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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020

#### Opinion No. 52/2020 concerning Ali Salem Bujmaa, also known as Ali Saadouni (Morocco)\*

1. The Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. 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 6 November 2019 the Working Group transmitted to the Government of Morocco a communication concerning Ali Salem Bujmaa, also known as Ali Saadouni. The Government submitted a late response on 23 February 2020. 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,

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\* Seong-Phil Hong did not participate in the deliberations on this case.



or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

## Submissions

### *Communication from the source*

4. Ali Salem Bujmaa, also known as Ali Saadouni, is a Saharan human rights defender and activist born in 1977, known for his activism for the self-determination of the Saharan people. He usually resides in Laâyoune. He is a member of a group of Saharan activists who refuse Moroccan nationality, believing that they are of Saharan nationality and live in an occupied territory.

#### (a) Context, arrest and detention

5. The source explains that, on 11 April 2019, at around 10 p.m., while Mr. Saadouni was in a car warehouse, a group of men jumped out of an unidentified car and forced Mr. Saadouni and the person accompanying him to get into the back seat with them. Mr. Saadouni had noticed that this car had been following him all day. In the car, they were insulted and humiliated, before the person accompanying Mr. Saadouni was released, after about 15 minutes.

6. The source notes that Mr. Saadouni was clearly identifiable in videos of a demonstration staged the day before by the “Committee of Those Who Reject Moroccan Nationality” group, of which Mr. Saadouni is a founding member, and that these videos were widely circulated on social media.

7. According to the source, Mr. Saadouni was taken to the basement of the police station, where he was detained for 48 hours. During this period, he was allegedly tortured by the men who abducted him, who tried to make him sign confessions that had been drawn up beforehand. In particular, Mr. Saadouni was stripped naked and handcuffed and then blindfolded before being hit with various objects. Mr. Saadouni was also allegedly denied access to his anti-epileptic drugs. He did not sign the documents and repeatedly asked why he was being detained without receiving any other answer than accusations of being a member of the Frente Popular para la Liberación de Saguía el-Hamra y de Río de Oro (Frente POLISARIO) and of having participated in demonstrations. Mr. Saadouni was reportedly questioned only about his activism.

8. The source asserts that the men who abducted and tortured Mr. Saadouni for two days were members of the Moroccan intelligence services. No arrest warrant was served on him.

9. The source reports that, on 13 April 2019, Mr. Saadouni was brought before an investigating judge of the *tribunal de grande instance* (court of major jurisdiction) of Laâyoune for the first time. The court informed him of the charges against him and ordered his detention. Mr. Saadouni was represented by a lawyer, whom he was not allowed to consult before, during or even after the hearing. Mr. Saadouni denounced the acts of torture to which he had been subjected and his violent arrest, but the judge ordered his detention without taking the information into account. He was then transported to Laâyoune prison, known as the “black prison”.

10. At this stage, the source maintains that Mr. Saadouni’s relatives had not been informed of his place of detention. Following a second hearing on 15 April 2019, Mr. Saadouni was finally allowed to call his family. He again denounced the torture he had been subjected to.

11. The source describes Mr. Saadouni’s conditions of detention in the “black prison” as inhuman and degrading and points out that he began a hunger strike to claim the right to file a complaint of torture with the competent authorities and call for his immediate release. Faced with the indifference of the prison governor and prison staff, and the deterioration of his health, Mr. Saadouni ended his hunger strike on 1 May 2019, after 16 days.

12. The source reports that the hearing on the merits before the Laâyoune court was held on 29 April 2019, in the presence of members of Mr. Saadouni’s family, but that Saharan journalists and activists were not able to have access to the courtroom. Once again, Mr. Saadouni’s two lawyers were not allowed to see him in private. Mr. Saadouni was convicted

of drug possession with intent to distribute and assaulting a police officer, which allegedly occurred during his arrest. Mr. Saadouni then denied all charges against him and recalled that he was fighting for the self-determination of the Saharan people and that he had been tortured in detention. Moreover, no concrete evidence of the commission of these offences was provided, with the prosecutor going so far as to claim that the drugs seized from Mr. Saadouni had been thrown away during his arrest. The charge of assault was corroborated only by the alleged victim, who was absent from the hearing but represented by his lawyer. Mr. Saadouni's lawyers also raised procedural objections in order to challenge the legality of the pretrial detention, without any reaction from the judge.

13. The source then explains that Mr. Saadouni was sentenced on 30 April 2019 to 7 months' imprisonment and a fine of 5,000 dirhams by the Laâyoune court, which was reduced to 5 months' imprisonment and a fine of 5,000 dirhams by the Court of Appeal of Laâyoune on 13 June 2019, again for drug possession and assault against a police officer. According to the source, the appeal hearing was conducted in a manner similar to the hearing at first instance, in particular with respect to the President's refusal to take into account the arguments presented by the defence.

14. According to the source, Mr. Saadouni was detained in the local prison of Laâyoune before being transferred to Bouizarkarne prison on 20 June 2019. He was reportedly beaten and subjected to psychological pressure during the transfer, which took place at night. In Bouizarkarne, Mr. Saadouni was held in solitary confinement until his release on 11 September 2019.

(b) Legal analysis

15. The source emphasizes that Mr. Saadouni's detention was arbitrary under categories I, II, III and V. The source adds that the violations committed against Mr. Saadouni also constitute violations of international humanitarian law, since Western Sahara is an occupied territory and Mr. Saadouni and the Saharan people 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, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), and customary international law. In particular, the first paragraph of article 4 of the Fourth Geneva Convention provides protection to persons in the hands of an occupying Power of which they are not nationals.

(i) Category I

16. The source recalls that article 9 (2) of the Covenant provides that anyone who is arrested is not only to be informed of the reasons for the arrest at the time of arrest but also to be promptly informed of any charges against him or her. Article 9 (3) adds that any person arrested or detained on a criminal charge is to be brought promptly before a judge or other officer authorized by law to exercise judicial power. According to Human Rights Committee general comment No. 35 (2014) on liberty and security of person, article 9 of the Covenant requires compliance with the provisions of domestic law relating to the authorization of detention by a judge. Article 23 of the Constitution of Morocco emphasizes in this regard that no one may be arrested except as provided by law. Thus, under articles 139 and 140 of the Code of Criminal Procedure, an arrest warrant must be served on the person under arrest and a detainee must be heard by a judge and have access to a lawyer within 24 hours of his or her arrest.

17. The source emphasizes that in the present case no arrest warrant was served on Mr. Saadouni and he was not informed of the reasons for his arrest by the Moroccan secret service officers. According to the source, Mr. Saadouni's arrest amounts to kidnapping, after which he was detained for two days at the police station and tortured before being brought before a judge on 13 April 2019. He was thus held incommunicado outside the framework of the law for two days.

18. The source concludes that Mr. Saadouni's arrest had no legal basis, in contravention of article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.

## (ii) Category II

19. According to the source, Moroccan law provides, in contravention of article 19 of the Covenant, which protects freedom of expression, that individuals may be detained and prosecuted for making speeches that threaten the territorial integrity of Morocco, particularly in the context of its sovereignty over the territory of Western Sahara.

20. The source claims that this is the case of Mr. Saadouni, who is a recognized activist in favour of Sahrawi Arab Democratic Republic independence and who has publicly rejected Moroccan nationality. Mr. Saadouni has already been arbitrarily detained for a year and a half and has been subjected to ill-treatment by the Moroccan police in response to his activism.

21. In the present case, the source stresses that Mr. Saadouni's arrest followed the widespread distribution of a video in which he was demonstrating for the right to self-determination of the people of Western Sahara, a criminal act under Moroccan law. The source adds that Mr. Saadouni's arrest, torture and detention are linked to increased new crackdowns on Saharan civil society and the occupation of the territory, as evidenced by a stronger military presence, the expulsion of international observers and the persecution of Saharan journalists and activists. The worsening of these conditions is said to be linked to the peace talks between Morocco and the Frente POLISARIO.

22. Accordingly, the source maintains that Mr. Saadouni's deprivation of liberty ensued from by his exercise of freedom of expression and the right to peaceful assembly, as guaranteed by articles 19 and 21 of the Covenant.

## (iii) Category III

23. Mr. Saadouni's detention, the source further maintains, was arbitrary under category III because of the violation of several aspects of his right to a fair trial, as protected by article 14 of the Covenant and articles 5, 66–75 and 147 of the Fourth Geneva Convention.

24. First of all, the source submits that Mr. Saadouni's right to be heard by an independent and impartial court, pursuant to article 14 (1) of the Covenant, was not respected. In fact, Mr. Saadouni was brutally tortured on several occasions. No investigation was ordered by the investigating judge after Mr. Saadouni reported these allegations and no medical examination was conducted. The judge further stressed that he would only take account of police reports, which were not adversarial in that they had not been signed by Mr. Saadouni. The court was also informed that Mr. Saadouni had not been given the opportunity to file a complaint regarding these allegations of torture; however, it took no steps to remedy the situation.

25. The political nature of the proceedings against Mr. Saadouni, according to the source, makes any ruling by an independent and impartial Moroccan court unlikely.

26. Furthermore, the source points out that the court not only displayed utter contempt for the torture reported by Mr. Saadouni but also refused to call witnesses for the defence and sentenced Mr. Saadouni in the absence of any evidence, including physical evidence of drug possession. This decision is proof of the lack of independence of the judiciary and its use to silence political opponents.

27. Finally, the source maintains that, because of their status as "protected persons" under articles 48, 67 and 76 of the Fourth Geneva Convention, Saharans may not be sentenced as Moroccan citizens by a Moroccan court and transferred to the territory of the occupying Power but must rather be detained in the occupied territory. In the present case, the transfer of Mr. Saadouni to Bouizarkane prison is contrary to the provisions of the Fourth Geneva Convention.

28. The source further reports that article 14 (3) (a) of the Covenant provides that everyone is entitled to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her. Furthermore, article 9 (2) of the Covenant provides that anyone who is arrested is not only to be informed, at the time of arrest, of the reasons for his or her arrest but also to be promptly informed of any charges against him or her. This includes both charges brought against the person and the

legal characterization of the offence in order to allow the person to exercise his or her right of defence, as provided for in article 14 (3) (b) and (d) of the Covenant.

29. The source reiterates that Mr. Saadouni was arrested and then detained for two days without being shown a warrant or informed of the factual and legal reasons for his arrest. This constitutes a violation of the Covenant and breach of the obligation to inform the accused of the nature and cause of the charges, as provided for under article 71 of the Fourth Geneva Convention.

30. The source argues that it follows from article 14 (3) (b) and (d) of the Covenant that everyone charged with a criminal offence has the right to communicate with counsel of his or her own choosing and to be informed of his or her right to have such counsel. Furthermore, article 14 (1) of the Covenant provides that all persons are equal before the courts. This principle of equality is fundamental and allows parties to legal proceedings to have equal access to the court, to present their case and to be treated without discrimination. The right to be represented by a lawyer is a fundamental principle underlying the right to a fair trial cited in numerous United Nations and Working Group documents and principles. This right applies throughout the period of detention, including immediately after arrest. Persons deprived of their liberty are to be provided with appropriate means to prepare their defence, and their legal counsel is to be free to defend them without fear of reprisals, intimidation, hindrance or harassment.

31. The source reiterates that Mr. Saadouni was not able to meet with his lawyer prior to the hearings to which he was summoned and consequently never had the opportunity to properly prepare his defence and communicate with his lawyer save during the hearings. The mere presence of a lawyer is not sufficient evidence of respect for the right to have access to a lawyer and to defend oneself in accordance with the Covenant and article 72 of the Fourth Geneva Convention.

32. The source further argues that, under article 14 (3) (e) of the Covenant, everyone has the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. This principle of equality of arms is essential for ensuring an effective defence. The Working Group has also previously affirmed that reliance on the testimony of witnesses who are absent and therefore not available for examination constitutes a violation of article 14 (3) (e) of the Covenant, in particular when the witness plays a key role in the conviction.

33. The source recalls that the key witness for the prosecution, who is also the victim of the alleged assault, was not present during the hearings of 29 April and 13 June 2019. This testimony was the only evidence against Mr. Saadouni on the charge of assaulting a police officer. Furthermore, Mr. Saadouni and his lawyer were prohibited from calling witnesses to Mr. Saadouni's violent arrest. These facts constitute serious violations of the principle of equality of arms.

34. Lastly, the source argues that the right to a fair and public hearing in accordance with article 14 (1) of the Covenant is a central component of the right to a fair trial. The decision to hold a hearing in camera must be justified by special circumstances. The public must be informed of the date and time of the hearing, and any uncertainty as to the public announcement about the hearing and any ban on entry for certain persons constitute violations of this article.

35. In the present case, the source notes that Mr. Saadouni was unable to inform his relatives of the date and place of the hearing on 13 April 2019. During the hearings on 29 April and 13 June 2019, the court was guarded by numerous police officers. While Mr. Saadouni's relatives and his lawyers were allowed access to the courtroom, members of Saharan civil society and the interpreter of Mr. Saadouni's foreign lawyers were not allowed to enter.

(iv) Category V

36. Finally, the source argues that Mr. Saadouni's detention was arbitrary under category V, as it ensued from his Saharan identity.

37. The source asserts that Mr. Saadouni is a Saharan and that, in accordance with the principles set out in General Assembly resolutions 1514 (XV), 1541 (XV) and 2625 (XXV), the Saharan people have the right to self-determination.

38. The source notes that, in the present case, Mr. Saadouni was arrested and imprisoned because of his political views on the right to self-determination of the Saharan people. If Mr. Saadouni had not been Saharan and had not expressed his opinion on the political crisis in Western Sahara, the trials in question would not have taken place. His unlawful arrest and the treatment he received while in detention are the direct consequences of his participation in a demonstration and constitute discrimination, in violation of international law, in particular articles 1, 2, 26 and 27 of the Covenant.

39. In the light of the foregoing, the source asserts that Mr. Saadouni's detention was arbitrary.

40. The source adds that it is prohibited under article 47 of the Fourth Geneva Convention to deprive persons in an occupied territory of the protection afforded by the Convention by assimilating them into the population of the occupying Power and that, if applicable, it involves a violation under category V. The prosecution of Mr. Saadouni is in response to and punishment for his refusal to assume Moroccan nationality because of the occupation of the territory of Western Sahara.

41. The source claims that Mr. Saadouni was arrested and imprisoned because of his activism in support of the Saharan people's right to self-determination. Forcing the inhabitants of an occupied territory – in this case, the Saharans – to accept Moroccan nationality and the fact of having tortured and detained Mr. Saadouni because of his political activism, on which he was exclusively interrogated, constitute, according to the source, violations of article 45 of the Regulations respecting the Laws and Customs of War on Land and international humanitarian law, in accordance with article 147 of the Fourth Geneva Convention.

#### *Response from the Government*

42. The Working Group sent the communication to the Government on 6 November 2019, with 6 January 2020 set as the deadline for a reply.

43. On 6 January 2020, the Government requested and was granted a one-month extension, with 6 February 2020 set as the new deadline.

44. On 23 February 2020, the Working Group received a reply from the Government, which was submitted after the cut-off date. This response was therefore received late by the Working Group. The Working Group regrets that it did not receive a reply from the Government to this communication within the allotted time.

#### *Source's additional comments*

45. On 18 March 2020, the source submitted his reply to the late submission by the Government.

#### **Discussion**

46. In the absence of a timely response from the Government, the Working Group has decided to render the present opinion on the basis of all the information submitted, in accordance with paragraphs 15 and 16 of its methods of work.

47. The Working Group takes note of Mr. Saadouni's release. In accordance with paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion on whether or not the deprivation of liberty was arbitrary, notwithstanding the release of the person concerned. It is alleged that Mr. Saadouni suffered serious human rights violations and, in particular, that he was detained for exercising his rights peacefully. The Working Group considers that it is important to render an opinion in this case.

48. In determining whether Mr. Saadouni's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has established a *prima facie* case for breach of international

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). In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source within the allotted time.

49. As a preliminary matter, the Working Group notes that this case is similar to several others presented to the Working Group and on which it rendered an opinion.<sup>1</sup>

50. The Working Group notes that the source has developed arguments under categories I, II, III and V, which it will consider in order.

#### *Category I*

51. The source alleges that Mr. Saadouni was arrested on 11 April 2019 by men who forced him into a car which, according to Mr. Saadouni, had been following him all day. In the car, Mr. Saadouni was said to have been insulted and humiliated. He was then detained in a police station for 48 hours, during which he was allegedly interrogated and tortured. The source alleges that Mr. Saadouni was not informed of the reason for his arrest. The Government did not challenge these allegations within the allotted time.

52. According to article 9 (1) of the Covenant, no one may be deprived of liberty except on such grounds and in accordance with such procedure as established by law. Article 9 (2) of the Covenant provides that anyone who is arrested is to be informed, at the time of arrest, of the reasons for his or her arrest. In the present case, the Working Group considers that the source has reported credible allegations that Mr. Saadouni was arrested without serving an arrest warrant on him, in violation of article 9 (1) of the Covenant. The Working Group recalls that it is not sufficient for there to be a law authorizing the arrest; the authorities must invoke this legal basis and apply it to the circumstances of the case through an arrest warrant.<sup>2</sup> In addition, Mr. Saadouni was not informed of the reasons for his arrest at the time of arrest, in violation of article 9 (2) of the Covenant. In addition, as the Working Group has previously stated, an arrest is arbitrary when it is made without the arrested person being informed of the reasons for the arrest.<sup>3</sup>

53. The source further reports that, on 13 April 2019, Mr. Saadouni was brought before a judge in Laâyoune. The judge is reported to have informed him of the charges against him and ordered his detention. The source also states that, under articles 139 and 140 of the Code of Criminal Procedure, an arrest warrant must be served on the person under arrest and a detainee must be heard by a judge and have access to a lawyer within 24 hours of his or her arrest. Under article 9 (3) of the Covenant, anyone arrested on a criminal charge must be brought promptly before a judge. The Working Group recalls that the Human Rights Committee has recommended a 48-hour time limit for bringing a detainee before a judge, except in cases where the legislation sets a shorter time limit, which must therefore be respected,<sup>4</sup> as is the case in Morocco. Accordingly, the Working Group considers that it has been established that Mr. Saadouni was not promptly brought before a judicial authority, in violation of article 9 (3) of the Covenant. In conclusion, the authorities have not established the legal basis for his detention in accordance with the provisions of the Covenant.

54. The Working Group also notes that the source described a situation in which Mr. Saadouni was abducted and then allegedly subjected to a period of enforced disappearance (from 11 to 13 April 2019). The Working Group considers that the allegations of the source are credible<sup>5</sup> and have not been disputed by the Government within the allotted time.

<sup>1</sup> See, *inter alia*, opinions No. 67/2019, No. 23/2019, No. 60/2018, No. 58/2018, No. 31/2018 and No. 11/2017.

<sup>2</sup> Opinions No. 45/2019, para. 51; No. 44/2019, para. 52; No. 46/2018, para. 48; and No. 36/2018, para. 40.

<sup>3</sup> See, for example, opinions No. 16/2020, para. 60; No. 46/2019, para. 51; and No. 10/2015, para. 34.

<sup>4</sup> General comment No. 35 (2014), para. 33.

<sup>5</sup> See also CCPR/C/MAR/CO/6, paras. 27–28.

55. The Working Group recalls that violent enforced disappearances violate numerous substantive and procedural provisions of the Covenant, including articles 9 and 14, and constitute a particularly aggravated form of arbitrary detention.<sup>6</sup>

56. Detaining a person in a manner that deprives the person of access to the outside world, in particular to the person's family and counsel, constitutes a violation of the right to challenge the legality of the detention before a court under article 9 (4) of the Covenant and of the right to recognition everywhere as a person before the law under article 6 of the Universal Declaration of Human Rights and article 16 of the Covenant.<sup>7</sup> Judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty.<sup>8</sup> Such oversight is essential to ensure that the detention has a legal basis. The Working Group considers that, in the case of Mr. Saadouni's enforced disappearance, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was violated.

57. The Working Group concludes that Mr. Saadouni's detention was arbitrary under category I.

### *Category II*

58. The source reports that Mr. Saadouni participated in a demonstration the day before his arrest. It also reports that Mr. Saadouni is an activist for the right to self-determination of the people of Western Sahara. The Working Group has no reason to doubt the claims made and the Government has not challenged them within the allotted time.

59. The Working Group recalls that article 19 (2) of the Covenant protects the right to freedom of expression. This right includes political discourse, commentary on public affairs and discussion of human rights.<sup>9</sup> It protects the right to take up a position and express opinions, including those that are critical of government policy or are not in keeping with it.<sup>10</sup>

60. The Working Group takes into consideration the general situation in Western Sahara<sup>11</sup> and the Government's<sup>12</sup> practices for corroborating the source's allegations, which it considers credible. In doing so, the Working Group considers that the conduct of Mr. Saadouni, who participated in a demonstration and is a member of an association promoting the rights of Saharans, falls within the scope of: (a) the right to freedom of opinion and expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant; (b) the right to peaceful assembly protected by article 20 of the Universal Declaration of Human Rights and article 21 of the Covenant; (c) the right to freedom of association protected by article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant; and (d) the right to take part in the conduct of public affairs protected by article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant.

61. Moreover, there is nothing to suggest that the restrictions that may be applied to the rights exercised by Mr. Saadouni, under articles 19 (3), 21 and 25 of the Covenant, would be applicable in this case. The Government has not demonstrated that the prosecution of Mr. Saadouni was necessary in order to protect a legitimate interest or that his sentence was a proportional response to his activities. The Human Rights Council has called on States to refrain from imposing restrictions under article 19 (3) of the Covenant that are not consistent with international human rights law.

<sup>6</sup> General comment No. 35 (2014), para. 17; see also opinions No. 5/2020 and No. 6/2020.

<sup>7</sup> See opinions No. 32/2019, No. 33/2019 and No. 45/2019.

<sup>8</sup> See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37), para. 3.

<sup>9</sup> Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 11.

<sup>10</sup> Opinions No. 8/2019, para. 55; and No. 79/2017, para. 55.

<sup>11</sup> See, inter alia, CCPR/C/MAR/CO/6.

<sup>12</sup> See, inter alia, opinions No. 67/2019, No. 23/2019, No. 60/2018, No. 58/2018, No. 31/2018 and No. 11/2017.



62. 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 the Special Rapporteur on the rights to freedom of peaceful assembly and of association.

63. According to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights, and to meet or assemble peacefully for this purpose.<sup>13</sup> Mr. Saadouni was detained for having exercised the rights set forth in the Declaration on Human Rights Defenders, in violation of his right to equality before the law and to the equal protection of the law without any discrimination, which is protected by article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.<sup>14</sup>

64. The Working Group concludes that Mr. Saadouni's deprivation of liberty was arbitrary under category II.

### *Category III*

65. Given its finding that Mr. Saadouni's detention was arbitrary under category II, the Working Group emphasizes that Mr. Saadouni should never have been tried. However, the source has identified several violations of the right to a fair trial in the present case and the Working Group will assess them.

66. First of all, the Working Group notes that, according to the facts, Mr. Saadouni did not have a lawyer present during his interrogations by the police forces between 11 and 13 April 2019. The source also states that Mr. Saadouni was not able to meet with his lawyer prior to the hearings and consequently never had the opportunity to properly prepare his defence and communicate with his lawyer outside the hearings. 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 the moment of apprehension, and must be given access to such assistance without delay.<sup>15</sup> This failure and the fact that Mr. Saadouni was not able to communicate with his lawyer prior to the hearings constitute violations of his right to have adequate time and facilities for the preparation of his defence and to communicate with his lawyer, in accordance with article 14 (3) (b) and (d) of the Covenant.<sup>16</sup>

67. Furthermore, the source reported that it had not been possible for the defence to examine the witness for the prosecution and that the court had not allowed the hearing of witnesses for the defence, who were to testify about Mr. Saadouni's treatment by the police at the time of his arrest. Taken together, these factors suggest that Mr. Saadouni would not have enjoyed the right to a fair trial before an independent and impartial court pursuant to article 10 of the Universal Declaration of Human Rights and article 14 (3) (e) of the Covenant.

68. The source also reports that the hearing on the merits before the Laâyoune court had been held on 29 April 2019, in the presence of members of Mr. Saadouni's family, but that Saharan journalists and activists were not able to gain access to the courtroom. During the hearings on 29 April and 13 June 2019, the court was guarded by numerous police officers. While Mr. Saadouni's relatives and his lawyers were allowed access to the courtroom, members of Saharan civil society and the interpreter of Mr. Saadouni's foreign lawyers were not allowed to enter. The Working Group recalls that hearings are to be made public in accordance with article 14 (1) of the Covenant and that the decision to hold a hearing in camera must be justified by particular circumstances. In the light of these restrictions, which

<sup>13</sup> General Assembly resolution 53/144, annex, arts. 1, 5 and 8. See also General Assembly resolution 70/161, para. 8.

<sup>14</sup> See, for example, opinions No. 9/2019, No. 46/2018, No. 45/2018, No. 36/2018, No. 35/2018, No. 79/2017 and No. 75/2017.

<sup>15</sup> See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, annex, principle 9 and guideline 8.

<sup>16</sup> Ibid.

were not justified by the Government within the allotted time, the Working Group considers that this right has been violated in the present case.

69. Lastly, the Working Group highlights its concern about the allegations of violence committed against Mr. Saadouni during his interrogation by members of the police force, between 11 and 13 April 2019, with a view to obtaining a confession and signature of the police report. The Working Group also notes the lack of action on the part of the judges, both during the investigation and during the trial, in that they did not order an inquiry or a medical examination. The Working Group considers that the source has established a credible *prima facie* case<sup>17</sup> – not challenged by the Government within the allotted time – that Mr. Saadouni was subjected to acts of torture and ill-treatment, in violation of the absolute prohibition of torture as a peremptory norm of international law and of article 5 of the Universal Declaration of Human Rights, article 7 of the Covenant and articles 2 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Morocco is a party. Furthermore, the Working Group considers that Mr. Saadouni's ability to participate in his own defence would have been seriously undermined by the allegations of torture and ill-treatment, in violation of his right to equality of arms under article 14 (1) of the Covenant.<sup>18</sup> Therefore, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

70. The Working Group concludes that these violations are of such gravity as to give Mr. Saadouni's deprivation of liberty an arbitrary character under category III.

#### *Category V*

71. The source asserts that the identification of Mr. Saadouni as a Saharan activist for the self-determination of the people of Western Sahara led to discriminatory treatment and his subsequent arrest and detention. This allegation, which the Government did not dispute in due course, seems credible in the light of the wealth of information collected by the Human Rights Council.<sup>19</sup>

72. The Working Group also notes the source's allegation that the questioning conducted by law enforcement officers was focused on Mr. Saadouni's political activism. The Working Group recalls that it has previously considered deprivation of liberty to be arbitrary in cases where it was used to quell members of political groups in order to silence their calls for self-determination.<sup>20</sup>

73. Furthermore, the Working Group notes that there is a widespread practice of abuse against persons who, like Mr. Saadouni, are either of Saharan origin or campaign for the self-determination of the Saharan people. The Working Group has noted the abuses committed against this community on several occasions.<sup>21</sup>

74. The Working Group considers that Mr. Saadouni was indeed arrested and deprived of his liberty because of his political activism in support of the right to self-determination of the people of Western Sahara. In these circumstances, it concludes that the situation has arisen as a result of discrimination in violation of international law, in particular article 7 of the Universal Declaration of Human Rights and articles 2 and 26 of the Covenant. The arrest and detention of the members of Mr. Saadouni was therefore arbitrary under category V.

75. Finally, the source invited the Working Group to apply international humanitarian law, in particular the Fourth Geneva Convention. The Working Group recalls that its mandate is limited to questions relating to arbitrary detention and that it does not address issues relating to the status of Western Sahara, to which the right to self-determination applies by virtue of the principles contained in General Assembly resolutions 1514 (XV) and 1541

<sup>17</sup> The Working Group also notes the concerns of the Human Rights Committee about acts of torture and ill-treatment in Western Sahara (CCPR/C/MAR/CO/6, para. 23).

<sup>18</sup> See, for example, opinions No. 24/2020, para. 108; No. 53/2018, para. 77; and No. 46/2017, para. 25.

<sup>19</sup> See, for example, CCPR/C/MAR/CO/6; opinions No. 67/2019, No. 23/2019, No. 60/2018, No. 58/2018, No. 31/2018 and No. 11/2017; and A/HRC/27/48/Add.5.

<sup>20</sup> See, inter alia, opinions No. 23/2019, No. 60/2018, No. 58/2018, No. 31/2018 and No. 11/2017.

<sup>21</sup> See opinions No. 58/2018 and No. 11/2017.

(XV).<sup>22</sup> The Working Group considers that, in the present case, in the light of the evidence in the case, it can reach a conclusion on the arbitrary nature of Mr. Saadouni's deprivation of liberty without having recourse to international humanitarian law.

### **Disposition**

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

The deprivation of liberty of Ali Saadouni, being in contravention of articles 3, 6, 7, 8, 9, 10, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 2, 9, 14, 16, 19, 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

77. The Working Group requests the Government of Morocco to take the steps necessary to remedy the situation of Mr. Saadouni 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.

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

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

80. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the case for appropriate action 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, and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

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

### **Follow-up procedure**

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

- (a) Whether compensation or other reparations have been made to Mr. Saadouni;
- (b) Whether an investigation has been conducted into the violation of Mr. Saadouni's rights and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Morocco with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

83. 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.

84. 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

<sup>22</sup> Opinion No. 60/2018, para. 64.

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.

85. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>23</sup>

*[Adopted on 26 August 2020]*

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<sup>23</sup> Human Rights Council resolution 42/22, paras. 3 and 7.