be tried without undue delay

25. The source submits that all detainees have the right to be tried without undue delay. Mr. Khairi's administrative detention order was seemingly issued as a direct response to two court orders requiring his release on bail. The source notes that, rather than bringing about a speedy trial, the military chose instead to bring him into its system of administrative detention, under which it may hold him indefinitely.

iii. Denial of the opportunity to present a meaningful defence

26. The source states that, because Mr. Khairi has joined over 500 administrative detainees in boycotting the Israeli military courts, the hearing at which his administrative detention order was confirmed was conducted in absentia. However, the source notes that, Mr. Khairi and his fellow administrative detainees know all too well that, given the way that such hearings function, his presence would have made little to no difference to his ability to present a meaningful defence. Mr. Khairi's administrative detention is reportedly based on a file of secret evidence to which he does not have access. The source notes that Israeli law allows military tribunals to deny detainees and their lawyers access to key case documents, including the evidence on which the administrative detention is based, for confidentiality concerns. The source asserts that Mr. Khairi's inability to access evidence against him substantially hinders his ability to introduce his own rebuttal or exculpatory evidence and to effectively cross-examine witnesses. The source asserts that the situation creates an inequality of arms, disadvantaging Mr. Khairi relative to his accusers and impeding his ability to defend himself against the accusations against him.

iv. Denial of the right to be presumed innocent until proven guilty

27. According to the source, the realities of the military court system have the effect of placing the burden of proof on the defendant, rather than on the military prosecutor. The source notes that the near-automatic extension by judges of administrative detention orders carries an implicit presumption of guilt and shifts the responsibility to the defendant to justify departure from that presumption. The source adds that that burden is made heavier by the insurmountable obstacles that Mr. Khairi faces in endeavouring to present a competent

¹⁵ Universal Declaration of Human Rights, article 11, and Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 36.

¹⁶ Articles 6, 9–10 and 14–15 of the Covenant and articles 6–12 of the Universal Declaration of Human Rights.

¹⁷ Universal Declaration of Human Rights, article 11; and Body of Principles, principles 11, 14 and 36.

¹⁸ Body of Principles, principle 36.

¹⁹ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial; and Working Group, opinions No. 8/2021, para. 56; and No. 60/2021, paras. 47–48.

defence, including lack of access to secret evidence used by the prosecutor to build the case against him.

v. Denial of the right to be tried in front of an independent and impartial tribunal

28. The source notes that, under the Covenant, judicial independence is assessed by looking at three factors that may compromise the independence of a tribunal,²⁰ namely, promotability, procedures and qualifications for appointment, with regard to members of the judiciary and their actual independence from political interference by the executive branch and the legislature. In addition, judicial independence must be both actual and objective.

29. The source asserts that military courts in Israel raise several red flags in that regard. The Israeli military commander in the West Bank holds the executive, legislative and judicial functions. Such a lack of separation of powers makes military judges susceptible to political interference by the executive branch and the legislature. According to the source, that lack of separation is a large part of the reason why military tribunals should never be used to try civilians.²¹ The judges on those tribunals are officers who are subject to discipline and dependent on their superiors for promotion,²² a dual pressure both discouraging military judges from ruling against the Government and encouraging judges to rule in favour of military objectives.

30. The source adds that, regarding the actuality of judicial independence, Israel has offered no evidence to show that military judges are not biased towards the interests of one of the parties to the detriment of the other. More troubling, however, is the fact that Palestinians tried criminally in military tribunals have reportedly historically faced a conviction rate of about 99 per cent, in the light of which no reasonable observer is likely to conclude that such a tribunal is fair and disinterested. The source therefore submits that Mr. Khairi's detention is arbitrary under category III, because the military court that heard his case was not independent or impartial.

vi. Denial of the right to equal treatment before the law

31. The source asserts that due process demands that all people be treated as equal before the law. The source notes that, in the West Bank, a bifurcated system of citizenship and a dual regime of legal rights grants superior legal status and protections to Jewish Israeli settlers over Palestinians. Such inequalities reportedly surface throughout legal proceedings; whereas Palestinians are subjected to the due process violations as described by the source, Jewish Israeli settlers who reside in the occupied West Bank are afforded the full rights and protections guaranteed to citizens under domestic Israeli law, including trial by Israeli civilian courts. The source submits that that inequality also substantially contributes to the submission that Mr. Khairi is subject to arbitrary detention under category V.

32. The source submits that those violations act in concert to strip Mr. Khairi of the fair trial rights guaranteed to him under international law and, as such, that they constitute a clear and grave case of arbitrary detention under category III.

e. Category V

i. Discrimination on the basis of national, ethnic or social origin

33. The source submits that Mr. Khairi's detention meets the definition of arbitrary detention under category V, because it is a form of discrimination on the basis of his national, ethnic or social origin as a Palestinian.²³ The source recalls that the Working Group has indicated that, in practice, administrative detention on the basis of military order No. 1651

²⁰ Human Rights Committee, general comment No. 32 (2007), wherein "tribunal" applies to military courts like those in use in the occupied Palestinian territories.

²¹ See opinion No. 15/2016.

²² Ibid.

²³ See opinion No. 34/2018, paras. 43–44.

was particularly directed against Palestinians.²⁴ Throughout the 55-year occupation by Israel of the West Bank, only a small number of Jewish Israelis have reportedly ever been held in administrative detention.

34. The source notes that the Human Rights Committee has expressed concern over the continuing practice of the administrative detention of Palestinians²⁵ and indicated that Israel should ensure equal treatment for all persons within its territory and subject to its jurisdiction, regardless of their national or ethnic origin.²⁶ The source recalls that the Committee on the Elimination of Racial Discrimination urged Israel to end its practice of administrative detention, which was discriminatory and constituted arbitrary detention under international human rights law.²⁷ The Committee has also expressed concern about the existence in the Occupied Palestinian Territory of two entirely separate legal systems and sets of institutions for Jewish communities in illegal settlements on the one hand and Palestinian populations living in Palestinian towns and villages on the other hand.²⁸ Indeed, the source notes that the use by Israel of administrative detention forms a key part of those entirely separate legal systems and sets of institutions that are applied to Palestinian human rights defenders such as Mr. Khairi on the basis of national origin in violation of international law.

35. The source submits that Mr. Khairi's detention is therefore arbitrary under category V, because it is discriminatory on the basis of his national, ethnic and social origin.

ii. Discrimination on the basis of political opinion

36. The source asserts that the detention of Mr. Khairi is arbitrary under category V, because it constitutes discrimination on the basis of his political opinion.²⁹ Israeli authorities initially arrested him on charges alleging his association in and leadership of unlawful organizations under Israeli law, and his attendance at meetings of the central political bureau of the Popular Front for the Liberation of Palestine. The source adds that such administrative detention and the accusation of posing a security threat relates directly to Mr. Khairi's political opinions and his work as a human rights lawyer and defender in the occupied West Bank.

37. According to the source, Mr. Khairi has spent his life and career dedicated to speaking out against the Israeli occupation of the West Bank. He has served as a legal adviser to several Palestinian civil society organizations. The source notes that Israel has recently criminalized six prominent Palestinian civil society organizations, including human rights organizations, a move that was widely criticized as the deliberate targeting of Palestinian freedom of expression and association,³⁰ and the continued detention of Mr. Khairi can allegedly be seen as part of a larger attempt to silence voices opposed to policies and practices of Israel in the occupied territories.

iii. Targeting of a human rights defender

38. The source submits that the detention of Mr. Khairi raises further concerns under category V, given that human rights defenders are a protected group entitled to equal protection of the law under article 26 of the Covenant, falling under category V.³¹ Mr. Khairi is a retired human rights lawyer who defended the rights of Palestinian detainees before

²⁴ See opinion No. 31/2017, para. 35.

²⁵ [CCPR/C/ISR/CO/4](#), para. 10.

²⁶ *Ibid.*, para. 7.

²⁷ [CERD/C/ISR/CO/14-16](#), para. 27.

²⁸ [CERD/C/ISR/CO/17-19](#), para. 22.

²⁹ Opinion No. 15/2016, para. 28.

³⁰ Office of the United Nations High Commissioner for Human Rights (OHCHR), "Israel's 'terrorism' designation an unjustified attack on Palestinian civil society – Bachelet", press release, 26 October 2021. Available at <https://www.ohchr.org/en/2021/10/israels-terrorism-designation-unjustified-attack-palestinian-civil-society-bachelet>. OHCHR, "UN experts condemn Israel's designation of Palestinian human rights defenders as terrorist organizations", press release, 25 October 2021. Available at <https://www.ohchr.org/en/press-releases/2021/10/un-experts-condemn-israels-designation-palestinian-human-rights-defenders>.

³¹ [A/HRC/48/55](#), para. 48.

Israeli military courts and advised Palestinian civil society organizations. The source submits that targeting Mr. Khairi with administrative detention, in particular at the current time and in conjunction with the recent criminalization of major Palestinian civil society organizations, raises significant concerns about systematic Israeli efforts to silence Palestinian human rights defenders.

Response from the Government

39. On 8 July 2022, the Working Group transmitted the allegations to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 6 September 2022 about the situation of Mr. Khairi. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, as well as its compatibility with the country's obligations under international human rights law. The Working Group called upon the Government to ensure the physical and mental integrity of Mr. Khairi.

40. 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 its reply, as provided for in paragraph 16 of the Working Group's methods of work.

41. The Working Group notes with concern the silence of the Government and its not availing itself of the opportunity to respond to the allegations made in the present case and in other communications.³² The Government has not provided a substantive response to the Working Group since 2007.³³ The Working Group urges the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

Discussion

42. 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.

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

44. The source argues that the arrest and detention of Mr. Khairi is arbitrary under categories I, III and V. While the Working Group examines each case on its merits, it notes that the allegations in the present case are similar to those examined in opinions adopted in recent years concerning Israel.³⁵

(a) Category I

45. The source submits that, on 29 October 2021, 15 Israeli soldiers stormed into Mr. Khairi's home and arrested him at approximately 3 a.m. At the time, he was reportedly neither presented with a warrant nor told what charges he faced. At the time of his arrest, he was 78

³² See opinions No. 36/1992, No. 17/1993, No. 18/1993, No. 26/1993, No. 16/1996, No. 17/1996, No. 18/1996, No. 24/1996, No. 8/1998, No. 9/1998, No. 10/1998, No. 11/1998, No. 4/1999, No. 16/2000, No. 17/2000, No. 18/2000, No. 31/2000, No. 23/2001, No. 5/2010, No. 9/2010, No. 3/2012, No. 20/2012, No. 58/2012, No. 43/2014, No. 13/2016, No. 15/2016, No. 24/2016, No. 3/2017, No. 31/2017, No. 44/2017, No. 86/2017, No. 34/2018, No. 73/2018, No. 84/2019, No. 12/2020, No. 8/2021, No. 60/2021 and No. 61/2021. The Government submitted responses to the Working Group's communications in relation to opinions No. 16/1994, No. 24/2003, No. 3/2004 and No. 26/2007.

³³ 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 it did not submit a substantive response.

³⁴ [A/HRC/19/57](#), para. 68.

³⁵ See, for example, opinions No. 73/2018, No. 12/2020, No. 60/2021 and 4/2022.

years old. The Government had the opportunity to provide the Working Group with an explanation of the circumstances of Mr. Khairi's arrest, but it has not.

46. As the Working Group has previously stated, for detention to have a legal basis, it is not sufficient that there is a law that authorizes the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant.³⁶ International human rights law 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 detention under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant.³⁷ Any form of detention or imprisonment should be ordered by, or be subject 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, independence and impartiality, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

47. In the present case, Mr. Khairi was arrested without an arrest warrant. In addition, the authorities failed to explain the reasons for his arrest. Instead, he was directly transferred to the Ofer military prison. The Working Group concludes that the arrest and detention of Mr. Khairi was in violation of article 9 (1) and (2) of the Covenant.

48. The source reports that Mr. Khairi was charged more than two weeks after his arrest, on 15 November 2021, with security-related offences under section 85 of the Defence (Emergency) Regulations of 1945. Under article 9 (2) of the Covenant, anyone who is arrested must be promptly informed of any charges against him or her. The right to be promptly informed of charges concerns notice of criminal charges and, as the Human Rights Committee has noted, that right applies in connection with ordinary criminal prosecutions and in connection with military prosecutions or other special regimes directed at criminal punishment.³⁸ This requirement was not satisfied in the case of Mr. Khairi. The Working Group therefore finds a breach of article 9 (2) of the Covenant.

49. It is also essential that the review of the lawfulness of detention be carried out by an independent and impartial authority.³⁹ 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 their superiors for promotion.⁴⁰ The Working Group has set out minimum guarantees pertaining to military justice, including that military tribunals should be competent to try only military personnel for military offences, and not civilians.⁴¹

50. The Ofer military court reportedly extended Mr. Khairi's initial detention three times, before ordering his release on bail, due to his old age. However, on 7 December 2021, an administrative detention order was issued for Mr. Khairi for 6 months' duration. The order, which was set to expire on 28 April 2022, was then renewed for six months, on the grounds that Mr. Khairi posed an imminent security threat to the region.

51. 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, given that other effective measures of addressing the threat, including within the criminal justice system, would be available. Administrative detention must therefore be exceptional. As the Human Rights Committee has pointed out in its general comment No. 35 (2014) on liberty

³⁶ See opinions No. 46/2017, No. 66/2017, No. 75/2017, No. 93/2017, No. 35/2018 and No. 79/2018.

³⁷ Opinions No. 88/2017, para. 27; No. 3/2018, para. 43; and No. 30/2018, para. 39.

³⁸ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 29; see also Working Group, opinion No. 44/2022, para. 66.

³⁹ 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, guideline 4, para. 55; see also International Committee of the Red Cross, "Internment in armed conflict: basic rules and challenges", opinion paper, 25 November 2014, p. 9.

⁴⁰ See opinions No. 3/2012, No. 58/2012, No. 24/2016, No. 73/2018, No. 12/2020, No. 60/2021 and No. 4/2022.

⁴¹ [A/HRC/27/48](#), para. 69.

and security of person, 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 must also 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.⁴²

52. The source submits that the allegations against Mr. Khairi date back to 2000 and 2007. Israeli authorities alleged that he attended meetings in 2000 and 2007 of the central political bureau of the Popular Front for the Liberation of Palestine, which is an unlawful organization under Israeli law, and that, beginning in 2000, he was involved in the leadership of at least one organization, the Health Work Committees, with alleged ties to the Popular Front for the Liberation of Palestine. In the present case, the Government has failed to provide any information or evidence to demonstrate that Mr. Khairi posed a present, direct and imperative threat to State security and how that threat has persisted during his ongoing detention, comprising 184 days in detention and 144 days in administrative detention. Under the circumstances, the Working Group concludes that the Government has not demonstrated that Mr. Khairi poses a threat to security and that his detention therefore lacks legal basis.

53. The source also argues that Mr. Khairi's administrative detention lacks a legal basis because it is a substitute for pretrial detention. The source submits that the military prosecutor appears to have sought Mr. Khairi's administrative detention as a direct response to the court's decisions ordering his release on bail. Mr. Khairi's administrative detention order was issued after a military court ordered his release on bail. At that time, Mr. Khairi was not informed of the reasons for his administrative detention. As the Human Rights Committee has stated, 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.⁴³ The Working Group therefore finds that Mr. Khairi has not had the ability to effectively challenge the lawfulness of his detention,⁴⁴ contrary to article 9 (4) of the Covenant. Without access to such information, Mr. Khairi's detention is arbitrary, and he has been denied an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

54. The Working Group finds that Mr. Khairi was denied the right to be tried without undue delay in order to challenge the legality of his continued deprivation of liberty. As discussed above, Mr. Khairi's administrative detention order was seemingly issued as a direct response to two court orders requiring his release on bail. The source notes that, rather than bringing about a speedy trial, the military chose instead to bring him into its system of administrative detention, under which it may hold him indefinitely, in violation of articles 9 (4) and 14 (3) (c) of the Covenant.

55. The source submits that the administrative detention order against Mr. Khairi was set to expire on 28 April 2022, but that the Israeli military commander renewed it for an additional six months. In that regard, the source adds that administrative detention orders are subject to renewal indefinitely.⁴⁵ The Working Group therefore considers that the detention of Mr. Khairi beyond 28 April 2022 further violated article 9 (1) of the Covenant. Indeed, to hold otherwise would mean that States would be able to hold individuals indefinitely, endlessly renewing their terms of administrative detention.⁴⁶

⁴² Human Rights Committee, general comment No. 35 (2014), para. 15. See also [A/HRC/38/15](#), paras. 118.77–118.83, in which States expressed concern during the most recent universal periodic review of Israel about the practice of administrative detention.

⁴³ Human Rights Committee, general comment No. 35 (2014), para. 15; and Working Group, opinions No. 73/2018, para. 49; and No. 12/2020, para. 26.

⁴⁴ The Working Group has made similar findings involving Israel, when detention was based on evidence not made available to the detainee. See opinions No. 44/2017, No. 86/2017, No. 34/2018, No. 73/2018 and No. 12/2020.

⁴⁵ Military order No. 1651, section 273.

⁴⁶ Opinion No. 60/2021, para. 43.

56. For those reasons, the Working Group concludes that the arrest and detention of Mr. Khairi lacks legal basis and is arbitrary under category I.

(b) Category III

57. The source alleges that the Government violated Mr. Khairi's right to a fair trial. The Working Group notes that the present case is one concerning administrative detention, which does not involve charges or a 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.⁴⁷

58. The Working Group has adopted that 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.⁴⁸ 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. That 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.⁴⁹

59. In the present case, Mr. Khairi's detention must be regarded as penal in nature, and the Working Group will consider whether his detention meets the requirements of article 14 of the Covenant and other relevant provisions. In its jurisprudence, the Working Group has found that, in cases involving an 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.⁵⁰

60. The source submits that Mr. Khairi's right to be tried before an independent and impartial tribunal was violated. The Working Group observes that Mr. Khairi, a civilian, was obliged to appear before a military court, and it was that military court that imposed the administrative detention upon him. In relation to the jurisdiction of the military courts, the Working Group has consistently stated its view 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.⁵¹ In the present case, the Government had the opportunity to explain the reasons for having Mr. Khairi appear before a military court, but it failed to do so. As noted earlier, the Working Group does not consider that Israeli military courts meet the standard of an independent and impartial tribunal for the purposes of considering matters involving civilians. Moreover, the source has submitted, and the Government does not contest, that Mr. Khairi's administrative detention orders have been approved by Israeli military court judges, who are subject to military discipline and dependent on their superiors for promotion. The Working Group recalls that, under article 14 of the Covenant, the court must be independent and impartial. In that regard, in its earlier jurisprudence, the Working Group has stated that the military courts

⁴⁷ Human Rights Committee, general comment No. 32 (2007), para. 15. See also *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 9.2.

⁴⁸ See opinions No. 3/2012, No. 20/2012, No. 45/2012, No. 58/2012, No. 43/2014, No. 31/2017, No. 73/2018, No. 12/2020 and No. 60/2021. See also [A/HRC/37/42](#), para. 17, and deliberation No. 9 ([A/HRC/22/44](#), sect. III), paras. 68–69.

⁴⁹ [A/HRC/37/42](#), para. 21.

⁵⁰ See opinions No. 31/2017, No. 73/2018, No. 12/2020 and No. 49/2020.

⁵¹ [A/HRC/27/48](#), paras. 66–71. See also opinions No. 44/2016, No. 30/2017, No. 28/2018, No. 32/2018 and No. 66/2019.

of Israel imposing such administrative detention do not satisfy that criterion.⁵² In the circumstances of the present case, the Working Group finds that Mr. Khairi was deprived of the right to have his case determined in a fair hearing by a competent, independent and impartial tribunal, as required under article 14 (1) of the Covenant.

61. The source submits that Mr. Khairi's detention is based on secret information to which neither he nor his lawyer was given access. On 26 December 2021, in a confirmation hearing held without the presence of Mr. Khairi or his lawyer, a military judge reviewed the validity and duration of the administrative detention order and confirmed it on the same day, noting that secret evidence allegedly established that he was an active member of the Popular Front for the Liberation of Palestine and posed a threat to the security of the region. The Working Group recalls that every individual deprived of liberty has the right to access to material related to their detention, including information that may assist the detainee in arguing that the detention is not lawful or that the reasons for the detention no longer apply.⁵³ However, that right is not absolute, and the disclosure of information may be restricted if it is necessary and proportionate in pursuing a legitimate aim, such as protecting national security, and if the State has demonstrated that less restrictive measures would be unable to achieve the same result, such as by providing redacted summaries that clearly point to the factual basis for the detention.⁵⁴ The Government has not provided an explanation of the nature of the secret evidence against Mr. Khairi, nor any justification as to why he could not be provided with access to it. The failure to provide full access to the evidence has violated Mr. Khairi's right to a fair trial and the equality of arms under articles 14 (1) and (3) (b) and (e) of the Covenant.⁵⁵

62. The source argues that the military court system has the effect of placing the burden on the defendant, in this case Mr. Khairi, to prove his innocence, in the light of the near-automatic extension by judges of administrative detention orders, which carries an implicit presumption of guilt and shifts the responsibility to the defendant to justify departure from that presumption. This burden is increased by the obstacles that Mr. Khairi faces in endeavouring to presenting a competent defence, including lack of access to secret evidence used by the prosecutor to build the case against him. As such, the Working Group finds that Mr. Khairi's right to be presumed innocent under article 14 (2) of the Covenant has been violated.

63. The Working Group finds that the fair trial and due process violations are of such a gravity as to give Mr. Khairi's arrest and detention an arbitrary character under category III.

(c) Category V

64. The source has argued, and the Government has chosen not to rebut, that the detention of Mr. Khairi is arbitrary and falls under category V, as detention based on discrimination. In that regard, the source notes that, in the West Bank, a bifurcated system of citizenship and a dual regime of legal rights grants superior legal status and protections to Jewish Israeli settlers over Palestinians. Such inequalities reportedly surface throughout the proceedings; while Palestinians are subjected to the due process violations described by the source, Jewish Israeli settlers who reside in the West Bank are afforded the full rights and protections guaranteed to citizens under domestic Israeli law, including trial by Israeli civilian courts.

65. The Working Group notes that Mr. Khairi has been administratively detained on the basis of secret evidence. This resonates with a pattern noted by the Working Group in previous cases before it, wherein the Israeli authorities have used administrative detention to

⁵² Opinions No. 15/2016 paras 25–27; and No. 24/2016, para. 21. See also opinions No. 3/2012 and No. 58/2012.

⁵³ 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, principle 12 and guidelines 11 and 13.

⁵⁴ *Ibid.*, guideline 13, paras. 80–81.

⁵⁵ Opinions No. 50/2014, para. 77; No. 89/2017, para. 56; No. 18/2018, para. 53; and No. 78/2018, paras. 78–79.

detain Palestinians, especially men and boys, on an indefinite basis, without charge or trial.⁵⁶ The source submits that Mr. Khairi is a retired human rights lawyer who defended the rights of Palestinian detainees before Israeli military courts and engaged in advising Palestinian civil society organizations. The source notes that Israel has recently criminalized six prominent Palestinian civil society organizations, including human rights organizations, which was widely criticized as the deliberate targeting of Palestinian freedom of expression and association.⁵⁷ Mr. Khairi's continued detention can allegedly be seen as part of a larger attempt to silence voices opposed to policies and practices of Israel in the occupied territories.

66. In the absence of an explanation from the Government, the Working Group concludes that Mr. Khairi, who is Palestinian, was detained on a discriminatory basis, namely, his national, ethnic and social origin, political opinions and for being a human rights defender.⁵⁸ Under the 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. Khairi is arbitrary under category V.

67. The Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

(d) Concluding remarks

68. The Working Group is gravely concerned by the detention of Mr. Khairi, who is 78 years old. The Working Group reminds 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. States should treat detainees over 60 years of age and those with underlying health conditions as vulnerable to SARS-CoV-2, refraining from holding them in facilities where the risk to their life is heightened and implementing early release schemes whenever possible.⁵⁹ The Working Group refers the case to the Independent Expert on the enjoyment of all human rights by older persons, for appropriate action.

69. 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.⁶⁰ 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.⁶¹

70. 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 that context, the Working Group recalls the invitation of 12 September 2014 extended to it by the Permanent Observer Mission of the State of Palestine to the United Nations Office and other

⁵⁶ Opinions No. 24/2016, No. 31/2017, No. 44/2017, No. 86/2017, No. 34/2018, No. 73/2018, No. 12/2020 and No. 60/2021. See also [A/HRC/38/15](#), paras. 118.159, 118.162, 118.164–165 and 119.4.

⁵⁷ OHCHR, "Israel's 'terrorism' designation an unjustified attack on Palestinian civil society"; and OHCHR, "UN special rapporteurs condemn Israel's designation of Palestinian human rights defenders as terrorist organizations."

⁵⁸ See, for example, opinions No. 60/2021, No. 61/2021, No. 4/2022 and No. 44/2022.

⁵⁹ [A/HRC/45/16](#), annex II, paras. 15–16.

⁶⁰ Opinions No. 36/1992, No. 17/1993, No. 18/1993, No. 16/1994, No. 16/1996, No. 17/1996, No. 18/1996, No. 24/1996, No. 8/1998, No. 9/1998, No. 10/1998, No. 11/1998, No. 16/2000, No. 17/2000, No. 23/2001, No. 23/2001, No. 3/2004, No. 26/2007, No. 5/2010, No. 9/2010, No. 3/2012, No. 20/2012, No. 58/2012, No. 43/2014, No. 24/2016, No. 31/2017, No. 86/2017, No. 34/2018, No. 73/2018, No. 12/2020, No. 60/2021, No. 61/2021 and No. 4/2022.

⁶¹ Opinion No. 47/2012, para. 22.

international organizations in Geneva to conduct an official visit to the Occupied Palestinian Territory.

Disposition

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

The deprivation of liberty of Bashir Khairi, being in contravention of articles 2, 3, 7, 8, 9, 10 and 11 (1) of the Universal Declaration of Human Rights and articles 2 (1) and (3), 9, 14 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

72. The Working Group requests the Government of Israel to take the steps necessary to remedy the situation of Mr. Khairi 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.

73. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Khairi immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.⁶² In the current context of the 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. Khairi.

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

75. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 and the Independent Expert on the enjoyment of all human rights by older persons and the Special Rapporteur on the situation of human rights defenders, for appropriate action.

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

Follow-up procedure

77. 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. Khairi has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Khairi;
- (c) Whether an investigation has been conducted into the violation of Mr. Khairi'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.

78. 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.

79. 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

⁶² See [A/HRC/45/16](#), annex I.

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.

80. 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.⁶³

[Adopted on 14 November 2022]

⁶³ Human Rights Council resolution 51/8, paras. 6 and 9.