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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 68/2020 concerning Walid El Batal (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 17 April 2020 the Working Group transmitted to the Government of Morocco a communication concerning Walid El Batal. The Government replied to the communication on 16 June 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, 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. Walid El Batal is a Saharan journalist born in 1994, who belongs to the Saharan journalists' organization Smara News. Mr. El Batal is also a human rights defender in the Saharan League for the Protection of Human Rights and a student. He is a former Saharan political prisoner, who was sentenced to 14 months' imprisonment on 5 December 2017.

a. Arrest and detention

5. According to the source, on 7 June 2019 Mr. El Batal intended to report, in his capacity as a journalist, on a reception organized following the release of a Saharan activist. The source explains that, in order to prevent supporters and journalists from meeting this activist, the city of Smara was effectively placed under siege, with an increased presence of military personnel and gendarmes in the city centre and around the house where the reception was due to take place. At approximately 4 p.m., while Mr. El Batal was on his way to the reception, Moroccan plain-clothes police and intelligence officers stopped his car and asked where he was going. Mr. El Batal answered that he was going to the reception. He was then assaulted by the police, who hit him with truncheons as he sat in the car with three other persons. The source reports that Mr. El Batal was then dragged out of the car and beaten in the street. This event was filmed covertly and the video was placed online.

6. Mr. El Batal was then allegedly put into a car, blindfolded and handcuffed, slapped and insulted, and spat at in the face. Mr. El Batal was taken to Smara police station, where he was again severely beaten, with wooden and iron truncheons, and kicked.

7. The source specifies that Mr. El Batal's family was never informed of his arrest but learned of it through the video published on social media. When members of his family asked the police for information, this was refused.

8. The source explains that, on 7 June 2019 at approximately 10.30 p.m., Mr. El Batal was transported to hospital owing to the violence inflicted on him. He was accompanied by some twenty police officers. Mr. El Batal's family was allowed to see him in hospital while he was unconscious.

9. According to the source, after a few hours in hospital, Mr. El Batal was returned to Smara police station, where he was detained for two days during which he was questioned about his activism.

10. The source explains that, on 8 June 2019, Mr. El Batal was informed by the police that there was an arrest warrant against him dating from 2018 and that that was the reason for his arrest. However, the source points out that no arrest warrant was shown at the time of the arrest. The warrant apparently contained false accusations against Mr. El Batal, as he had been moving freely around Smara since his release from prison in 2017 and had been to the police station four times to apply for a taxi licence. The police are required to check that any person applying for a taxi licence has no criminal record and that there is no arrest warrant pending against him or her. During his most recent visit, Mr. El Batal had been informed that the taxi licence was being issued, meaning that his application had been granted. In fact, according to the source, the police became determined to charge him once the video of his arrest had gone viral.

11. In addition, the source reports that, during his detention at Smara police station, Mr. El Batal had no access to a lawyer and was also refused permission to contact his family. During this period, he was reportedly also tortured and forced to sign police reports.

12. On 10 June 2019, Mr. El Batal was brought before the investigating judge of Laayoune Court of First Instance. On this occasion, Mr. El Batal was represented by a lawyer, but he was never allowed to meet with him, whether before, during or after the hearing.

13. The source reports that Mr. El Batal was in an alarming state when he was brought before the investigating judge after having been tortured for three days at Smara police station. Apparently, Mr. El Batal had visible marks on his body, particularly on his head, which was still swollen, and on his hands. Mr. El Batal informed the judge of the torture to

which he had been subjected and mentioned the existence of the video showing him being assaulted at the time of his arrest. In addition, he explained to the judge that the police had targeted his car because they did not want anyone to attend the reception for the released Saharan activist and that, once the video had gone viral, the police had needed an excuse to arrest him. However, the judge interrupted, telling Mr. El Batal that he was interested only in the charges against him. The judge did not follow up on the allegations of torture and did not order a medical examination or an investigation.

14. According to the source, the judge declared that there was an arrest warrant against Mr. El Batal dating from 2018, related to a demonstration in which Mr. El Batal was alleged to have taken part on 27 March 2018, along with two other journalists who had been arrested and released on 27 September 2018. The judge also stated that Mr. El Batal had been hiding from the police. He accused him of having erected roadblocks and thrown stones at the police, attacked police officers carrying out their work, participated in an unauthorized demonstration and destroyed public property. On this basis, Mr. El Batal was charged with attempted murder, endangering traffic, assaulting public officials performing their duties and possession of weapons. He was also accused of assaulting a public official at the time of his arrest on 7 June 2019, as the police files indicated that Mr. El Batal and the driver of the car had attacked two police officers. Reportedly, the charge of attempted murder was subsequently withdrawn by the investigating judge.

15. Mr. El Batal denied the charges against him and stated that he had been compelled under torture to sign the confessions contained in the police reports. He also told the judge that he had never been informed of the arrest warrant against him but had only heard of it at Smara police station on 8 June 2019 while being tortured. Mr. El Batal informed the judge that he had been moving around freely, that he was a student in Smara and that the Moroccan authorities were aware of his address and of his studies at the local university. He also stated that he had been to the police station four times in 2019 and had never been informed that there was an arrest warrant pending against him.

16. The investigating judge ordered Mr. El Batal's detention. Mr. El Batal was brought before the judge again 20 days later and his detention was extended. During this hearing, Mr. El Batal repeated his previous claims.

17. Mr. El Batal was transferred to the "black prison" in Laayoune on 10 June 2019 and placed in a cell that was allegedly overcrowded.

18. According to the source, Mr. El Batal's first instance trial before Laayoune Court of First Instance began on 2 October 2019. On that date, proceedings were deferred until 9 October 2019 at the request of the defence. Allegedly, Mr. El Batal was never allowed to meet with his lawyer, whether before, during or after the proceedings. The prosecutor's case file relies solely on the police records signed by Mr. El Batal under torture and the written statements of two officers who claimed that Mr. El Batal had attacked them while he was being arrested. The two officers did not attend the hearing on 9 October 2019. Therefore, the defence never had the opportunity to examine the police officers whose statements were used as evidence against Mr. El Batal. Moreover, the source indicates that Mr. El Batal tried to inform the judge that he had been a victim of torture (the video was submitted to the judge) and stated that he had been forced to sign confessions and police reports during his custody in Smara police station. However, it is alleged that, when Mr. El Batal gave his evidence at the trial, he was constantly interrupted. The judge reportedly did not ask questions about Mr. El Batal's ill-treatment and did not follow up on the allegations of torture or order a medical examination or an investigation.

19. Mr. El Batal was found guilty of all the charges against him and sentenced to 6 years' imprisonment by Laayoune Court of First Instance.

20. An appeal was lodged against this decision. The source explains that the appeal began on 29 October 2019 before Laayoune Court of Appeal. Neither Mr. El Batal nor his lawyer were informed of the date of the hearing or officially summoned. On that date, proceedings were deferred owing to the absence of Mr. El Batal's lawyer, who was on strike with several other Saharan and Moroccan lawyers. The appeal hearing was deferred to 5 November 2019 and then to 12 November 2019. On that date, Mr. El Batal was brought before the court with his lawyer. Mr. El Batal's family was also present during the trial. Once again, the judge did

not respond to the allegations of torture, even though the confessions were the only evidence used against Mr. El Batal. Following the trial, he was sentenced to 2 years' imprisonment for endangering traffic, assaulting public officials performing their duties and possession of weapons. An appeal was subsequently lodged with the Court of Cassation.

21. The source explains that Mr. El Batal was transferred to the Bou Izakarn prison on 16 November 2019. He was then transferred to the Smara prison on 11 January 2020 in order to sit his university exams and back to the Bou Izakarn prison on 24 January 2020. Mr. El Batal was again transferred to the Smara prison on 9 March 2020, where he was subjected to ill-treatment based on racial discrimination. Mr. El Batal began a hunger strike in response to the poor detention conditions and was finally returned to the Bou Izakarn prison.

22. On 8 November 2019, a joint communication from special procedure mandate holders regarding Mr. El Batal¹ was sent to the Moroccan authorities, which replied on 14 February 2020.²

b. Legal analysis

23. The source submits that Mr. El Batal's arrest and detention are arbitrary under categories II, III and V.

24. As a preliminary issue, the source argues that, in addition to human rights law, international humanitarian law applies in this case as *lex specialis*.³ The source also affirms that Mr. El Batal is a protected person under article 4 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention).

i. Category II

25. The source asserts that Mr. El Batal's arrest is directly related to his status as a Saharan journalist and human rights defender who campaigns for the right to self-determination of the people of Western Sahara. As shown by the facts of the case, at the time of his arrest Mr. El Batal was on his way to a reception being given in the home of a released Saharan activist, from which he was to report for Smara News. Following his violent arrest, a video showing the assault was widely disseminated. In response, Mr. El Batal was issued with a completely fabricated arrest warrant. This arrest warrant apparently followed a press release issued by the Moroccan authorities, indicating that the police had arrested criminals known to the regime and that the use of violence had been due to the criminal actions of the persons in the car.

26. The source concludes that Mr. El Batal's continued detention is directly related to his arbitrary arrest and his work as a Saharan journalist and is part of a cover-up by the Moroccan authorities consistent with the culture of impunity prevailing in Western Sahara. Consequently, the deprivation of liberty results from Mr. El Batal's exercise, as a Saharan journalist and human rights activist, of his rights to freedom of expression and association under articles 19 and 22 of the Covenant and is therefore arbitrary under category II.

ii. Category III

27. The source affirms that the violation of the right to a fair trial is of such gravity as to give Mr. El Batal's deprivation of liberty an arbitrary character. Moreover, the criminal proceedings against him, as a Saharan and a "protected person" under the Fourth Geneva Convention, constitute a separate violation of international humanitarian law. Wilfully depriving a "protected person" of the right to a fair trial and subjecting him or her to torture are grave breaches of international humanitarian law, in accordance with article 147 of the Fourth Geneva Convention, and potentially constitute war crimes under article 8 (2) (a) (ii) and (vi) of the Rome Statute of the International Criminal Court. The criminal proceedings

¹ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24936>.

² <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35172>.

³ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para. 106.

against Mr. El Batal also constitute a violation of the right to a fair trial enshrined in articles 5 and 66 to 75 of the Fourth Geneva Convention.

28. The source claims, firstly, that there is a lack of judicial independence. The source reiterates that Mr. El Batal was subjected to torture for three days at Smara police station. He told the investigating judge that he had been a victim of torture and he apparently bore signs of torture. He is said to have repeated the allegation on 1 July and 9 October 2019. However, the judge apparently did not respond to these serious allegations and did not order an investigation or a medical examination. The trial judge also reportedly failed to respond when evidence of violence on the part of the authorities was presented in court. The judge simply took the photographs and added them to the case file.

29. According to the source, these facts demonstrate that Mr. El Batal was subjected to a politically motivated prosecution before a Moroccan court that was neither independent nor impartial, in violation of article 14 (1) of the Covenant. The judicial system was thus employed to silence dissidents opposed to the Moroccan regime. This use of the judicial system to pursue political dissidents undermines irrevocably the principle of the right to be heard by an independent and impartial tribunal.

30. Moreover, this violation of the right to be tried before an independent and impartial tribunal is evidenced not only by the courts' blatant disregard of allegations of torture, but also by the way in which the Moroccan court handled Mr. El Batal's case. During the trial, the judge allegedly failed to consider Mr. El Batal's statements and explanations and took no action to verify the information presented. Instead, he based his decision solely on police reports and on confessions signed under torture. The decisions made by the court thus demonstrate that the Moroccan judicial system is neither independent nor impartial.

31. The source also affirms that a Moroccan court convicting a Saharan, who is a protected person under international humanitarian law, as a Moroccan national cannot be considered independent or impartial. The court did not take account of the fact that the accused was not a national of the occupying Power. Accordingly, Mr. El Batal's conviction constitutes a violation of the court's obligation to take into consideration the fact that the accused was not a national of the occupying Power, as required in article 67 of the Fourth Geneva Convention.

32. Secondly, the source recalls that, during his custody at Smara police station, Mr. El Batal was compelled under torture and with no lawyer present to sign the confessions contained in the police reports. These police reports were then used as evidence against Mr. El Batal. The source therefore concludes that the authorities acted in violation of articles 7 and 14 (3) (g) of the Covenant and article 75 (4) (d) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

33. As regards the assistance of counsel, the source repeats that Mr. El Batal was prevented from meeting with his lawyer prior to his hearing before the investigating judge and that he was never able to consult with his lawyer in private. The source stresses that it is not sufficient for a lawyer merely to be present during proceedings. The right of access to a lawyer and the right to an effective defence, provided in article 14 of the Covenant and article 72 of the Fourth Geneva Convention, were thus violated.

34. The source also alleges that the two police officers who were said to have been assaulted by Mr. El Batal were not present at the trial on 9 October 2019. Mr. El Batal was thus prevented from examining the prosecution witnesses. According to the source, the fact that the court relied on allegations made by absent witnesses constitutes a serious violation of the principle of equality of arms.

iii. Category V

35. The source asserts that Mr. El Batal 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.

36. The source argues that Saharans defending the right to self-determination are persecuted and systematically targeted by local police and Moroccan military forces.⁴

37. In this case, the source claims that Mr. El Batal was arrested and imprisoned because of his political opinions regarding the Saharan people's right to self-determination. If Mr. El Batal had not been Saharan and had not expressed his opinion on the political crisis in Western Sahara, the proceedings in question would not have taken place. His illegal arrest in response to his work as a Saharan journalist and the treatment he suffered during the arrest clearly indicate that his detention constitutes discrimination, in violation of international law. Mr. El Batal was targeted and was a victim of discrimination owing to his status as a Saharan and his political opinions on the right to self-determination of the Saharan people, which renders his detention arbitrary in that it constitutes a violation of articles 1, 2, 26 and 27 of the Covenant.

38. The source also affirms that the arrest, torture and detention of Mr. El Batal constitute separate violations of international humanitarian law, owing in particular to:

- (a) The withdrawal of the protection provided for in the Geneva Conventions of 1949;
- (b) The treatment of Saharans as Moroccans, in violation of article 47 of the Fourth Geneva Convention; and
- (c) The obligation of allegiance to the occupying Power, in violation of article 45 of the Regulations respecting the Laws and Customs of War on Land. These violations constitute grave breaches of international humanitarian law, in accordance with article 147 of the Fourth Geneva Convention.

39. The source argues that there is a systematic pattern of abuse against the people of Western Sahara, the aim of which is to silence the call for self-determination. Through their actions, the Moroccan authorities are denying the existence of a local population with a different nationality and applying a strategy that consists in forcing the inhabitants of the occupied territories to pay allegiance to the occupying Power. In this context, the source argues that the people of Western Sahara are victims of systematic human rights violations and grave breaches of international humanitarian law, which may constitute war crimes and crimes against humanity.

Response from the Government

40. On 17 April 2020, the Working Group transmitted a communication to the Government of Morocco, requesting it to provide detailed information on Mr. El Batal's situation by 16 June 2020 at the latest. The Working Group asked the Government to clarify the legal provisions related to his detention and their compatibility with international human rights law.

41. The Government submitted its response on 16 June 2020. The Government begins by stating that the allegations of the source confuse Saharan cultural identity with a Saharan pseudo-nationality, that Saharans are a constituent part of the Moroccan people and that the United Nations does not recognize any Saharan State entity. The Government also rejects the comments attacking the independence and operation of the Moroccan judicial system.

42. The Government then turns to the facts and the context of Mr. El Batal's case. It notes that Mr. El Batal was arrested in flagrante delicto in Smara on 7 June 2019, owing to his involvement in rioting and public disorder, during which several persons committed acts of violence against and abused and insulted public officials. The Government specifies that, during this unauthorized gathering, Mr. El Batal attacked a security device with stones, before driving through a security barrier in a vehicle with other persons, damaging police cars and causing injuries and major property damage.

⁴ See CAT/C/MAR/CO/4; A/HRC/22/53/Add.2; and A/HRC/27/48/Add.5.

43. The Government indicates that, at the time of his arrest, Mr. El Batal had a criminal record and was named in a wanted notice issued by the criminal investigation service on 30 March 2018.

44. The Government explains that Mr. El Batal appeared before the investigating judge for a preliminary hearing on 10 June 2019 and a detailed hearing on 27 June 2019 and was then brought before the criminal division of Laayoune Court of Appeal. It adds that, on the basis of the above-mentioned events, on 9 October 2019 Mr. El Batal was sentenced to 6 years' imprisonment for obstruction of traffic on the public highway, abuse of public officials carrying out their duties, intentional violence against public officials resulting in injuries, violence against and abuse of public officials carrying out their duties, possession of weapons that could constitute a threat to the safety of people and property, forceful resistance to a public official and damage of public property, armed resistance to public officials by a group of persons and looting of public property. On 12 November 2019, the court of appeal decided to reduce the sentence handed down at first instance to 2 years' imprisonment.

45. The Government goes on to make clarifications regarding the source's various allegations.

46. Regarding the allegation that Mr. El Batal's conviction was related to his activities as a journalist and human rights defender, the Government asserts that his conviction is related solely to his commission of acts of violence punishable by law. It notes that, during the judicial proceedings, neither the court nor the prosecution called into question Mr. El Batal's exercise of his right to freedom of expression or his professional activities. His claims to the contrary are unsubstantiated and he cannot use them to evade responsibility for his illegal acts. The Government recalls article 25 of the Constitution, which guarantees to all citizens without distinction the right to freedom of opinion and expression throughout the national territory.

47. As regards the allegations about Mr. El Batal's arrest and placement in police custody, the Government claims that he was in possession of a knife and tear gas spray at the time of his arrest and behaved violently towards law enforcement officers. The Government indicates that the law enforcement officers therefore had to use force, within the strict limits authorized by law, to arrest Mr. El Batal, who was caught in flagrante delicto and was immediately and properly informed of the reasons for his arrest and his right to remain silent and to communicate with his lawyer and family members. The Government specifies that the notification to Mr. El Batal of his rights and the reason for his arrest was reflected in the records of the investigation, which he read and signed. In addition, it confirms that Mr. El Batal was placed in police custody on 7 June 2019 and that custody was extended until 10 June 2019. Lastly, the Government reports that Mr. El Batal's family was informed of his arrest and custody by the police.

48. Concerning the allegations of torture and ill-treatment, the Government stresses that Mr. El Batal was never subjected to violence or ill-treatment. It maintains that Mr. El Batal's injuries on the day of his arrest resulted from the impact with the vehicles he deliberately drove into and from the violent resistance he offered. The Government specifies that Mr. El Batal was taken to see a doctor from Smara hospital on 7 June 2019 and was brought on 10 June 2019, at the end of the period of police custody, before the chief crown prosecutor, who ordered a medical examination. The Government also notes that Mr. El Batal stated that he had not been tortured when the National Human Rights Council visited the Laayoune prison on 10 June and 17 October 2019. Lastly, with respect to the allegations that the investigating judge did not order an expert assessment, the Government points out that Mr. El Batal did not raise these allegations at his preliminary hearing.

49. Regarding the allegation of non-compliance with guarantees for a fair trial, the Government confirms that Mr. El Batal enjoyed all such guarantees. In particular, it indicates that the trial consisted of six public hearings, attended by his lawyer and members of his family. Moreover, the Government notes that the court did not rely, in its judgment, on the reports drawn up by criminal investigation officers but also based its conviction on the material evidence in the case file, which confirmed the criminal acts of violence committed by the group of lawbreakers of which Mr. El Batal was part, and on witness statements made before the investigating judge. With respect to the allegation that the records were signed

under duress, the Government indicates that Mr. El Batal read and accepted the content of the records before signing them and did not raise the matter of duress before the investigating judge or the court. Lastly, as regards the absence of witnesses at the hearing, the Government claims that Mr. El Batal did not submit any petition for witnesses to be heard at the first instance trial or the appeal and that it is for the judge alone to consider whether a request to summon or hear a witness should be accepted. The Government notes that, on 29 July 2019, the investigating judge heard two police witnesses, who confirmed all the charges against Mr. El Batal. Concerning the right to communicate with a lawyer, the Government notes that Mr. El Batal was assisted by counsel before the investigating judge, at his first instance trial and at his appeal.

50. Lastly, as regards the allegations that the arrest, prosecution and conviction of Mr. El Batal are related to his Saharan origin and his political opinions on the right to self-determination of the Saharan people, the Government indicates that Saharan origin may under no circumstances constitute the basis for arrest or detention and recalls that all Moroccan citizens are equal before the law. The Government indicates that the arrest, prosecution and conviction of Mr. El Batal were based on the offences he committed and are unrelated to his ideas or activism.

51. The Government concludes with some comments about Mr. El Batal's detention conditions. It states that he enjoys all his rights, including his right to regular visits from his family, regular telephone calls and daily exercise. The Government indicates that Mr. El Batal is serving his sentence at the Bou Izakarn prison, where he was transferred on 16 November 2019, in conditions meeting the relevant international standards and that he has been able to continue his studies in good conditions.

Additional information from the Government

52. On 7 August 2020, the Government provided the following additional information.

53. The Government notes that an investigation was conducted following the submission of a written application by the prosecutor in respect of a criminal investigation officer suspected of having used violence in the performance of his duties without legitimate reason. The Government also indicates that five other police officers are being prosecuted for violence and that a trial was scheduled for 10 September 2020.

Further comments from the source

54. The Working Group transmitted the Government's response to the source, which submitted further comments on 1 July and 16 August 2020.

55. In the first of these communications, the source maintains all the allegations and provides additional details about the circumstances of Mr. El Batal's arrest and detention. In particular, the source insists, as regards category II, that Saharan journalists are subjected to harassment, threats and arbitrary arrest and detention on account of their exercise of their right to freedom of expression and that this is why Mr. El Batal was arrested and convicted. The source also indicates, in relation to category III, that the Government's arguments that Mr. El Batal did not inform the judge that he had been tortured and forced to sign the records containing his confession and made no request to confront the witnesses are contradicted by the judgment of Laayoune Court of Appeal of 12 November 2019. Lastly, as regards category V, the source insists that Mr. El Batal was arrested because of his political opinions about the right to self-determination of the people of Western Sahara. This is shown, according to the source, by the fact that the purpose of Mr. El Batal's arrest was to prevent him from reporting, in his capacity as a journalist, on the reception for a released Saharan activist, to which he was travelling.

56. In the second additional communication, the source points out that neither Mr. El Batal nor his family have been informed of the supposed investigations conducted in respect of the police officers. The source requests that the Government supply additional documents and information, including the identity of the police officers being prosecuted and the outcome of the trial supposedly held on 10 September 2020.

Discussion

57. The Working Group thanks the parties for their cooperation and will now examine their allegations with a view to rendering an opinion.

58. In determining whether Mr. El Batal'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 (A/HRC/19/57, para. 68). As the Working Group has often pointed out, including in cases concerning Morocco,⁵ it is not enough to make a formal objection to the allegations: the Government is in possession of all the material relating to the proceedings and is therefore able to provide any information that it deems necessary to support each of its counterarguments.

59. 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 (XV). 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. El Batal's deprivation of liberty without having recourse to international humanitarian law.⁶

60. Lastly, the Working Group has taken note of the position expressed by Morocco regarding the political status of the territory of Western Sahara and the fact that the Government points out that the United Nations does not recognize any Saharan State entity.

61. The Working Group considers that this argument does not concern the allegations in question. Regardless of the status of Western Sahara, this cannot justify human rights violations committed against its inhabitants. Moreover, it does not affect the Working Group's competence to receive, consider and deliberate on the validity of allegations of human rights violations in this territorial area. Similarly, the Working Group's conclusions on the allegations of violations have no legal consequences for the status of Western Sahara. Consequently, the Working Group's opinions should not be interpreted as expressing any political view concerning the present or future status of the Non-Self-Governing Territory of Western Sahara.⁷

i. Category I

62. The Working Group observes that the parties agree that Mr. El Batal was arrested on 7 June 2019 and held in police custody until 10 June 2019. The source alleges that Mr. El Batal was arrested and then detained at Smara police station without knowing the reason for his arrest. According to the source, the reason for his arrest and detention in police custody was only provided to him on 8 June 2019. That reason was apparently an arrest warrant dating from 2018, related to a demonstration in which Mr. El Batal was said to have taken part on 27 March 2018 with two other journalists. According to the source, this arrest warrant was completely fabricated.

63. In its response, the Government challenges these allegations and maintains that Mr. El Batal was arrested in *flagrante delicto* and immediately informed of the reasons for his arrest. It also indicates that the reason for Mr. El Batal's arrest was set down in the records of the investigation, which he read and signed.

64. The Working Group notes that the Government has simply denied the allegations that Mr. El Batal was arrested without being informed of the reasons. The Working Group is not convinced by the justification of *flagrante delicto* invoked by the Government. According to the source, the video of the arrest, which was submitted to the judge and widely disseminated

⁵ See, in particular, opinions No. 11/2017 and No. 27/2016.

⁶ Opinion No. 52/2020, para. 75; and A/HRC/27/48/Add.5, para. 62.

⁷ Opinion No. 60/2018, paras. 62–64.

on social media, shows that Mr. El Batal was assaulted at the time of his arrest. The Government has not disputed the existence or the content of this video.

65. Moreover, the Working Group notes that the Government also states that a warrant had been issued for Mr. El Batal's arrest in connection with incidents dating from 2018 and that this was supposedly the reason for his arrest. The Working Group observes that the source has reported that Mr. El Batal was only informed of the existence of an arrest warrant dating from 2018 on the day after his arrest, 8 June 2019. The Government has not supplied any reason for the delay in executing the warrant, although Mr. El Batal could easily have been located in Smara.

66. The Working Group recalls that, according to article 9 (1) of the Covenant, no one may be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Article 9 (2) provides that anyone who is arrested should be informed, at the time of arrest, of the reasons for his or her arrest and should be promptly informed of any charges against him or her. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, 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.⁸ Mr. El Batal was arrested without being shown an arrest warrant, in violation of article 9 (1) of the Covenant. In addition, Mr. El Batal was not informed of the reasons for his arrest, in violation of article 9 (2) of the Covenant. The Working Group considers that an arrest is arbitrary when it is made without the arrested person being informed of the reasons for the arrest.⁹ In this case, the Working Group concludes that the failure to show an arrest warrant at the time of the arrest and to provide information about the reasons for the arrest constitutes a violation of article 9 of the Universal Declaration of Human Rights and article 9 of the Covenant.

67. Furthermore, article 9 (3) of the Covenant provides that anyone arrested or detained on a criminal charge should be brought promptly before a judge so that he or she is able to challenge the legality of the detention. As the Human Rights Committee has stated, 48 hours is ordinarily sufficient to satisfy the requirement of bringing a detainee "promptly" before a judge following his or her arrest, and any longer delay must remain absolutely exceptional and be justified under the circumstances.¹⁰ In this case, Mr. El Batal was not brought before the investigating judge of Laayoune Court of First Instance until 10 June 2019. The Working Group observes that the Government violated its obligation under article 9 (3) of the Covenant by not bringing Mr. El Batal before a judge until three days after his arrest, without justifying the delay. The Government notes in its response that Mr. El Batal's detention was extended by the prosecutor on 9 June 2019. However, as the Working Group has previously noted, a prosecuting body cannot be considered a judicial authority for the purposes of article 9 (3) of the Covenant.¹¹

68. Although the source does not invoke category I in relation to the allegations, the Government has had the opportunity to comment on the facts laid out above. In the Working Group's view, all these violations of article 9 of the Covenant lead to the conclusion that Mr. El Batal's arrest without his being shown an arrest warrant or informed of the reasons for the arrest and the failure to bring him before a judge promptly render his detention arbitrary under category I, owing to the lack of a legal basis for it.

ii. *Category II*

69. Under category II, the source alleges that Mr. El Batal's arrest is directly related to his work as a journalist and his activism for the right to self-determination of the people of Western Sahara. In its response, the Government denies that Mr. El Batal's arrest and detention result from his expression of an opinion or his association with others. However, the Government merely states that Mr. El Batal's exercise of his right to freedom of

⁸ Opinions No. 25/2020, para. 34; No. 46/2018, para. 48; No. 36/2018, para. 40; No. 10/2018, para. 45; and No. 38/2013, para. 23.

⁹ Opinions No. 83/2019, para. 50; No. 46/2019, para. 51; and No. 10/2015, para. 34.

¹⁰ Human Rights Committee, general comment No. 35 (2014), para. 33.

¹¹ Ibid., para. 32. See also opinions No. 41/2020, para. 60; No. 5/2020, para. 72; and No. 14/2015, para. 28. See also A/HRC/45/16/Add.1, para. 35.

expression and his professional activities were never called into question during the judicial proceedings and that it is for him to provide evidence for his allegations.

70. The source also reports that Mr. El Batal's conviction is based on incidents dating from 2018, namely his participation in a demonstration on 27 March 2018 during which he was allegedly part of a group of people that resisted and attacked the police. The Government claims that he was wanted for these incidents, but it has not responded to Mr. El Batal's claim that he had been moving around freely since his release in 2017 and had visited Smara police station several times to apply for a taxi licence without being told that there was a warrant pending against him. Moreover, he was not informed of this reason at the time of his arrest but only the day after, following the dissemination of a video showing the violence meted out by plain-clothes police officers during the arrest. The Working Group notes that the allegation that a prior warrant was outstanding is difficult to reconcile with the period that elapsed between Mr. El Batal's arrest and the notification of this reason to justify his arrest and detention. The Working Group considers that the Government has not demonstrated that the 2018 arrest warrant was the real reason for Mr. El Batal's arrest.

71. The Working Group notes the links between Mr. El Batal and the political situation in Western Sahara. Mr. El Batal is affiliated with the political movement for the independence of Western Sahara, a movement that runs counter to the Government's policy of laying claim to the entire territory of Western Sahara. Moreover, the events in question and the arrest took place in that region. During his interrogation, Mr. El Batal was required to answer questions related to his political activism. In addition, the use of the criminal justice system to silence dissent has been reported several times, to the Working Group¹² and other bodies.¹³

72. The Working Group recalls that article 19 (2) of the Covenant provides that everyone has the right to freedom of expression; this right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his or her choice. This right includes political discourse, commentary on public affairs, discussion of human rights and journalism.¹⁴ The Working Group considers that there is corroborating evidence to show that the political opinion publicly expressed by Mr. El Batal and the exercise of his profession of journalist are the real cause of the judicial proceedings against him. In particular, his arrest occurred while he was on his way to a reception to report for Smara News on the release of a human rights defender and activist for the self-determination of the people of Western Sahara.

73. There is nothing to suggest – and the Government has not argued – that the restrictions to which the right to freedom of expression may be subject under article 19 (3) of the Covenant apply in the present case. The Working Group is not convinced that the prosecution of Mr. El Batal was necessary to protect a legitimate interest under those provisions or that his conviction and sentence were a proportionate response to his activities. Importantly, there is no evidence to suggest that Mr. El Batal's behaviour at the time of his arrest could reasonably be considered to have posed a threat to national security, public order, public health or morals, or the rights or reputations of others. In its resolution 12/16 (para. 5 (p)), the Human Rights Council called upon States to refrain from imposing restrictions under article 19 (3) that are not consistent with international human rights law. 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.

74. In these circumstances, the Working Group considers that Mr. El Batal's arrest and detention appear to be related to the expression of a political opinion on the situation in Western Sahara and the exercise of his profession of journalist, in violation of the protection he enjoys under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant, which guarantee the right to freedom of expression. The Working Group

¹² See, in particular, opinions No. 23/2019, No. 60/2018 and No. 58/2018.

¹³ CAT/C/MAR/CO/4, para. 10; and A/HRC/22/53/Add.2, paras. 62–64.

¹⁴ Human Rights Committee, general comment No. 34 (2011), para. 11. See also, for example, opinions No. 46/2020, No. 45/2019 and No. 31/1998 (in which it is noted that journalism is protected as part of freedom of expression under article 19 of the Covenant).

concludes that Mr. El Batal's arrest and detention stem from the exercise of one of his fundamental freedoms and are therefore arbitrary under category II.

iii. *Category III*

75. As Mr. El Batal's detention is arbitrary under category II, he cannot be tried; no trial should therefore have been held. However, since a trial has taken place and the source has submitted arguments in that regard, the Working Group will assess those arguments additionally.

76. The Working Group notes that, according to the source and the Government's response, Mr. El Batal was convicted on the basis of confessions contained in police reports drafted at Smara police station. The confessions were made by Mr. El Batal after his arrest, during his detention in police custody, while he had no access to a lawyer. According to the source, Mr. El Batal was compelled under torture to sign the records containing these confessions, a fact he reported to the investigating judge of Laayoune Court of First Instance.

77. In its response, the Government confines itself to denying the existence of confessions obtained under torture. It alleges that Mr. El Batal's injuries result not from torture but from impacts with vehicles he deliberately crashed into and the violent resistance he offered at the time of his arrest. However, the Government has not produced any information that could confirm the veracity of these claims, for example the findings of medical experts regarding the injuries. Given that the source has made credible allegations, the burden of proving the contrary lies with the Government.

78. The Working Group considers that the source has made a *prima facie* credible case, which has not been refuted by the Government, that Mr. El Batal was tortured during his detention. His treatment seems to violate the provisions 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.¹⁵ The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

79. In addition, the Working Group considers that the allegations related to forced confessions are credible and recalls that confessions made in the absence of a lawyer are inadmissible as evidence in criminal proceedings.¹⁶ The burden is on the Government to prove that the confessions were made freely,¹⁷ but it has not done so. Accordingly, the Moroccan authorities violated Mr. El Batal's right to be presumed innocent and not to be compelled to confess guilt, under article 14 (2) and (3) (g) of the Covenant. The use of confessions obtained under torture constitutes a violation of article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, even if other evidence was available to support the verdict.¹⁸

80. The Government observes that Mr. El Batal did not raise these allegations at his preliminary hearing, but it has not responded to the source's claim that Mr. El Batal had visible marks on his body during that hearing.¹⁹ Nor has the Government responded to the source's claim that Mr. El Batal informed the judge of the video showing him being assaulted during his arrest. Moreover, according to the source, Mr. El Batal told the investigating judge that he had been a victim of torture, and the judge did not respond to the allegations of torture, which were repeated at the hearings of 1 July and 9 October 2019 and during the appeal. Lastly, the Working Group takes note of the Government's second response, in which it states that an investigation is pending against a police officer who is suspected of having used violence in the performance of his duties without legitimate reason and that prosecutions for

¹⁵ A/HRC/27/48/Add.5, paras. 63–64 and 74; CCPR/C/MAR/CO/6, paras. 23–24; and CAT/C/MAR/CO/4, paras. 12 and 17.

¹⁶ Opinions No. 41/2020, para. 70; No. 15/2020, para. 76; and No. 5/2020, para. 83. See also A/HRC/45/16, para. 53.

¹⁷ Human Rights Committee, general comment No. 32 (2007), para. 41.

¹⁸ Opinion No. 41/2020, para. 70.

¹⁹ Opinion No. 29/2017, paras. 63–65.

violence have been initiated against five police officers. This being the case, Mr. El Batal's allegations of police violence do not appear to be unfounded. The Working Group considers that the investigating judge and the trial judge had an obligation under articles 12, 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to open an investigation. Failure by a judicial authority to intervene in cases of allegations of torture constitutes a violation of the right under article 14 (1) of the Covenant to be tried by an independent and impartial tribunal.²⁰ The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers.

81. Moreover, the court admitted the statements of the two police officers heard by the investigating judge on 29 July 2019 as decisive evidence against Mr. El Batal, although he was not present at the hearing and the two witnesses were not present at his first instance trial on 9 October 2019. Mr. El Batal was thus denied the opportunity to confront them during the trial. The source stresses that Mr. El Batal asked the judge on numerous occasions to be able to examine them. The Government responds that Mr. El Batal made no such request, but it has not provided evidence that Mr. El Batal was informed of the possibility of examining the two officers.

82. In the Working Group's view, the fact that Mr. El Batal was denied the right to confront the witnesses whose statements played a decisive role in the guilty verdict violates the fundamental guarantees for a fair trial provided in article 10 of the Universal Declaration of Human Rights and article 14 (3) (e) of the Covenant.

83. The source also reports that Mr. El Batal did not have access to a lawyer during his detention in police custody and did not have the possibility of speaking to a lawyer before, during or after his appearances before the investigating judge of Laayoune Court of First Instance on 10 June 2019 and before the same court on 2 and 9 October 2019. The Working Group notes that the Government has not responded directly to this allegation. It simply affirms that Mr. El Batal was assisted by counsel before the investigating judge, at his first instance trial and at his appeal. The mere presence of a lawyer at the hearings is not sufficient because the accused must be given the opportunity to communicate in private with a lawyer of his or her choice in order to prepare a defence, in accordance with article 14 (3) (b) of the Covenant.²¹

84. To sum up, the present case involves a person who was arrested, accused, tried and convicted on the basis of confessions potentially obtained under torture and on the basis of statements by witnesses whom he was not given the opportunity to confront. He did not have access to a lawyer during his interrogation, was not able to communicate with his lawyer before the trial and retracted his confession at his trial.

85. The Working Group considers that the violations of the right to a fair and just trial are of such gravity as to give Mr. El Batal's detention an arbitrary character under category III.

iv. Category V

86. Lastly, the source alleges that Mr. El Batal is being discriminated against on the basis of his Saharan identity and his political opinions on the right to self-determination of the Saharan people. The Government disputes this allegation, affirming that Mr. El Batal is a Moroccan national and that his prosecution and conviction result solely from the offences he committed.

87. The Working Group notes that there is a widespread practice of abuse against persons who, like Mr. El Batal, campaign for the right to self-determination of the Saharan people.

²⁰ Opinions No. 24/2020, para. 108; and No. 53/2018, para. 77 (b). See also CCPR/C/MAR/CO/6, paras. 33–34.

²¹ 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, annex), principle 9 and guideline 8. See also CCPR/C/MAR/CO/6, paras. 25–26; CAT/C/MAR/CO/4, para. 7; and A/HRC/45/16.

In this regard, the Working Group recalls its previous decisions in cases involving Saharans and its finding that the persons concerned had suffered discrimination.²²

88. Taking into account the previous conclusion concerning category II, the Working Group has no doubt that the accusations against Mr. El Batal result from his status as a Saharan and his political opinion in favour of self-determination for the Saharan people. If he had not been Saharan and had not expressed his opinion on the political crisis in Western Sahara, the proceedings in question would probably not have taken place.

89. That constitutes discrimination in violation of international law, including of articles 2 (1) and 26 of the Covenant. On that basis, the Working Group considers that Mr. El Batal's detention is also arbitrary under category V.

90. Lastly, the Working Group takes note of the Government's second response, in which it specifies that investigations are in progress in relation to the allegations received regarding Mr. El Batal. The Working Group thanks the Government for its cooperation, shown by its willingness to inform the Working Group of developments, and encourages the Government to continue its investigations into acts of violence committed by law enforcement officials.

Disposition

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

The deprivation of liberty of Walid El Batal, being in contravention of articles 2, 3, 7, 9, 10, 11 (1) and 19 of the Universal Declaration of Human Rights and articles 2 (1), 9, 14, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

92. The Working Group requests the Government of Morocco to take the steps necessary to remedy the situation of Mr. El Batal without delay and bring it into conformity with the relevant international standards, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

93. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. El Batal immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.²³ In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. El Batal.

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

95. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

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

Follow-up procedure

97. 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:

²² Opinions No. 67/2019, No. 23/2019, No. 60/2018, No. 58/2018, No. 31/2018 and No. 11/2017.

²³ Working Group on Arbitrary Detention, deliberation No. 10 (A/HRC/45/16, annex I), identifying the comprehensive reparations to which victims of arbitrary deprivation of liberty are entitled.

- (a) Whether Mr. El Batal has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. El Batal;
- (c) Whether the investigation into the violation of Mr. El Batal's rights, the existence of which the Government has affirmed, is ongoing and, if so, what the outcome of the investigation is;
- (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.

98. 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.

99. 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.

100. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²⁴

[Adopted on 24 November 2020]

²⁴ Human Rights Council resolution 42/22, paras. 3 and 7.