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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 67/2019 concerning Brahim Moussayih, Mustapha Burgaa, Hamza Errami, Salek Baber, Mohamed Rguibi, Elkantawi Elbeur, Ali Charki, Aomar Ajna, Nasser Amenkour, Ahmed Baalli, Aziz El Ouahidi, Mohammed Dadda, Omar Baihna and Abdelmoula El Hafidi (Morocco)

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 (A/HRC/36/38), on 5 July 2019 the Working Group transmitted to the Government of Morocco a communication concerning Brahim Moussayih, Mustapha Burgaa, Hamza Errami, Salek Baber, Mohamed Rguibi, Elkantawi Elbeur, Ali Charki, Aomar Ajna, Nasser Amenkour, Ahmed Baalli, Aziz El Ouahidi, Mohammed Dadda, Omar Baihna and Abdelmoula El Hafidi. The Government submitted a late response to the communication on 13 November 2019. 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 D);

(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

(a) Background

4. Brahim Moussayih was born in 1993. Mr. Moussayih is a Saharan student activist linked to a Saharan student committee in Agadir.
5. Mustapha Burgaa was born in 1994. Mr. Burgaa is a Saharan student activist linked to a Saharan student committee in Agadir.
6. Hamza Errami was born in 1992. Mr. Errami is a Saharan activist and spokesperson for a Saharan student committee of the faculty of sciences of Ibn Zohr University in Agadir.
7. Salek Baber was born in 1993. Mr. Baber is a Saharan student and spokesperson for a Saharan student committee of the faculty of sciences of Ibn Zohr University in Agadir.
8. Mohamed Rguibi was born in 1993. Mr. Rguibi is a Saharan student activist linked to a Saharan student committee in Agadir.
9. Elkantawi Elbeur was born in 1992. Mr. Elbeur is a Saharan student activist linked to a Saharan student committee in Agadir.
10. Ali Charki was born in 1994. Mr. Charki is a Saharan student and a representative of the Union of Saharan Students in Moroccan Universities.
11. Aomar Ajna was born in 1993. Mr. Ajna is a Saharan student and a member of the Marrakech Association of Saharan Students.
12. Nasser Amenkour was born in 1992. Mr. Amenkour is a Saharan student activist seeking employment in Marrakech.
13. Ahmed Baalli was born in 1991. Mr. Baalli is a student at Ibn Zohr University in Agadir. He was actively involved in the establishment of a Saharan student committee in Agadir and in cooperation between Saharan and Moroccan student unions. Mr. Baalli is a well-known Saharan activist who openly campaigns for the right to self-determination of the people of Western Sahara.
14. Aziz El Ouahidi was born in 1993. Mr. El Ouahidi is a Saharan student activist and a member of the Agadir Students' Association.
15. Mohammed Dadda was born in 1993. Mr. Dadda is a Saharan student activist and a member of the Marrakech Students' Association.
16. Omar Baihna was born in 1991. Mr. Baihna is a Saharan student activist linked to the Marrakech Students' Association.
17. Abdelmoula El Hafidi was born in 1986. Mr. El Hafidi is a student in Marrakech and a human rights activist linked to the Boujdour Press media committee and the Association sahraouie pour la défense des droits de l'homme (Saharan Association for the Defence of Human Rights). He was previously detained as a political prisoner because of his views on the right to self-determination of the people of Western Sahara.
18. These persons are hereinafter referred to as "the group of students".

(b) Arrest and detention

19. The source reports that the group of students were arrested in connection with an incident that resulted in the death of a Moroccan student during a demonstration held at Cadi Ayyad University in Marrakech on 23 January 2016. The demonstration had in fact

been organized after a Saharan student was seriously injured in a knife attack in December 2015. When the Moroccan authorities made no attempt to prosecute the perpetrators and to ensure that justice was done, the Saharan students organized the demonstration of 23 January 2016, during which the demonstrators were met by several Moroccan students who tried to disperse them. One student died in the clash between the two groups. According to the source, it was not possible to ascertain how he died or who was responsible for his death.

20. The source states that Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber and Mr. Rguibi were arrested by police officers near the Malaysia Café on Al Bustan Alal Fassi Street in Marrakech at around 3 p.m. on 24 January 2016. On 26 January 2016, they were brought before the prosecutor, who ordered a thorough investigation. On 27 January 2016, they were brought before the investigating judge, who informed them of the reason for their arrest and ordered that they be detained in Oudaïa prison.¹

21. The source then explains that Mr. Elbeur, Mr. Charki, Mr. Ajna, Mr. Amenkour and Mr. Baalli were arrested at a house in the Madame Plaza district at around 6 p.m. on 24 January 2016 by police officers who beat them and insulted them. On 26 January 2016, the five men were brought before the prosecutor, who ordered that the investigation should continue and sent them back to the police station. On 27 January 2016, they were brought before the investigating judge, who informed them of the reason for their arrest and ordered that they be detained in Oudaïa prison.²

22. As for Mr. El Ouahidi, the source reports that he handed himself in at Mhamid el Rhozlane gendarmerie station at around 10 p.m. on 5 February 2016, after Moroccan intelligence officers broke into his home twice and some members of his family were severely assaulted. His younger brother was reportedly also threatened with arrest if Mr. El Ouahidi did not turn himself in to the authorities. According to the source, Mr. El Ouahidi did not know why he was wanted by the authorities and was not informed of the reason for his arrest by the gendarmerie when he handed himself in. He was transferred to Marrakech on 6 February 2016 and held incommunicado until 7 February 2016, when he was brought before the investigating judge, who informed him of the reasons for his arrest. After his arrest, he was placed in detention at Oudaïa prison.³

23. The source also explains that Mr. Dadda was arrested in Laayoune, Western Sahara, at 5 p.m. on 29 February 2016. That same day, he was transferred to Agadir; when he arrived there on 1 March 2016, he was detained in a police station. At 4 a.m. on 2 March 2016, he was transferred to Marrakech. He arrived at the police station in Marrakech at around 7 a.m. and was questioned. Mr. Dadda was held incommunicado until 5 March 2016, when he was brought before the investigating judge, who informed him of the reasons for his arrest. After his arrest, he was placed in detention at Oudaïa prison.⁴

24. As regards Mr. Baihna, the source reports that he was arrested at Laayoune police station on 15 March 2016 as he was collecting some administrative documents. He was transferred by public transport to Agadir police station, arriving there on 16 March 2016. Mr. Baihna was allegedly held in the basement of Agadir police station for two days without food or water. On 18 March 2016, he was transferred by bus to Marrakech. Upon his arrival at the police station, he was taken to a small room to be questioned about his

¹ As regards the places of detention, according to the source, Mr. Moussayih and Mr. Baber were transferred to Ait Melloul prison on 14 July 2018. On 4 July 2018, Mr. Burgaa and Mr. Rguibi were transferred to Tiznit prison and Mr. Errami to Ait Melloul prison.

² The source states that on 4 July 2018, Mr. Elbeur and Mr. Amenkour were transferred to Bouizakarne prison and Mr. Charki to Ait Melloul prison. Mr. Ajna was transferred first to Tiznit prison on 4 July 2018, then to Ait Melloul prison on 29 July 2018, and finally to Oukacha prison in Casablanca on 17 November 2018. Mr. Baalli was transferred to Ait Melloul prison on 4 July 2018, then to Tiznit prison on 14 July 2018, and finally to Bouizakarne prison on 18 January 2019.

³ Mr. El Ouahidi was transferred to Ait Melloul prison on 15 July 2018, then to Bouizakarne prison on 17 July 2018.

⁴ Mr. Dadda was transferred to Ait Melloul prison on 15 July 2018, then to Oukacha prison in Casablanca on 17 November 2018.

political activism; he was then detained incommunicado. On 20 March 2016, he was brought before the Marrakech investigating judge, who informed him of the reasons for his arrest. After his arrest, he was placed in detention at Oudaïa prison.⁵

25. Lastly, the source reports that Mr. El Hafidi was arrested in a shop in Cabo Bojador, Western Sahara, on 16 April 2016. He was taken to the police station before being transported to Agadir, where he was detained for 48 hours without food or water. On 18 April 2016, he was taken to Marrakech. He was shown photographs of other human rights activists and photographs taken at seminars, and he was asked about his links with the people in the photographs, his political activism and his human rights activities. On 20 April 2016, he was brought before the investigating judge, who informed him of the reason for his arrest. After his arrest, he was placed in detention at Oudaïa prison.⁶

26. The source asserts that although the various members of the group of students were arrested in different places and at different times, there are similarities between the arrests. All the members of the group of students were arrested without a warrant and without being informed of the reasons for their arrest. After their arrest, they were held incommunicado for a period ranging from two to five days before being brought before an investigating judge. Only then were they informed of the reasons for their arrest. All the members of the group of students claim to have been tortured, beaten and threatened with rape. They were also forced to sign police reports that had been prepared in advance, without having had the opportunity to read them. In particular, the source reports that Mr. Baalli was beaten around the head with a metal tube and fainted three times. He was also allegedly threatened with rape by officers who ripped his trousers. All the members of the group of students claim that they were questioned about their political activism and their links with the Frente Popular para la Liberación de Saguía el-Hamra y de Río de Oro (Frente POLISARIO).

27. The source reports that the members of the group of students were initially charged with murder but that, on 6 July 2017, the court of first instance amended the charges and classified the acts as violence intentionally causing death, under articles 392, 393, 400, 401 and 403 of the Moroccan Criminal Code.

28. According to the source, the trial before the Marrakech Court of First Instance was opened on 14 July 2016 but was postponed the same day. The trial was subsequently postponed nine times; in the end, it began in May 2017. During the proceedings of May 2017, the members of the group of students declared that they were being detained on account of their political views on the right to self-determination of the Saharan people and informed the judge that they had been subjected to torture and forced to sign the confessions that had been put forward as the only evidence against them. They further informed the court that, during their initial questioning, they had been tortured and had been asked only about their political beliefs. They added that they had not known what they were being charged with while they were in police custody because they had not been informed of the charges until they were brought before the investigating judge. They also demanded to undergo a medical examination in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). Lastly, the members of the group of students insisted that they had not been present during the violent clashes that had followed the demonstration on 23 January 2016 and declared themselves innocent of all the charges against them. The proceedings were postponed to 21 June and then to 6 July 2017. On that date, 4 members of the group were sentenced to 10 years' imprisonment and 10 members of the group were sentenced to 3 years' imprisonment.

29. The source notes that during the appeal hearings that began on 12 December 2017, the members of the group of students made the same statements they had made before the court of first instance. The source notes that all the evidence submitted by the defence was

⁵ Mr. Baihna was transferred to Ait Melloul prison on 15 July 2018, then to Bouizakarne prison on 17 July 2018.

⁶ Mr. El Hafidi was transferred to El Arjat prison on 15 July 2018, before being returned to Oudaïa prison on 17 July 2018. He was transferred to Ait Melloul prison on 20 July 2018 and then to Oukacha prison in Casablanca.

rejected. The hearings were postponed three times and then the court of appeal upheld the convictions on 10 April 2018.

30. The four persons sentenced to 10 years' imprisonment are Mr. El Ouahidi and Mr. Dadda, who are being detained in Oudaïa prison in Marrakech; Mr. El Hafidi, who is being detained in Oukacha prison in Casablanca; and Mr. Elbeur, who is being detained in Bouizakarne prison.⁷

31. The other students were sentenced to 3 years' imprisonment. After serving their sentences, Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber, Mr. Rguibi, Mr. Charki, Mr. Baalli, Mr. Ajna and Mr. Amenkour were released on 25 January 2019. Mr. Baihna was released on 17 March 2019.

32. The source also describes the conditions in which those who are still deprived of their liberty are being held. Apparently, in the period since the release of some members of the group of students, the other members' conditions of detention have deteriorated. The detainees are kept under close watch and are repeatedly harassed by prison guards, and they cannot use the prison telephone to contact their families. They have been denied the right to receive visits from their families, in violation of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Mr. Dadda and Mr. El Ouahidi reportedly went on hunger strike on 18 February 2019 to protest against their conditions of detention and the refusal of the prison administration to communicate with them. Mr. Dadda went on hunger strike for a second time on 2 May 2019 in response to the prison administration's refusal to provide him with the medical care that he needed. That day, he had requested medical treatment for a skin rash but the prison administration had refused to grant his request. Since then, the skin rash has reportedly spread and grown worse. When Mr. Dadda informed the prison administration of his intention to go on hunger strike, his request was denied and he was beaten and denigrated by an officer at Ait Melloul prison. He was then placed in solitary confinement, where he remains. As at 14 May 2019, Mr. Dadda was still on hunger strike and in solitary confinement.

33. The source also draws attention to the conditions of detention faced by Mr. El Hafidi, who was placed in solitary confinement because he had registered as a university student and had requested permission to sit his examinations while in detention. According to the source, restrictions on studying and on access to examinations are a common form of retaliation against Saharan political prisoners. Mr. El Hafidi's examinations were postponed several times. When Mr. El Hafidi contacted a prison officer, he was accused of insulting the officer and sentenced to 45 days of solitary confinement, starting on 12 March 2019. In response, Mr. El Hafidi went on hunger strike on 9 March 2019. Since then, his family has been prevented from communicating with him and he has had no contact with the outside world. Mr. El Ouahidi and Mr. Dadda announced that they would go on hunger strike in solidarity with Mr. El Hafidi, starting on 28 March 2019.

(c) Legal analysis

34. The source asserts that the detention of the group of students is arbitrary under categories I, II, III and V as defined in the Working Group's methods of work. The source adds that the violations committed against the group of students also constitute violations of international humanitarian law, since Western Sahara is an occupied territory and the group of students are among the persons protected by the Convention respecting the Laws and Customs of War on Land, the Geneva Conventions for the protection of war victims (Geneva Conventions of 1949), in particular the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), and customary international law.

⁷ In a submission dated 14 May 2019, the source reports that Mr. Elbeur and Mr. El Ouahidi are now being detained in Bouizakarne prison, while Mr. El Hafidi is being detained in Oukacha prison in Casablanca and Mr. Dadda is being detained in Ait Melloul prison in Agadir.

(i) Category I

35. The source claims that the arrest and detention of the group of students have no legal basis, contrary to article 9 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights, and Moroccan law; they therefore constitute a violation under category I. The members of the group of students were arrested without a warrant and without being informed of the charges against them, in violation of article 9 (2) of the Covenant. The source also reports that the members of the group of students were not informed of the charges against them before they were brought before the investigating judge. They were taken to the police station and held incommunicado for between two and five days, outside the protection of the law, in violation of article 9 (3) of the Covenant. The source points out that under article 140 of the Moroccan Code of Criminal Procedure, detainees must be brought before a judge within 24 hours of their arrest and they must have access to a lawyer within the same period. In addition, the members of the group of students were subjected to acts of torture while they were being questioned. They were then forced to sign police reports that had been prepared in advance, without having had the opportunity to read them.

(ii) Category II

36. The source maintains that the arrest and detention of the members of the group of students resulted from the exercise of their fundamental rights and therefore constitute a violation under category II.

37. The source notes that some members of the group of students are well-known human rights activists and that one of them, Mr. El Hafidi, is a former political prisoner. Saharans who study in Morocco are subjected to discrimination and harassment by fellow students, professors and the administration. The Moroccan police often raid their rooms and destroy their property, creating a climate of fear among Saharan students. The students therefore set up student organizations and committees that hold demonstrations. During one such demonstration, one person died and the members of the group of students were all found guilty of violence intentionally causing death.

38. The source notes that all the members of the group of students told the court that they had not been present in front of Cadi Ayyad University in Marrakech at the time of the incident and that they had not attended the demonstration held on 23 January 2016. There was no evidence against the group of students aside from the police reports that they had signed under torture. The source also notes that they were questioned about their political views and activities, especially their links with the Frente POLISARIO and with other Saharan activists, and about their participation in various human rights conferences.

39. The source maintains that the group of students were imprisoned in response to their open advocacy of the right to self-determination of the people of Western Sahara and their human rights activism, particularly with regard to the treatment of Saharan students in Moroccan universities. Consequently, the source argues that the detention of the group of students resulted from the exercise of their rights to freedom of expression and association, enshrined in articles 19 and 21 of the Covenant, as Saharan student human rights activists and that their detention is therefore arbitrary under category II.

(iii) Category III

40. The source asserts that the deprivation of liberty of the group of students is arbitrary because their detention and the proceedings instituted by the Government of Morocco failed to meet international standards.

41. The source maintains that the use of police reports signed under torture as evidence was a violation of the right not to be compelled to testify against oneself, which is protected by article 14 of the Covenant and by Moroccan law, and that the reports should not have been admissible, as they constituted evidence obtained by illegal means. The use of torture to obtain a confession is also a violation of customary international law and of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

42. The source notes that the members of the group of students informed the investigating judge and the trial judge that the police reports had been prepared in advance and that they had signed the reports under torture. Moreover, after the treatment that they had suffered, they bore obvious signs of torture and they demanded to undergo a medical examination in accordance with the Istanbul Protocol. Neither the investigating judge nor the trial judge took these allegations of torture into account, nor did they order a medical examination or an investigation.

43. The source argues that the criminal proceedings were fundamentally corrupted, as they were based on evidence obtained through such abuses, and that the principle of a fair trial was irrevocably undermined. Consequently, the source submits that the Government of Morocco acted in violation of articles 7 and 14 (3) (g) of the Covenant.

44. The source also notes that the group of students did not receive adequate legal assistance and were not given the opportunity to prepare a defence, as required by article 14 (3) (b) and (d) of the Covenant. Yet the right to legal assistance and the right of defence are central to the right to a fair trial and the principle of equality before courts and tribunals.

45. The source reports that the members of the group of students did not receive legal assistance either when they were arrested or when they were brought before the investigating judge. During the most recent proceedings against members of the group, the defence were prohibited from submitting exonerating evidence to the court for inclusion in the case file, such as witness statements and evidence that the defendants had not been present at the scene of the crime. Mr. Dadda was not allowed to submit documents proving that he had been sitting an examination at the time of the demonstration. Mr. El Ouahidi, meanwhile, had been in Agadir on the day of the demonstration, and he urged the court to order the disclosure of bus station surveillance recordings in order to prove his innocence. The court denied his request, however. The members of the group of students and their lawyers were also repeatedly interrupted, which prevented them from making a proper defence.

46. The source maintains that the right of the group of students to a public hearing, under article 14 (1) of the Covenant, was not respected. The source reports that international observers and human rights activists were repeatedly prevented from entering the courtroom during the trials. Furthermore, access to the courtroom was granted to the families of the accused only three times and to just one person per family each time.

47. In conclusion, the source asserts that: (a) the proceedings brought against the members of the group of students did not meet the requirements of international law on the right to a fair trial, as set out in articles 9 and 14 of the Covenant; (b) their arrest was unlawful under article 9 (2) of the Covenant; (c) their right to be informed of the charges against them, under article 14 (3) (a) of the Covenant, was violated; (d) the use of confessions signed under torture and/or duress as criminal evidence was a violation of article 14 (3) (g) of the Covenant; (e) their right to legal counsel and to a proper defence, under article 14 (1) and (3) (b) of the Covenant, was violated; and (f) their right to a public hearing, under article 14 (1) of the Covenant, was not respected. According to the source, all these violations render the detention of the members of the group of students arbitrary under category III.

48. The source argues that the breaches of fair trial requirements and of the prohibition of torture are also violations of international humanitarian law. Furthermore, the conviction of the members of the group of students by the Moroccan courts and their detention in Moroccan prisons constitute violations of the Geneva Conventions of 1949, in particular articles 48, 66, 67 and 76 of the Fourth Geneva Convention.

(iv) Category V

49. Lastly, the source asserts that the detention of the group of students is arbitrary because it is based on their Saharan identity and therefore constitutes a violation under category V.

50. The source maintains that the members of the group of students are Saharans and, as such, they have the right to self-determination, in accordance with the principles set out in General Assembly resolutions 1514 (XV), 1541 (XV) and 2625 (XXV).

51. The source notes that in the present case, the members of the group of students were arrested and imprisoned because of their political views on the right to self-determination of the Saharan people. If the members of the group of students had not been Saharans and had not expressed their opinion on the political crisis in Western Sahara, the trials in question would not have taken place.

52. The source reiterates that the members of the group of students are all human rights defenders who are concerned about the rights and repression of Saharan students. The source draws attention once again to the fact that Saharans who study at Moroccan universities are subjected to discrimination and harassment. The members of the group of students have been at the forefront of efforts to protect the rights of Saharan students. Their unlawful arrest and subsequent treatment, which included torture and questioning about their political activism, show that their detention constitutes discrimination in violation of international law, insofar as the equality of human beings is being ignored.

53. The members of the group of students were therefore targeted and subjected to discrimination because of their political views on the right to self-determination of the Saharan people; this renders their detention arbitrary under category V, as it constitutes discrimination in violation of international law, specifically articles 1, 2, 26 and 27 of the Covenant.

54. The source adds that article 47 of the Fourth Geneva Convention prohibits depriving persons who are in occupied territory of the protection of the Convention by assimilating them into the population of the occupying Power and that doing so constitutes a violation under category V. The source claims that the members of the group of students were arrested and imprisoned because of their activism in support of the right to self-determination. They were all tortured and questioned solely about their activism and their views on the Western Sahara conflict. The officer who tortured them called them separatists, traitors and enemies of the Kingdom of Morocco; this shows that the aim of the practices used against the students, which included arbitrary arrest, torture and arbitrary detention, was to force them to swear allegiance to the occupying country. According to the source, these practices contravene article 45 of the Regulations respecting the Laws and Customs of War on Land and constitute grave violations of international humanitarian law, as defined in article 147 of the Fourth Geneva Convention.

Response from the Government

55. On 5 July 2019, the Working Group transmitted the allegations from the source to the Government through its regular procedure. The Working Group requested the Government to provide further information by 4 September 2019 on the situation of the members of the group of students since their arrest, including any comments it might wish to make on the allegations set forth in the communication. In particular, the Working Group requested the Government to clarify the facts and legal provisions justifying the detention of the group of students and the compatibility of their detention with the obligations of Morocco under international human rights law. The Working Group also called on the Government to safeguard the physical and mental integrity of the persons concerned.

56. On 30 August 2019, the Government of Morocco requested a one-month extension of the deadline for its response; the Working Group granted this request and extended the deadline to 4 October 2019.

57. On 1 November 2019, the Government requested a second extension. This request was not granted because there is no provision for such an extension in the Working Group's methods of work. On 13 November 2019, the Government submitted its response. Since the response was sent after the extended deadline, the Working Group cannot consider it to have been submitted on time.

Discussion

58. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work. The Working Group notes that pursuant to paragraph 16 of its methods of work, it renders opinions on the basis of all the information it has received.

59. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a *prima facie* case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68).⁸ In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

60. The Working Group notes that Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber, Mr. Rguibi, Mr. Charki, Mr. Baalli, Mr. Ajna and Mr. Amenkour were released on 25 January 2019, while Mr. Baihna was released on 17 March 2019. In such circumstances, the Working Group has the option of filing the case or rendering an opinion as to the arbitrariness of the detention, in conformity with paragraph 17 (a) of its methods of work. The Working Group notes that the releases occurred at the end of the prison terms imposed on the persons concerned. Mr. El Ouahidi, Mr. Dadda, Mr. El Hafidi and Mr. Elbeur are still in detention, as they have not yet served their sentences in full. Bearing in mind these circumstances, the Working Group has decided to continue considering the case with a view to rendering an opinion.

61. In the complaint, the source presents arguments relating to four categories of arbitrary detention.

(a) Category I

62. The source alleges that the arrests of the members of the group of students, which occurred between 24 January and 16 April 2016, were carried out without a warrant and without their being informed of the reasons for their arrest or the charges against them. The Working Group recalls that under article 9 (1) of the Covenant, no one may be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. In order for deprivation of liberty to have a legal basis, the mere existence of a law that may be used to justify it is insufficient. The authorities must invoke this legal basis and apply it to the circumstances of the case by means of an arrest warrant, except in the case of arrests in *flagrante delicto* where the circumstances are sufficient to justify the arrest. Article 9 (2) of the Covenant, meanwhile, stipulates that anyone who is arrested must be informed, at the time of arrest, of the reasons for the arrest. In the present case, the Working Group notes that all the persons concerned deny that they were present at the demonstration on 23 January 2016. The Working Group also notes that the arrests were spaced out in time and considers that, in view of the information transmitted by the source, which has not been contested by the Government, the procedure that applies in the case of arrests in *flagrante delicto* does not seem to be applicable. It therefore concludes that the arrests of the members of the group of students should have been accompanied by an arrest warrant. It further concludes that the failure to inform the persons concerned of the reasons for their arrest constitutes a violation of article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.

63. The source maintains that the arrested persons were held incommunicado for a period ranging from three to five days. The Government has chosen not to refute this allegation, which the Working Group considers to be credible. The Working Group notes that the use of incommunicado detention means that the arrested persons had no contact with the outside world, including with persons such as family members or lawyers, who could have assisted them. They were therefore unable to exercise their right to challenge the lawfulness, appropriateness and necessity of their arrest and detention, in violation of article 9 (4) of the Covenant.

⁸ See also opinion No. 27/2016, para. 36.

64. Lastly, once in detention, the members of the group of students were allegedly not brought before a judge until 48 hours after their arrest, with the exception of Mr. Dadda, who was not brought before a judge until 72 hours after his arrest. Yet, according to the source, article 140 of the Moroccan Code of Criminal Procedure stipulates that anyone who is arrested must be brought before a judge within 24 hours of the arrest. The Working Group recalls that, as a general rule, the question of whether proceedings were conducted in accordance with national law is outside its jurisdiction. However, it notes that the national standard is consistent with article 9 (3) of the Covenant, which stipulates that anyone who is arrested must be brought promptly before a judge. The Working Group notes that the Human Rights Committee has explained that the time frame in such cases should not exceed 48 hours;⁹ it further notes that Moroccan law imposes a shorter time limit of 24 hours. In the light of the Committee's interpretation, the Working Group considers that the violation of this stricter standard also constitutes a violation of the international standard and that the issue therefore falls within its jurisdiction. The Working Group concludes that, by failing to bring the detainees before a judge within the 24-hour time limit established by Moroccan law, the Government failed to meet its obligation under article 9 (3) of the Covenant.

65. The Working Group concludes that the arrest and detention of the group of students had no legal basis and were therefore arbitrary under category I.

(b) Category II

66. The source maintains that the members of the group of students are Saharans who support the right to self-determination of the people of Western Sahara and that, as soon as they were arrested, they had to answer questions about their political activism. Recalling its previous decisions involving similar situations,¹⁰ the Working Group concludes that these are established facts, since the Government has chosen not to contest the allegations. Consequently, the arrest and detention of the group of students appear to be linked to the expression of a political opinion, an act that is protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. The Working Group therefore concludes that the arrest and detention of the group of students are arbitrary under category II.

67. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the relevant information to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

(c) Category III

68. The Working Group's finding that the detention is arbitrary under category II means that no trial should have been held. However, since trials were held in this case, the Working Group proceeds to consider the alleged violations of the right of the group of students to a fair trial.

69. The source alleges that the members of the group of students were subjected to ill-treatment, physical violence, torture and threats of rape when they were arrested and then while they were in police custody. The source also reports that they were forced by these means to sign police reports that had been prepared in advance, without having had the opportunity to read them. The Working Group notes that the Government has not contested these allegations. The Working Group recalls that torture is prohibited, under article 7 of the Covenant in particular, and that forced confessions cannot be used as criminal evidence, under article 14 (3) (g) of the Covenant. In the present case, the Working Group concludes that the trial was not fair, in view of the judges' failure to respond to the above allegations and the use of confessions that had, according to the members of the group of students, been obtained against their will.

⁹ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 33.

¹⁰ Opinion No. 23/2019, paras. 77–78; opinion No. 60/2018, paras. 70–72; opinion No. 58/2018, paras. 44–45; opinion No. 31/2018, paras. 43–46; and opinion No. 11/2017, paras. 47–48.

70. The Working Group notes the source's allegations that the members of the group of students were not assisted by counsel when they were arrested or when they were brought before the investigating judge. They were allegedly then prevented from submitting exonerating evidence for inclusion in the case file and were not allowed to present their case in full. It is also alleged that their lawyers were repeatedly interrupted during the proceedings. The Working Group recalls that all accused persons have the right to be assisted by counsel as soon as possible and at any time during detention, including immediately after their arrest.¹¹ It is particularly important for a lawyer to be present in order to protect the rights of the accused in the event that he or she chooses to confess. In the present case, the Working Group considers that the members of the group of students were deprived of a proper defence as a result of the failure to comply with fair trial requirements, in violation of article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

71. Lastly, the source maintains that international observers and human rights activists were repeatedly prevented from entering the courtroom, while the families of the accused were granted access to only 3 of the 14 trials and only one person per family was allowed to enter the courtroom each time. The Government has not responded to this allegation. The Working Group therefore concludes that the right to a public hearing, enshrined in article 14 (1) of the Covenant, has been violated.

72. The Working Group concludes that these infringements of the right to a fair trial are particularly serious and render the arrest and detention arbitrary under category III.

73. In accordance with paragraph 33 (a) of its methods of work, the Working Group considers it appropriate to refer the allegations of torture and other inhuman and degrading treatment to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

(d) Category V

74. The Working Group recalls its previous decisions in cases involving Saharans and its finding of discrimination against the persons concerned.¹² In the present case, the facts support such a finding. First, two criminal offences were committed, resulting in the injury of a Saharan student and then the death of a Moroccan student. According to the source, only the acts committed against the Moroccan student were investigated and no such proceedings were initiated by the authorities in respect of the acts committed against the Saharan student. The Government could have sought to demonstrate that the two situations were dealt with in the same way, but it chose to remain silent.

75. The Working Group notes the links between the group of students and the political situation in Western Sahara. The source states that all the members of the group are Saharan activists and affirm their links with the political movement for the independence of Western Sahara. The Working Group also notes the source's allegation that the questioning conducted by law enforcement officers was focused on the group members' political activism and links with the Frente POLISARIO. These allegations have not been contested by the Government. The Working Group recalls that it has previously considered deprivation of liberty to be arbitrary in cases where it was used to repress members of political groups in order to silence their calls for self-determination.¹³

76. The Working Group considers that the members of the group of students were indeed targeted because of their political activism in support of the right to self-determination of the people of Western Sahara. In these circumstances, it concludes that the current situation has arisen as a result of discrimination in violation of international law, in

¹¹ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 34, and 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 9 and guideline 8.

¹² See, inter alia, opinions No. 23/2019, No. 60/2018, No. 58/2018, No. 31/2018 and No. 11/2017.

¹³ Ibid.

particular article 7 of the Universal Declaration of Human Rights and articles 1, 2 and 27 of the Covenant. The arrest and detention of the members of the group of students are therefore arbitrary under category V.

Disposition

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

The deprivation of liberty of Brahim Moussayih, Mustapha Burgaa, Hamza Errami, Salek Baber, Mohamed Rguibi, Elkantawi Elbeur, Ali Charki, Aomar Ajna, Nasser Amenkour, Ahmed Baalli, Aziz El Ouahidi, Mohammed Dadda, Omar Baihna and Abdelmoula El Hafidi, being in contravention of articles 7, 9, 10 and 19 of the Universal Declaration of Human Rights and articles 1, 2, 7, 9, 14, 19 and 27 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

78. The Working Group requests the Government of Morocco to take the steps necessary to remedy the situation of Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber, Mr. Rguibi, Mr. Elbeur, Mr. Charki, Mr. Ajna, Mr. Amenkour, Mr. Baalli, Mr. El Ouahidi, Mr. Dadda, Mr. Baihna and Mr. El Hafidi 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.

79. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Elbeur, Mr. El Ouahidi, Mr. Dadda and Mr. El Hafidi immediately and accord them, as well as Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber, Mr. Rguibi, Mr. Charki, Mr. Ajna, Mr. Amenkour, Mr. Baalli and Mr. Baihna, who have already been released, an enforceable right to compensation and other reparations, in accordance with international law.

80. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber, Mr. Rguibi, Mr. Elbeur, Mr. Charki, Mr. Ajna, Mr. Amenkour, Mr. Baalli, Mr. El Ouahidi, Mr. Dadda, Mr. Baihna and Mr. El Hafidi and to take appropriate measures against those responsible for the violation of their rights.

81. 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 and to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

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

Follow-up procedure

83. 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. Elbeur, Mr. El Ouahidi, Mr. Dadda and Mr. El Hafidi have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber, Mr. Rguibi, Mr. Elbeur, Mr. Charki, Mr. Ajna, Mr. Amenkour, Mr. Baalli, Mr. El Ouahidi, Mr. Dadda, Mr. Baihna and Mr. El Hafidi;

(c) Whether an investigation has been conducted into the violation of the rights of Mr. Moussayih, Mr. Burgaa, Mr. Errami, Mr. Baber, Mr. Rguibi, Mr. Elbeur, Mr. Charki, Mr. Ajna, Mr. Amenkour, Mr. Baalli, Mr. El Ouahidi, Mr. Dadda, Mr. Baihna and Mr. El Hafidi 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 Morocco with its international obligations in line with the present opinion;

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

84. 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.

85. 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.

86. 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.¹⁴

[Adopted on 20 November 2019]

¹⁴ Human Rights Council resolution 42/22, paras. 3 and 7.