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**Human Rights Council
Working Group on Arbitrary Detention****Opinions adopted by the Working Group on Arbitrary
Detention at its ninetieth session, 3–12 May 2021****Opinion No. 8/2021 concerning Layan Kayed, Elyaa Abu Hijla and
Ruba Asi (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,¹ on 16 December 2020 the Working Group transmitted to the Government of Israel a communication concerning Layan Kayed, Elyaa Abu Hijla and Ruba Asi. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

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

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

Layan Kayed

4. Ms. Kayed is a 22-year-old Palestinian student who studies sociology at Birzeit University, in Birzeit, a city in the occupied West Bank. Ms. Kayed has recently completed the final year of her undergraduate studies (but is still to formally graduate) and she usually lives with her parents. Ms. Kayed has had no previous engagement with the law and this is her first experience with the Israeli military forces, courts and prisons.

5. The source reports that, on 8 June 2020, at approximately 8.30 a.m., Ms. Kayed was arrested at Za'tara checkpoint near Nablus while travelling to Ramallah with a family member in their private car. She was subsequently searched and cuffed with restraints on both her hands and legs before being transferred to a nearby facility, where she was asked questions regarding her medical situation. It is unknown whether there was a warrant for her arrest. Ms. Kayed was then returned to Za'tara checkpoint. Although she was given food and water, the soldiers refused to uncuff her while she was eating or when she went to the toilet.

6. The source adds that Ms. Kayed was then transferred to Hasharon prison, in Israel and outside of the occupied West Bank. Specifically, she was taken to a section that holds both civil (common law) Israeli prisoners and Palestinian political prisoners. Ms. Kayed was placed in a cell with other Israeli detainees, both men and women. They allegedly subjected her to abuse, which caused her distress.

7. While at Hasharon prison, Ms. Kayed was reportedly confined to a cell under round-the-clock video surveillance and her conditions of detention were poor. The cell and the blankets in it were dirty, and there was an exposed toilet without a door. According to the source, Ms. Kayed was never provided with clean clothes and received only two meals per day. The food was reportedly inedible; although Ms. Kayed forced herself to eat it, it caused her to vomit on several occasions.

8. At nearly all times, Ms. Kayed was reportedly confined in the cell with another Palestinian female detainee, although this was not always the same detainee, as Ms. Kayed or the other detainee would be regularly moved from one cell to another. One of the female detainees with whom Ms. Kayed shared a cell suffered from suicidal ideation; another required psychological treatment, which caused distress to Ms. Kayed.

9. While Ms. Kayed was detained at Hasharon prison, she was reportedly taken to Ofer prison in the occupied West Bank for interrogation and investigation on 10 and 11 June 2020. On 10 June 2020, she was reportedly interrogated for approximately one hour and a half, during which time she was cuffed to a chair. She was also forced to undertake a DNA test. On 11 June 2020, Ms. Kayed was interrogated for a second time, for approximately two to three hours.

10. The source reports that, while at Ofer prison, Ms. Kayed was confined to a windowless cell and then transferred to another cell without bathroom facilities, including no toilet. Ms. Kayed's initial requests for food, water and the use of a toilet were refused. She was finally given water and a small cup of yoghurt after she began to shout and was then taken to the toilet by a female security guard. Before using the toilet, she requested the guard to uncuff her hands, but the guard refused. After approximately one hour and a half, Ms. Kayed was reportedly taken to a transfer vehicle where she was subjected to further degrading treatment, as she was unable to get into the vehicle with her legs cuffed. As a result, she fell over and Israeli male soldiers laughed at her, providing no assistance to help her into the vehicle.

11. The source reports that, on 18 June 2020, 10 days after her arrest and detention, Ms. Kayed was charged with: (a) being affiliated with the illegal group the Democratic Progressive Student Pole (DPSP), contrary to section 85 (1) (b) of the Defence (Emergency) Regulations (1945); (b) attending an illegal gathering, contrary to section 85

(1) (d) of the same Regulations; and (c) throwing stones, contrary to section 212 (2) of Military Order 1651 (2009).

12. On 24 June 2020, Ms. Kayed was transferred to Damon prison, where she remained in pretrial custody. At the time of the source's submission, her most recent trial hearing was scheduled for 7 December 2020.

Elyaa Abu Hijla

13. Ms. Abu Hijla is a 21-year-old Palestinian student of law at Birzeit University. She usually lives with her parents. At the time of her arrest, Ms. Abu Hijla was due to begin the fourth year of her undergraduate studies. She is on the honour list of Birzeit University and is therefore a visible individual at the educational institute. She has had no previous engagement with the law and this is her first experience with the Israeli military forces, courts and prisons.

14. The source reports that, on 1 July 2020, Ms. Abu Hijla's home in Ramallah was raided by Israeli soldiers in the middle of the night. The soldiers searched Ms. Abu Hijla before asking her to change her clothes. She was then handcuffed and taken to a waiting military jeep. Once in the vehicle, the soldiers put a mask over her face and another mask just over her eyes. It is unknown whether there was a warrant for her arrest. She was transported in the military jeep to what was suspected to be Ofer prison.

15. Upon arrival, Ms. Abu Hijla was reportedly questioned about her medical status by a doctor while still in the military jeep and asked to sign a document, which she refused to do. She was then removed from the military jeep and taken to a room, where she was kept for one hour and a half. During that time, she was forced to lean on her knees while on the floor. Her request for a chair was refused. While awaiting a transfer, Ms. Abu Hijla was reportedly confined in a military surveillance tower for four hours. The temperature inside the tower was very high. She was then transferred to Ofer prison in a military vehicle.

16. The source reports that, upon arrival at Ofer prison, Ms. Abu Hijla was confined to a small, windowless cell before being taken to an interrogation room and being asked more than 30 questions. After the interrogation, she was returned to the cell and later transferred by bus, with a male prisoner, to Hasharon prison.

17. While at Hasharon prison, Ms. Abu Hijla was reportedly subjected to poor detention conditions. She was provided with clothes only occasionally and she was never provided with any change of underwear. Both Ms. Abu Hijla and the other Palestinian detainee in her cell were allegedly constantly subjected to humiliating and threatening behaviour. Notably, the prison guards threatened to move Ms. Abu Hijla to a cell under round-the-clock video surveillance and to cuff her hands and legs to her bed.

18. According to the source, Ms. Abu Hijla suffers from hyperthyroidism, with which she was diagnosed in 2016, and requires 75 mcg of thyroxine medication daily. She requires medical tests and evaluations for this condition every three months. While in custody, she has reportedly been given medication that is different to the one she is usually prescribed and at a higher dose of 100 mcg.

19. On 8 July 2020, eight days after her arrest and detention, Ms. Abu Hijla was charged by Ofer military court with the following: (a) being affiliated with the illegal group DPSP, contrary to section 85 (1) (b) of the Defence (Emergency) Regulations (1945); (b) attending an illegal gathering, contrary to section 85 (1) (d) of the same Regulations; and (c) throwing stones, contrary to section 212 (2) of Military Order 1651 (2009).

20. On 15 July 2020, Ms. Abu Hijla was tested for the coronavirus disease (COVID-19). The following day, she was transferred to Damon prison, where she remains in custody. Ms. Abu Hijla's initial trial date of 14 September 2020 was postponed, on the day of the trial, to 11 November 2020. No definitive reason was provided for the rescheduling or the extension of the time spent in pretrial detention. The source adds that Ms. Abu Hijla had spent five months in pretrial detention by the time the initial trial was rescheduled, noting with concern that the effects of prolonged, harsh detention conditions will have a serious effect on her in the interim. At the time of the source's submission, the next trial hearing of Ms. Abu Hijla was scheduled for 23 December 2020.

Ruba Asi

21. Ruba Asi is a 20-year-old Palestinian student who also attends Birzeit University. She studies sociology and usually lives with her parents. Ms. Asi was due to begin the fourth year of her undergraduate studies at the time of her arrest. She has had no previous engagement with the law and this is her first experience with the Israeli military forces, courts and prisons.

22. The source reports that, on 9 July 2020, at approximately 2 a.m., Ms. Asi's home was raided by Israeli soldiers. Ms. Asi was searched by two female soldiers who took her identity document and telephone. One of the soldiers reportedly grabbed her with force and removed her from her home, without permitting her to say goodbye to her family or take a jacket with her. The soldiers then placed Ms. Asi's hands in iron cuffs and forced her into a waiting military jeep. Once in the vehicle, the soldiers put a mask over Ms. Asi's face and another mask just over her eyes. It is unknown whether there was a warrant for her arrest.

23. According to the source, Ms. Asi was taken to an open space nearby, where her body temperature was tested and she was asked to sign a medical form, which she refused to do. Ms. Asi was then taken to a military officer who informed her that she had been arrested because of her involvement in DPSP and the Popular Front for the Liberation of Palestine. Ms. Asi replied that she did not know what he meant by this. She was then returned to the military jeep.

24. The source adds that Ms. Asi was left in an open yard for several hours before being transferred by private car to Ofer prison. While at Ofer prison, she was allegedly subjected to poor detention conditions. She was confined to a windowless cell containing a bed made of concrete, a water tap and a toilet, which was a hole in the ground next to the bed.

25. On 9 July 2020, Ms. Asi was reportedly transferred to Hasharon prison, where she was searched again. The soldiers also took pictures of her and took her fingerprints. Ms. Asi was then questioned and asked to sign a statement, but she refused to do so. While at Hasharon prison, Ms. Asi confirmed that she had been tested for COVID-19 on 19 July 2020.

26. On 21 July 2020, 13 days after her arrest and detention, Ms. Asi was charged with the following: (a) being affiliated with the illegal group DPSP, contrary to section 85 (1) (b) of the Defence (Emergency) Regulations (1945); (b) attending an illegal gathering, contrary to section 85 (1) (d) of the same Regulations; and (c) throwing stones, contrary to section 212 (2) of Military Order 1651 (2009).

27. On 30 July 2020, Ms. Asi was transferred to Damon prison, where she remains in custody. At the time of the source's submission, her most recent trial hearing was scheduled for 13 December 2020.

a. Context

28. The source notes that, according to a public statement released by Birzeit University on 23 January 2020, Israeli forces have detained 74 Birzeit University students between September 2019 and January 2020. Other students, including Ms. Kayed, Ms. Abu Hijla and Ms. Asi, have been arrested since January 2020, although the actual number was unclear at the time of the submission by the source. According to the source, this clearly indicates that the wholly unlawful approach of targeting Palestinian university students is intensifying in a grave and serious manner.

29. The source highlights that all three female students were in full-time education at Birzeit University at the time of their arrest and that their student activities ran in parallel with their tertiary education studies. The source adds that their involvement with societies at the university was both peaceful and lawful under international human rights law. According to the source, the arrest and military detention of and the criminal charges brought against the three female students fall within a clear and intensifying pattern, in place since August 2019, of arresting and detaining Palestinian university students for the peaceful exercise of their basic and fundamental human rights to freedom of assembly, association and expression. It is of particular concern that female students are being systematically targeted.

b. Analysis of violations

30. The source recalls that Ms. Kayed, Ms. Abu Hijla and Ms. Asi were all arrested by Israeli occupation forces within the time frame of a month, indicating a possible systematic pattern of targeting female students from Birzeit University. Upon arrest, all three students were subjected to body searches, handcuffing with the use of iron cuffs and the imposition of face and eye masks to block their vision. Two of the female students were reportedly arrested in terrifying night-time raids of the family home. All three female students were reportedly interviewed without a lawyer present, in accordance with Israeli military orders, which prohibit the presence of legal representatives, strongly indicating a lack of due process and a worrying disregard for international human rights standards.

31. According to the source, all three female students were presented with a list of identical charges. The source also reports that excessive and punitive military orders have been used to underpin these charges. The first two charges have reportedly been applied to the participation in democratic university student groups, in other words to the peaceful exercise of a basic and fundamental human right. The source notes that the third charge appears to have been based on third-person confessions allegedly obtained during military interrogations, under duress and possibly through ill-treatment, and which are therefore inherently unreliable.

32. The source adds that all three female students have been charged with being affiliated with an illegal group, namely a student group at Birzeit University called DPSP. According to the source, DPSP is a leftist group unaffiliated with a political party. In this respect, the source asserts that the Israeli authorities have criminalized all political groups under repressive military laws that are being utilized to target, arrest and arbitrarily detain university students.

33. According to the source, on 21 October 2020 the Israeli occupying forces officially declared the DPSP an unlawful association. That designation was made under the Defence (Emergency) Regulations (1945), making membership in or affiliation with such a group a criminal offence.

34. The source adds that the Defence (Emergency) Regulations (1945) empower the authorities, among other things, to declare as unlawful groups that advocate inciting hatred or contempt, or disaffection, against the authorities. In that respect, the source highlights the clearly apparent unjust imposition of criminal charges against Ms. Kayed, Ms. Abu Hijla and Ms. Asi for being affiliated with a legitimate university student group and for attending one of its meetings.

35. The source notes that section 212 (2) of Military Order 1651 (2009) provides that the throwing of an object, including a stone, “at a person or property, with the intent to harm the person or property will be sentenced to ten years imprisonment”. The source notes with concern that all three female students face a 10-year prison sentence, having been charged with throwing stones. According to the source, while it is unclear precisely what evidence there is to base these charges, it appears that the names of individuals correspond to those allegedly interrogated and tortured in 2019.

36. The source submits that the Defence (Emergency) Regulations (1945) and military orders (including Military Order 1651 (2009)) are not sufficiently clear, precise and narrow to allow Palestinians to know what actions may have criminal consequences and how to ensure that their behaviour conforms with the law and that they therefore violate a basic principle of both the law of occupation and international human rights law. The source adds that the overly broad wording of the orders creates vague and abstractly defined criminal offences. To this end, the source alleges that, instead of interpreting this broad language narrowly, the Israeli military authorities have exploited the ambiguity of these orders by using criminal law in an arbitrary and discriminatory manner, as in the present case.

37. The three female students have been interrogated and reportedly remain detained. As at the time of the source’s submission, they were all being held in pretrial military detention in Damon prison, which is within the State of Israel and is where all female Palestinian prisoners are incarcerated. The source submits that the transfer of protected persons to a location outside the occupied West Bank for the purpose of detention constitutes a clearly

apparent breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).

38. The source also highlights the severe adverse consequences to Ms. Kayed, Ms. Abu Hijla and Ms. Asi of having been subjected to excessive and discriminatory military orders due to living under military occupation, which has thus deprived them of the freedom to exercise basic and fundamental rights protected under international human rights law and guaranteed to them as civilians. The source submits that, as civilians, Ms. Kayed, Ms. Abu Hijla and Ms. Asi should have the criminal charges against them be processed by an independent and impartial civilian tribunal, not a military court.

39. According to the source, the arrest and continuing detention of Ms. Kayed, Ms. Abu Hijla and Ms. Asi raise issues under a number of provisions of international human rights law, notably articles 18, 19, 21, 22 and 26 of the Covenant. The source adds that the Covenant expressly guarantees those rights that have been infringed with respect to the three female university students. Furthermore, the exercise of fundamental and civil rights is of direct relevance to their arrest and continuing detention. The source underscores that the military detention of the three young female students is also contrary to article 9 of the Universal Declaration of Human Rights and Commission on Human Rights resolution 1991/42 on arbitrary detention, as clarified by Commission resolution 1997/50, in addition to being contrary to other legal protections afforded to all individuals under international human rights law.

40. Furthermore, the source submits that several other human rights and due process issues are brought up by these cases, including: (a) the use of terrifying night-time arrest raids of the family home; (b) conditions of detention that appear to amount to degrading treatment, in breach of the prohibition of cruel, inhuman or degrading treatment or punishment under international human rights law, and that are incompatible with the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules); (c) interrogations conducted without the essential safeguard of having a lawyer present; (d) charges that may be based on third-person confessions obtained during military interrogations, under duress and allegedly in breach of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international human rights law; (e) the absence of bail hearings, so that the students are kept in continuous pretrial detention for months after having been charged; (f) the consequential adverse impact of detention on the students' tertiary education and future careers; (g) the substantial risk of psychological harm to young people of being unjustly detained for a prolonged period and of being subjected to harsh prison settings and criminal prosecutions; and (h) the gender aspect of these three young female Palestinian university students having been arrested and detained within the space of one month.

41. In the light of the above, the source submits that Ms. Kayed, Ms. Abu Hijla and Ms. Asi have been unlawfully detained under categories II and V of the categories applicable to cases submitted to the Working Group on Arbitrary Detention.

42. The source also submits that the detention of Ms. Kayed, Ms. Abu Hijla and Ms. Asi is arbitrary under category II, given that they have been targeted for being Palestinian and for having been active in lawful and peaceful organizations (democratic student groups).

43. The source further submits that Ms. Kayed, Ms. Abu Hijla and Ms. Asi have clearly been subjected to discrimination by the Israeli occupying forces for being Palestinian and that they have been deprived of legal protection for the same reason. Moreover, the source argues that they have been arbitrarily detained as a direct result of being Palestinian, a circumstance falling under category V. The source adds that category V expressly prohibits any deprivation of liberty that actively seeks to evade the equality of human rights.

44. In conclusion, the source notes with serious concern that the three young female Palestinian university students who are the subject of the present case are being illegitimately targeted and punished by the military authorities of Israel with charges underpinned by overly broad, sweeping and unlawful military orders. According to the source, that such orders are being increasingly used to severely punish and intimidate Palestinian university students who undertake peaceful and lawful student activities in the context of democratic student groups. The source adds that, as the targeting of Palestinian

university students increases in scope and intensity, the military authorities of Israel are acting in a manner that appears purposefully designed to intimidate other Palestinian university students and to dissuade them from exercising their fundamental civil and political rights for fear of being subjected to similar punitive sanctions.

45. On 29 March 2021, the Working Group was informed that, on 21 March 2021, Ofer Military Court had sentenced Ms. Kayed to 16 months of imprisonment and a fine of 6,000 NIS (approximately \$1,820), while Ms. Abu Hijla was sentenced on 23 December 2020 to 11 months' imprisonment. The trial of Ms. Asi, however, has again been rescheduled, with the latest date announced being 4 April 2021.

Response from the Government

46. On 16 December 2020, 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 15 February 2021, detailed information about the current situations of Ms. Kayed, Ms. Abu Hijla and Ms. Asi and to clarify the legal provisions justifying their continued detention, as well as its compatibility with the obligations of Israel under international human rights law, in particular with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Israel to ensure the physical and mental integrity of the three female Palestinian students.

47. The Working Group regrets that it did not receive a response from the Government, 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.

48. 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.² Indeed, the Government has not provided a substantive response to the Working Group's communications since 2007.³ The Working Group urges the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

Discussion

49. 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.

50. In determining whether the deprivation of liberty of Ms. Kayed, Ms. Abu Hijla and Ms. Asi 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.⁴ In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

51. 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

² See opinions 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 the cases addressed in its opinions No. 26/2007, No. 3/2004, No. 24/2003 and No. 16/1994.

³ In relation to the case addressed in opinion No. 86/2017, the Government requested and received an extension of the time for responding to the Working Group's communication but did not submit a substantive response.

⁴ A/HRC/19/57, para. 68.

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 Ms. Kayed, Ms. Abu Hijla and Ms. Asi without having recourse to international humanitarian law.⁵

52. The source has alleged that the detention of Ms. Kayed, Ms. Abu Hijla and Ms. Asi is arbitrary and falls under categories II and V of the Working Group. The Government has chosen not to address these allegations. The Working Group shall examine the allegations in turn.

i. Category I

53. While the source has not argued that the detention of Ms. Kayed, Ms. Abu Hijla and Ms. Asi is arbitrary under category I, the Working Group notes that it has submitted that all three women were detained in circumstances that were unclear as to whether arrest warrants had been presented. The Government had the opportunity to explain the circumstances of the arrests and detentions, including their legal basis, but has chosen not to do so.

54. The Working Group therefore accepts that Ms. Kayed was arrested at a checkpoint and that Ms. Abu Hijla and Ms. Asi were arrested at their homes, in the middle of the night. All three arrests appear to have been carried out with a clear excess of force, as none of the women are reported to have put up any resistance but all were handcuffed and two (Ms. Abu Hijla and Ms. Asi) were also blindfolded. These circumstances, and the lack of a response from the Government of Israel, suggest that the arrests were carried out without a duly issued arrest warrant, although the source clarifies that it is not sure whether arrest warrants were presented. Ms. Asi was also searched and her identity document and telephone were confiscated.

55. The Working Group recalls that, according to article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge should be brought promptly before a judge authorized by law to exercise judicial power. As the Human Rights Committee has noted, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee promptly before a judge following his or her arrest; any longer delay must remain absolutely exceptional and be justified under the circumstances.⁶

56. Similarly, to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court (art. 9 (4) of the Covenant). The Working Group wishes to recall that, according to the 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, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.⁷ This right, which is in fact a peremptory norm of international law, applies to all situations of deprivation of liberty,⁸ including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.⁹ Moreover, it applies irrespective of the place of

⁵ The Working Group has adopted a similar approach, for example, in opinions No. 52/2020, para. 75, and No. 68/2020, para. 59.

⁶ General comment No. 35 (2014), para. 33.

⁷ A/HRC/30/37, paras. 2–3.

⁸ Ibid., para. 11.

⁹ Ibid., annex, para. 47 (a).

detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.¹⁰

57. In the present case, the Working Group notes the uncontested allegations that Ms. Kayed was detained on 8 June 2020 and presented with charges on 18 June 2020; Ms. Abu Hijla was detained on 1 July 2020 and presented with charges on 8 July 2020; and Ms. Asi was detained on 9 July 2020 and presented with charges on 21 July 2020. There is nothing to indicate that any of the three women were presented before a judicial authority, as required by article 9 (3)–(4) of the Covenant. Moreover, the ordinary permissible period of delay for being brought before a judge of 48 hours was clearly violated in each individual case. The Government had the opportunity to explain the reasons for such a delay, but it has chosen not to do so. In these circumstances, the Working Group finds that the detention of Ms. Kayed, Ms. Abu Hijla and Ms. Asi violates article 9 (3)–(4) of the Covenant.

58. Furthermore, in relation to the uncontested submissions of the source concerning the failure to hold bail hearings, the Working Group recalls that it is a well-established norm of international law that pretrial detention should be the exception and not the rule, and that it should be ordered for as short a time as possible.¹¹ Article 9 (3) of the Covenant provides that it should not be the general rule that persons awaiting trial should be detained, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings. It follows that liberty is recognized as a principle and detention as an exception in the interests of justice.¹²

59. In order to give effect to this principle, pretrial detention must be based on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹³ The courts must examine whether alternatives to detention, such as bail, would render custodial measures unnecessary. According to the source, the bail hearings for Ms. Kayed, Ms. Abu Hijla and Ms. Asi did not take place and the Government has not explained why. In the absence of such an explanation, the Working Group cannot accept that the pretrial detention of these three women was properly constituted in accordance with article 9 (3) of the Covenant.

60. Noting all the above, the Working Group concludes that the detention of Ms. Kayed, Ms. Abu Hijla and Ms. Asi is arbitrary under category I as it lacks a legal basis.

ii. Category II

61. The source has submitted, and the Government has not contested, that Ms. Kayed, Ms. Abu Hijla and Ms. Asi were detained purely for being part of a student group at Birzeit University and thus for exercising their rights to freedom of expression, peaceful assembly and association.

62. The Working Group recalls that freedom of opinion and freedom of expression, as expressed in article 19 of the Covenant, are indispensable conditions for the full development of the person. They are essential for any society. In fact, they constitute the foundation stone for every free and democratic society.¹⁴ It also recalls that the freedom of expression includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, and that this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.¹⁵

¹⁰ Ibid., annex, para. 47 (b).

¹¹ Opinions No. 8/2020, para. 54; No. 57/2014, para. 26; No. 49/2014, para. 23; and No. 28/2014, para. 43. See also Human Rights Committee, general comment No. 35 (2014), para. 38, and A/HRC/19/57, paras. 48–58.

¹² A/HRC/19/57, para. 54.

¹³ Human Rights Committee, general comment No. 35 (2014), para. 38.

¹⁴ General comment No. 34 (2011), para. 2.

63. In the present case, the Government had the opportunity to explain the detention and subsequent charges against the three women but has chosen not to do so. The source, on the other hand, has presented a credible pattern of detention of the three women students, their charges being nearly identical, being as they are based on their activities as members of a student group at Birzeit University that was declared unlawful by the Government on 21 October 2020. It is notable that there have been no credible allegations of any violence or incitement to violence by these three women students or indeed the student group. Moreover, the detention of all three women preceded the declaration of the group as unlawful by the Government.

64. It is therefore clear to the Working Group that Ms. Kayed, Ms. Abu Hijla and Ms. Asi were arrested and subsequently detained for exercising their rights to freedom of expression, peaceful assembly and association. While the rights to freedom of expression and assembly are not absolute rights, the Human Rights Committee has stated that, when a State party to the Covenant imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.¹⁶ Moreover, restrictions to that right may be permitted only to respect the rights or reputations of others or to protect national security, public order or public health or morals. Restrictions are not allowed on grounds not specified in article 12 (3) of the Covenant, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.¹⁷ It should be noted that articles 21 and 22 of the Covenant permit restrictions to the right of assembly on the same three grounds. Furthermore, article 12 (3) of the Covenant may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights.¹⁸ The same applies to the freedoms of peaceful assembly and association.

65. The Working Group therefore finds that the detention of Ms. Kayed, Ms. Abu Hijla and Ms. Asi resulted from their legitimate exercise of the freedoms of expression, peaceful assembly and association, as protected by articles 19, 21 and 22 of the Covenant, and is therefore arbitrary, falling under category II. The Working Group refers the case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association for appropriate action.

iii. Category III

66. Given its finding that the deprivation of liberty of Ms. Kayed, Ms. Abu Hijla and Ms. Asi is arbitrary under category II, the Working Group emphasizes that no trial should have taken place. However, all three women remain detained, with Ms. Abu Hijla and Ms. Kayed having received sentences already while Ms. Asi's trial proceedings are under way.

67. In this respect, the Working Group cannot help but notice that all three women were reportedly interrogated extensively following their initial arrest. All three women were also allegedly subjected to very harsh treatment prior, during and after their respective interrogations. Thus, Ms. Kayed's arms and legs were put in restraints and during the interrogation she was cuffed to a chair and forced to undergo a DNA test. She was also held in very poor conditions and denied clean clothing, food and water. She was also given food of a standard which caused her to vomit.

68. The Working Group also notes that face masks and separate eye masks were forcibly placed on both Ms. Abu Hijla and Ms. Asi upon arrest; Ms. Abu Hijla was forced to wait in a room while leaning on her knees on the floor and not allowed to sit. Following her interrogation, she was placed in detention, where she was subjected to humiliations and

15 Ibid., para. 11.

16 Ibid., para. 21.

17 Ibid., para. 22.

18 Ibid., para. 23.

threats by other detainees and by guards who threatened to cuff her hands and legs to her bed. She was also reportedly given the wrong dose of a medicine she needed to treat her medical condition. Ms. Asi was held in a windowless cell lacking basic hygiene facilities. All three women were interrogated without a lawyer being present. The Working Group notes the absence of a response from the Government to any of these allegations and concludes that the treatment of the three female students clearly falls short of the obligations of Israel as a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The treatment also violates the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the Bangkok Rules. The Working Group refers the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

69. The source has further submitted that all three female students were interrogated extensively upon arrest without their lawyers being present and that legal assistance was also denied thereafter. The Government had the opportunity to respond to these allegations but has chosen not to do so. The Working Group recalls that all persons deprived of their liberty have the right to legal assistance by counsel of their choice at any time during their detention, including immediately after their apprehension, and such access must be provided without delay.¹⁹ In particular, the presence of legal counsel during interrogations is an essential safeguard in ensuring that any admissions by an individual are given freely.²⁰ The Working Group considers that the failure to provide Ms. Kayed, Ms. Abu Hijla and Ms. Asi with access to a lawyer from the moment of their detention violated their right to adequate time and facilities for the preparation of their defence and to communicate with a lawyer of their choice (art. 14 (3) (b) of the Covenant).

70. Furthermore, the Working Group notes that all three female students were charged under a military order and were in fact tried by a military court (see para. 38 above). The Working Group also notes that the proceedings in relation to Ms. Asi are still under way.

71. 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.²¹ Moreover, in the present case, the Government could have explained why the three women students appeared before a military court but failed to do so. The Working Group therefore finds a breach of article 14 (1) of the Covenant and refers the case to the Special Rapporteur on the independence of judges and lawyers for appropriate action.

72. Noting all the above, the Working Group concludes that the violations of the fair trial rights of Ms. Kayed, Ms. Abu Hijla and Ms. Asi are of such gravity as to render their detention arbitrary under category III.

73. The Working Group reminds the Government that, in accordance with article 10 of the Covenant, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person. The denial of medical assistance constitutes a violation of the Nelson Mandela Rules (Rules 24–25, 27 and 30 in particular) and the Bangkok Rules.

iv. Category V

74. Finally, the source has also argued that the detention of the three female students falls under category V and, to this end, submits information revealing a consistent pattern of behaviour involving the Israeli authorities specifically targeting female students from

19 A/HRC/45/16, paras. 51–52; A/HRC/30/37, annex, principle 9 and guideline 8; Human Rights Committee, general comment No. 35 (2014), para. 35.

20 A/HRC/45/16, para. 53.

21 A/HRC/27/48, paras. 66–70. See also opinions No. 48/2020, No. 66/2019, No. 32/2018, No. 28/2018, No. 30/2017 and No. 44/2016.

Birzeit University (see paras. 30–32 above in particular). The Government has chosen not to contest these allegations.

75. In the absence of an explanation from the Government, the Working Group concludes that Ms. Kayed, Ms. Abu Hijla and Ms. Asi, all of whom are female students and all of whom are also Palestinian, have been detained on discriminatory grounds, namely because of their gender and their national, ethnic and social origin. The Working Group considers that they were also detained on the basis of their status as university students, as the source has made credible allegations, which the Government has chosen not to address, that female Palestinian university students are being targeted.

76. 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 Ms. Kayed, Ms. Abu Hijla and Ms. Asi is arbitrary under category V. The Working Group refers the matter to the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 for appropriate action.

Final remarks

77. The present case is one of several cases brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of Palestinians in Israel.²² 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.²³

78. The Working Group wishes to place on record that it is disturbed by the manner in which the three female students were arrested and at the excessive force used by the authorities. Their subsequent treatment at the hands of the authorities, including the failure to remove handcuffs when eating, the imposed use of a toilet without a door for privacy and the failure to provide appropriate clothing, reveal a prima facie breach of the Bangkok Rules. The Working Group refers the case to the Special Rapporteur on violence against women, its causes and consequences, and the Working Group on discrimination against women and girls for appropriate action.

79. 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

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

The deprivation of liberty of Layan Kayed, Elyaa Abu Hijla and Ruba Asi, being in contravention of articles 2, 3, 7, 9, 10, 19 and 20 of the Universal Declaration of Human Rights and articles 2 (1), 9, 14, 19, 21, 22 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

22 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.

23 Opinion No. 47/2012, para. 22.

81. The Working Group requests the Government of Israel to take the steps necessary to remedy the situation of Ms. Kayed, Ms. Abu Hijla and Ms. Asi 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 Covenant.

82. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Kayed, Ms. Abu Hijla and Ms. Asi immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global 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 Ms. Kayed, Ms. Abu Hijla and Ms. Asi.

83. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Kayed, Ms. Abu Hijla and Ms. Asi and to take appropriate measures against those responsible for the violation of their rights.

84. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on violence against women, its causes and consequences, the Working Group on discrimination against women and girls and the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 for appropriate action.

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

Follow-up procedure

86. 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 Ms. Kayed, Ms. Abu Hijla and Ms. Asi have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Ms. Kayed, Ms. Abu Hijla and Ms. Asi;
- (c) Whether an investigation has been conducted into the violations of Ms. Kayed, Ms. Abu Hijla and Ms. Asi'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.

87. 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.

88. 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.

89. 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.²⁴

[Adopted on 4 May 2021]
