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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 53/2020 concerning Messaoud Leftissi (Algeria)*

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 3 January 2020 the Working Group transmitted to the Government of Algeria a communication concerning Messaoud Leftissi. The Government submitted a late response on 12 March 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,

* Hong Seong-Phil did not participate in the discussion of the present case.



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

4. Messaoud Leftissi is an engineer and a national of Algeria.

(a) Background, arrest and detention

5. According to the source, beginning on 22 February 2019, Mr. Leftissi took part in demonstrations every Friday to assert the rights and freedoms of the indigenous peoples of North Africa, especially the Amazigh people, whose symbol is the Berber flag. The participants in these demonstrations do not advocate the separation of the Berber-speaking regions from Algeria; they wave the Amazigh flag to express pride in their identity. The Amazigh flag was created in the 1970s and adopted by many organizations at the first meeting of the World Amazigh Congress in 1997. It is used today across North Africa, in places such as the Canary Islands, Morocco, Algeria, Libya and Egypt, by the Congress's member organizations. Tamazight is recognized as an official language of Algeria under article 4 of the Constitution.

6. The source adds that an Algerian army general stated publicly, in a speech given on 19 June 2019, that he had strictly instructed the police to arrest and detain any demonstrator who was displaying the Amazigh flag, even though doing so is not prohibited under Algerian law.

7. The source explains that, on 21 June 2019, plainclothes police officers arrested Mr. Leftissi in Algiers, without showing him an arrest warrant or any other decision issued by the authorities, as he was leaving a cafe and heading to a demonstration. When the police officers searched him, an Algerian flag and an Amazigh flag were found in his bag; as a result, he was taken into custody and the Amazigh flag was confiscated, along with a placard that he was also carrying.

8. The source reports that Mr. Leftissi was placed in custody at Sidi M'Hamed police station in Algiers by the senior police officer on duty, in accordance with article 51 of the Code of Criminal Procedure, and that he remained there until 23 June 2019, when the investigating judge of the Sidi M'Hamed court ordered that he be placed in pretrial detention, in application of article 109 of the Code of Criminal Procedure.

9. The source notes that the public prosecutor attached to the Sidi M'Hamed court requested that Mr. Leftissi be detained on the grounds that he had allegedly jeopardized national unity by waving an Amazigh (or Berber) flag. These acts are punishable by up to 10 years' imprisonment and a fine of 3,000 to 70,000 Algerian dinars (DA) under article 79 of the Criminal Code.

10. According to the source, on 23 June 2019, Mr. Leftissi was transferred to El Harrach prison in Algiers, where he remained for the duration of his pretrial detention. On 10 July 2019, the indictments chamber of the Algiers Court of Appeal dismissed the appeal lodged by Mr. Leftissi against the ordinance of 23 June 2019 and confirmed the decision of the investigating judge.

11. The source reports that on 20 October 2019, after the trial and the deliberation had been postponed, the investigating judge of the eleventh chamber of the Sidi M'Hamed court handed down a committal order, setting the date of the trial for 22 October 2019. Mr. Leftissi appeared before the criminal section of the Sidi M'Hamed court and the trial proceeded. The court decided that he would be detained until it reached a verdict.

12. The source reports that Mr. Leftissi was sentenced by the Sidi M'Hamed court to a prison term of 1 year, suspended after 6 months, for violating the integrity of the national territory. The date set for the court to deliver its verdict was postponed several times. It was initially to do so on 10 October 2019, and later on 29 October 2019 and 5 November 2019; the verdict was finally pronounced on 12 November 2019.

13. Lastly, the source notes that Mr. Leftissi appealed against this verdict and was released on 23 December 2019, having served the non-suspended portion of his sentence. The appeal hearing, which was initially scheduled for 25 December 2019, was postponed to 15 January 2020.

(b) Legal analysis

14. The source asserts that Mr. Leftissi never used or called for the use of violence and was therefore deprived of his liberty for having exercised his right to freedom of expression and his right to demonstrate peacefully, both of which are enshrined in the Algerian Constitution, the Universal Declaration of Human Rights and the Covenant.

15. The source reports that article 48 of the Constitution guarantees freedom of expression, association and assembly. Article 49, for its part, guarantees the freedom to demonstrate peacefully within the framework of the law governing the exercise of this freedom.

16. The source adds that the detention of Mr. Leftissi violated article 19 of the Universal Declaration of Human Rights and articles 9 and 19 of the Covenant.

17. In addition, the source notes that Mr. Leftissi was arrested without being shown an arrest warrant and that he was taken to the police station and placed in pretrial detention even though the circumstances did not require it.

18. According to the source, Mr. Leftissi was detained for expressing his Amazigh identity.

19. In the light of the above, the source submits that the detention of Mr. Leftissi was arbitrary under categories I, II, III and V.

Response from the Government

20. On 3 January 2020, the Working Group sent a communication concerning Mr. Leftissi to the Government, requesting a reply by 3 March 2020.

21. The Working Group received a reply from the Government after the expiry of the time limit, on 12 March 2020. The Working Group regrets that it did not receive a timely response from the Government. The Government did not request an extension of the time limit for its reply, as provided for in paragraph 16 of the Working Group's methods of work. The Working Group therefore cannot accept the Government's reply as if it had been submitted on time.

Additional comments from the source

22. On 18 March 2020, the source submitted its response to the Government's late reply.

Discussion

23. 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 available to it, in conformity with paragraphs 15 and 16 of its methods of work.

24. At the outset, the Working Group notes that Mr. Leftissi was released on 23 December 2019, at the end of his sentence. 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. In the present case, Mr. Leftissi was reportedly the victim of serious human rights violations, particularly as he was allegedly detained for having exercised his right to freedom of expression and association. In these circumstances, the Working Group considers it important to render an opinion on his case.

25. 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). In the present case, the Government chose not to challenge, within the applicable time limit, the *prima facie* credible allegations made by the source.

Category I

26. The source reports that Mr. Leftissi took part in demonstrations to promote the Amazigh identity and assert the rights of the indigenous peoples of North Africa. Mr. Leftissi was arrested on 21 June 2019, as he was leaving a cafe and heading to a demonstration; he was carrying an Amazigh flag and a placard when he was arrested. The source notes that he was not shown an arrest warrant. These claims have not been contested by the Government.

27. Article 9 (1) of the Covenant stipulates that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. In the present case, the Working Group considers that the source has made credible allegations, which have not been contested by the Government, that Mr. Leftissi was arrested without being shown an arrest warrant or any other document justifying his arrest, 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 that legal basis and apply it to the circumstances of the case through an arrest warrant.¹ Furthermore, the Working Group notes that, although his flag and placard were confiscated, which would imply that Mr. Leftissi was in a position to know the reasons for his arrest, he was not duly informed by the authorities of such reasons at the time of arrest, in violation of article 9 (2) of the Covenant.² The Working Group concludes that these failures violate article 9 of the Universal Declaration of Human Rights and article 9 (1) and (2) of the Covenant and render Mr. Leftissi's arrest arbitrary under category I.

Category II

28. In addition, the Working Group notes that the reason for Mr. Leftissi's arrest was that he had an Amazigh flag in his possession a few days after an Algerian army general had stated that the police should arrest and detain anyone displaying the Amazigh flag. The Working Group also notes that Mr. Leftissi was charged with jeopardizing national unity by waving an Amazigh flag and that he was convicted on that charge.

29. The Working Group recalls that arrest or detention as punishment for the legitimate exercise of the rights guaranteed by the Covenant, including the right to freedom of opinion and expression (art. 19), the right of peaceful assembly (art. 21), the right to freedom of association (art. 22) and the right to take part in the conduct of public affairs (art. 25), is arbitrary.³ In the present case, the Working Group considers that the acts of possessing and displaying an Amazigh flag and participating in demonstrations to promote the rights of the indigenous peoples of North Africa fall within the scope of the rights mentioned above.

30. The Working Group also recalls that under article 19 (3) of the Covenant, two limitative areas of restrictions on the right to freedom of opinion and expression are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (*ordre public*) or of public health or morals. Article 19 (3) of the Covenant lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be provided for by law; they may only be imposed on one of the grounds set out above; and they must conform to the strict tests of necessity and proportionality.⁴ Article 21 of the Covenant stipulates that no restrictions may be placed on the exercise of this right other than those

¹ Opinions No. 45/2019, para. 51; No. 44/2019, para. 52; No. 46/2018, para. 48; and No. 36/2018, para. 40.

² See, for example, opinions No. 16/2020, para. 60; No. 46/2019, para. 51; and No. 10/2015, para. 34.

³ Human Rights Committee, general comment No. 35 (2014) on liberty and security of person, para. 17.

⁴ Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, paras. 21–22.

imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

31. In the present case, there is nothing to suggest that the restrictions authorized under the Covenant are applicable. The Working Group notes that the Government, in its late reply, did not provide any explanation or justification showing that it had imposed a lawful, proportionate and necessary restriction. The Working Group therefore finds that the arrest and detention of Mr. Leftissi constitute a violation of articles 19, 20 and 21 of the Universal Declaration of Human Rights and articles 19, 21, 22 and 25 of the Covenant, and are arbitrary under category II.

Category III

32. In view of its finding that the detention of Mr. Leftissi was arbitrary under category II, the Working Group stresses that no trial should have taken place. However, Mr. Leftissi was tried and sentenced on 12 November 2019. The Working Group notes that the source argues that the detention of Mr. Leftissi was arbitrary under category III, without substantiating this claim. The Working Group therefore cannot draw any conclusions relating to category III.

Category V

33. Lastly, according to the source, Mr. Leftissi was detained for expressing his Amazigh identity. The source also notes that the police were instructed to arrest and detain anyone displaying the Amazigh flag.

34. The Working Group recalls that deprivation of liberty is regarded as arbitrary if it 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.

35. The Working Group considers that the circumstances of the present case demonstrate that Mr. Leftissi was indeed deprived of his liberty as a result of discrimination based on his ethnic origin and his political opinion, which he expressed by taking part in demonstrations to promote the rights of the Amazigh people and by displaying an Amazigh flag.

36. The Working Group takes note of the concluding observations of the Human Rights Committee on the fourth periodic report of Algeria, in which the Committee stated that it was concerned by allegations of acts of discrimination, stigmatization and hate speech against Amazigh communities,⁵ and considers that this observation corroborates the source's claims.

37. The Working Group finds a violation of article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant and considers that the detention of Mr. Leftissi was arbitrary under category V.

38. Given that the issues of identity and minority rights are central to this case, the Working Group considers it appropriate to refer the case to the Special Rapporteur on minority issues.

Disposition

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

The deprivation of liberty of Messaoud Leftissi, being in contravention of articles 7, 9, 19, 20 and 21 of the Universal Declaration of Human Rights and articles 9, 19, 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and V.

⁵ CCPR/C/DZA/CO/4, para. 19. See also CERD/C/DZA/CO/20-21.

40. The Working Group requests the Government of Algeria to take the steps necessary to remedy the situation of Mr. Leftissi 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.

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

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

43. The Working Group requests the Government to bring its laws into conformity with the recommendations made in the present opinion and with the commitments made by Algeria under international human rights law.

44. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on minority issues, for appropriate action.

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

Follow-up procedure

46. 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. Leftissi;
- (b) Whether an investigation has been conducted into the violation of Mr. Leftissi'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 Algeria with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

47. 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.

48. 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.

49. 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.⁶

[Adopted on 25 August 2020]

⁶ Human Rights Council resolution 42/22, paras. 3 and 7.