



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018****Opinion No. 60/2018 concerning Mbarek Daoudi (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 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 16 May 2018, the Working Group transmitted to the Government of Morocco a communication concerning Mbarek Daoudi. The Government replied to the communication on 16 July 2018. 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. Mbarek Daoudi was born in 1956. He lives in Guelmim, Morocco, with his wife and five children. Mr. Daoudi is a former officer of the Moroccan army who is now retired. He is a political activist and human rights defender: Mr. Daoudi defends the right to self-determination of the Sahrawi people and has become a well-known figure in the Sahrawi community, particularly in Guelmim, in southern Morocco.

(a) Arrest and detention

5. According to the source, on 28 September 2013, the police searched Mr. Daoudi's and his father's houses without a warrant. The police reportedly found and confiscated 35 shotgun cartridges, an antique gun and a long metal tube. These objects constitute the official reason for Mr. Daoudi's arrest. The arrest was made without obtaining a warrant or showing any other legal documents. The legal basis for the arrest is also unknown.

6. The source reports that two of Mr. Daoudi's sons were also arrested on that occasion. All three were taken to an undisclosed location. The source points out that Mr. Daoudi and his sons were tortured in front of each other. The source adds that the police beat one of the sons so brutally that he had blood and cuts on his face. The source also claims that the police urinated and spat on him. The police then brought in Mr. Daoudi and started torturing him in the same way and humiliating him in front of his sons. After three days of detention and interrogation, Mr. Daoudi was forced to sign a statement in which he confessed to possessing a shotgun, an antique gun and a metal tube with the intention of making a weapon using the metal tube, knowing that doing so was illegal.

7. According to the source, Mr. Daoudi was then taken to Salé 1 prison in Morocco.

8. According to the source, Mr. Daoudi appeared before the Rabat Military Court on 30 January 2014 and was charged with "possession of hunting cartridges" and "attempt to make a firearm". Mr. Daoudi said that the police had forced him to sign a written statement and denied the charges against him. He claimed that the cartridges were for a shotgun that he had legally acquired, that the other gun was an antique inherited from his grandfather and that he did not intend to make a weapon with the metal tube. On 30 January 2014, the hearings in this case were postponed indefinitely without the reasons for the postponement being given to the accused.

9. The source also states that, in December 2014, Mr. Daoudi went on a 52-day hunger strike to demand a trial. At the time he had been in pretrial detention for 15 months.

10. On 5 March 2015, Mr. Daoudi appeared before the Rabat Military Court. The hearing was again adjourned. On 23 July 2015, the source points out that the case against Mr. Daoudi before the Rabat Military Court was closed.

11. The source points out that, while Mr. Daoudi was being tried in the Rabat Military Court, charges against him had also been brought in the Guelmim Court of First Instance. The case opened on 9 March 2015 before this court includes the charge of "possession of a military uniform". Mr. Daoudi had been sentenced to 3 months in prison and fined 1,000 dirhams. The public prosecutor's office lodged an appeal against the court's decision against Mr. Daoudi and called for harsher penalties. The hearing of the appeal before the Agadir Court of Appeal began on 31 March 2015 and was postponed on the same day. The case was adjourned again on 2 April 2015. On 9 April 2015, Mr. Daoudi was sentenced to 6 months in prison by the Agadir Court of Appeal. The source states that Mr. Daoudi was not represented by counsel at these hearings.

12. According to the source, although Mr. Daoudi should have been released on 3 September 2015, he was kept in detention. Instead, Mr. Daoudi was informed by a prison guard that other cases had been brought against him. However, the prison guard did not provide any further information on the substance of the cases or the charges brought.

13. The source reports that a new case had indeed been brought against Mr. Daoudi and the trial began on 27 October 2015 in the Agadir Court of Appeal. The case was adjourned.

On 3 December 2015, the Criminal Division of the Agadir Court of Appeal sentenced Mr. Daoudi to 5 years' imprisonment for "possession of hunting cartridges" and "attempt to make a firearm". He was not represented by counsel. Following his appeal to the Agadir Court of Appeal, on 8 February 2016, the Criminal Division of the Court upheld his conviction. The source also states that Mr. Daoudi was removed from the courtroom because of his support for the Frente POLISARIO and his demand for the Sahrawi people's right to self-determination during the trial.

14. In addition, on 16 November 2017, Mr. Daoudi was notified of a decision stating that his previous 6-month sentence was not included in the new 5-year sentence. Mr. Daoudi was therefore sentenced to 5 years and 6 months' imprisonment, since he was sentenced twice by two different courts.

15. The source indicates that Mr. Daoudi, after having been detained in Salé 1 prison, was transferred on 12 March 2015 to Ait Melloul prison. On 27 April 2016, he returned to Salé 1 prison. On 28 August 2016, he was transferred again and has since been held in Bouizakarne prison.

(b) Legal analysis

16. The source alleges that the facts and reasons for Mr. Daoudi's arrest clearly indicate that he is being subjected to arbitrary detention, that he is a victim of his political opinions concerning the right to self-determination of the Sahrawi people, that he was sentenced to imprisonment without a fair trial, with the use of confessions signed under duress and torture, and that he is under detention because of his Sahrawi ethnicity. The detention is arbitrary under categories I, II, III and V.

(c) Deprivation of liberty under category I

17. According to the source, at the time of his arrest, Mr. Daoudi was arrested with his two sons without an arrest warrant and held incommunicado for three days without being able to consult a lawyer or contact his family. After his arrest, Mr. Daoudi was placed in solitary confinement and denied access to a lawyer for several months. The treatment Mr. Daoudi suffered upon his arrest constitutes a serious violation of article 7 of the International Covenant on Civil and Political Rights and makes the arrest unlawful under article 9 of the Covenant.

18. In addition, the source submits that Mr. Daoudi should have been released on 3 September 2015. Instead of being released, he was informed by a prison guard that there were other pending cases against him, without being informed of the exact charges or the reasons for his continued detention. Mr. Daoudi was not informed of them until he appeared before the Agadir Court of Appeal on 27 October 2015. That being the case, the fact that the Government continues to keep Mr. Daoudi in detention, whereas he was to have been released on 3 September 2015 until new charges were brought on 27 October 2015, without informing him of the reasons for his continued detention and without his being able to challenge the detention, makes the detention devoid of legal basis.

19. This places Mr. Daoudi outside the protection of the law and renders his detention illegal under article 9 of the Covenant and article 9 of the Universal Declaration of Human Rights, falling into category I.

(d) Deprivation of liberty under category II

20. The source indicates that Mr. Daoudi is a Sahrawi national from Western Sahara. Western Sahara is registered as a Non-Self-Governing Territory and the territory is subject to the right to self-determination in accordance with the principles contained in General Assembly resolutions 1514 (XV) and 1541 (XV).

21. The source notes that Mr. Daoudi's detention is in response to his political activism regarding the right to self-determination of the Sahrawi people and the independence of Western Sahara. Since his retirement from the Moroccan army in 2008, Mr. Daoudi has openly pleaded for the right to self-determination of the Sahrawi people. He has organized meetings with human rights activists and international observers, encouraging Sahrawis to

fight for their human rights. Shortly before his arrest, he testified as a witness to the execution of a Sahrawi family in February 1976. He revealed the Amgala mass grave, where the bodies of this family were found in June 2013, to foreign human rights activists.

22. In addition, the source indicates that Mr. Daoudi's family has been harassed since his arrest and that four of his sons have also been prosecuted for their political opinions. Furthermore, Mr. Daoudi's treatment clearly indicates that he was arrested and detained as a result of the exercise of his rights under the Covenant. At the appeal hearing on 8 February 2016, Mr. Daoudi was removed from the courtroom during the proceedings after having openly expressed his support and pleaded for the Frente POLISARIO and the right to self-determination. In addition, Mr. Daoudi was not released on the specified date and was not informed of the charges against him, which clearly indicates that he is being subjected to politically motivated prosecution because of his support for the right to self-determination of the Sahrawi people. His treatment while in custody and the extended period of his detention indicate that Mr. Daoudi is being prosecuted for his political activism and testimony on the Amgala mass grave in June 2013.

23. Consequently, the source considers that the deprivation of liberty is the result of the exercise by Mr. Daoudi of his rights to freedom of expression and association as a political activist in Western Sahara guaranteed by articles 19, 21, 22, 26 and 27 of the Covenant and is therefore arbitrary under category II.

(e) Deprivation of liberty under category III

24. The source claims that Mr. Daoudi's deprivation of liberty is arbitrary since the Government's detention and prosecution of the applicant does not comply with minimum international standards of due process.

25. The source alleges that Mr. Daoudi was not informed of the reason for his arrest in March 2013. The police officers who made the arrest did not provide him with a legal basis or a warrant. After his arrest, he was denied the assistance of a lawyer for more than four months. Having been unable to meet with a lawyer, Mr. Daoudi remained unaware of the content of the charges against him.

26. Mr. Daoudi's right to be informed was also violated when his planned release in September 2015 was cancelled. After his conviction by the Agadir Court of Appeal, he was not properly informed of the existence or content of the new charges brought against him. Mr. Daoudi therefore remained unaware of the reason for his continued detention for more than a month.

27. In addition, the source alleges that, after his arrest, Mr. Daoudi was tortured along with his two sons and forced to sign a confession already drawn up by the Moroccan authorities. Mr. Daoudi was not allowed to read the confession before signing it. As he was held incommunicado, he was also not assisted by a lawyer. This confession was used as preliminary evidence against him.

28. According to the source, during all the proceedings against Mr. Daoudi, he informed the judge that the confessions were the result of torture. Mr. Daoudi also informed the court that the confession had been drawn up by the police who were detaining him. No court conducted an investigation into the allegations of torture. On the contrary, the confession was used against him as preliminary evidence. The Government has therefore failed to comply with its international obligations and acted in violation of articles 7 and 14 (3) (g) of the Covenant.

29. The source also reports that the applicant was neither represented by counsel nor allowed to consult a lawyer from the time of his arrest until the trial began on 30 January 2014. As a result, the applicant was denied the right to counsel during the first four months of his pretrial detention.

30. In addition, at the time of the appeal lodged with the Agadir Court of Appeal in March and April 2015, the applicant was not represented by counsel in any of the hearings. He also did not have a lawyer present during the proceedings before this court on 27 October and 3 December 2015, or during his appeal on 8 February 2016.

31. The source also notes that, in the most recent proceedings that ended in a 5-year prison sentence, Mr. Daoudi repeated slogans in support of the Frente POLISARIO and claimed the Sahrawi people's right to self-determination and the independence of Western Sahara during the hearing. In response, the President of the court ordered his removal from the courtroom and proceeded with the deliberation of the case. After more than three hours of deliberation, the court upheld the initial sentence of 5 years' imprisonment previously imposed by the Agadir Court of First Instance. Mr. Daoudi's family reports that he had no lawyer at all at the time of this appeal.

32. The court in question took no steps to ensure that Mr. Daoudi had access to proper legal representation, which constitutes a violation of article 14 (3) (d) of the Covenant, principle 17 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

33. The source further argues that, while the applicant was arrested in September 2013, he was ultimately convicted in February 2016. This period of two years, five months is not a reasonable time limit for these criminal proceedings, since neither the complexity nor the particular circumstances of this case justify an investigative process of more than two years. Mr. Daoudi felt compelled to go on hunger strike in order to appear in court to challenge the charges laid against him. Before taking such action, the applicant remained unaware of the content of the charges against him.

34. Lastly, the source recalls that the applicant was to be released on 3 September 2015, after serving his 6-month sentence, and that his case before the Rabat Military Court had been closed in July 2015. He was then informed by a prison officer of new charges brought against him and new proceedings scheduled for October 2015 before the Agadir Court of Appeal.

35. Therefore, according to the source, because of the lack of clarity of the case against Mr. Daoudi, and the lack of information regarding the new charges brought against him, there are doubts as to whether these new charges are based on the same facts as those in the previous cases, which were officially closed by the Moroccan authorities. The source therefore points out that the principle of *non bis in idem* has not been observed.

(f) Deprivation of liberty under category V

36. The source states that Mr. Daoudi is a Sahrawi national from Western Sahara. However, Sahrawis defending the right to self-determination are persecuted and systematically targeted by local Moroccan police and military forces.

37. The source submits that Mr. Daoudi is a human rights defender who advocates the right to self-determination of the Sahrawi people, respect for human rights and an end to impunity. Before his arrest, Mr. Daoudi lifted the veil on the Amgala mass grave in front of international observers, which led to the arrest of Mr. Daoudi and two of his children, and to the persecution of his family. In addition, the treatment he has suffered, including forms of torture and other inhuman treatment, and the refusal to release him on the specified date clearly indicates that his detention constitutes discrimination in violation of international law. It is clear, according to the source, that Mr. Daoudi was targeted and discriminated against because of his support for the Sahrawi people's right to self-determination, which makes the detention of the applicant arbitrary under category V, as it constitutes discrimination in violation of articles 1, 2, 26 and 27 of the Covenant.

38. The source also stresses that, in certain circumstances, widespread or systematic imprisonment or other serious cases of deprivation of liberty in violation of the fundamental rules of international law may constitute crimes against humanity.¹

¹ Opinion No. 47/2012, para. 22.

Government reply

39. The Working Group sent a communication to the Government of Morocco on 16 May 2018. The Government sent its response on 16 July 2018.

40. By way of introduction, the Government points out that Mr. Daoudi's case is made up of a single case file divided into two related cases. The first case concerns charges involving the possession of hunting cartridges and an attempt to make firearms. The case was subsequently referred to the Agadir Court of Appeal after the entry into force, on 1 July 2015, of the Military Justice Act, No. 108-13. The second case concerns facts relating to the illegal wearing of a regulation uniform in public and illegal interference in a post regulated by law, which fall within the jurisdiction of the First Instance Court of the City of Guelmim.

41. The Government makes clear that Mr. Daoudi was arrested on 28 September 2013 in Guelmim after an investigation into a case of robbery in which one of his sons was allegedly involved. In fact, during a search of the family home, the criminal investigation service discovered shotgun cartridges and an iron gun fitted out with two electrical wires used to make a mechanism for projecting explosive objects. In the same search, criminal investigators went to another of Mr. Daoudi's homes, where an antique firearm and a hunting cartridge were discovered. This was sufficient evidence to arrest and detain Mr. Daoudi on charges of attempt to illegally make a firearm, illegal wearing a regulation military uniform in public and unlawful interference in a post regulated by law.

42. The Government reports that a hearing was scheduled for 30 January 2014. However, considering that exhibits had still not been handed over to the military court by the Guelmim criminal investigation service, the hearing had to be postponed.

43. The Government points out that the person concerned is currently in detention in Bouizakarne prison, where he is serving his custodial sentence in accordance with Act No. 23/98 on the organization and functioning of prison facilities in Morocco and under conditions of detention that fully comply with international standards in this regard, including accommodation, food, medical care, walks, sports and telephone calls. In this regard, Mr. Daoudi has the right to make regular and repeated calls to contact his family, just as he has the right to receive ongoing visits.

44. Lastly, the Government reports that Mr. Daoudi's state of health is completely normal, as his medical file attests.

45. With regard to the allegations of the source relating to category I, the Government responds that Mr. Daoudi was placed in police custody, in accordance with the instructions of the competent public prosecutor's office and in compliance with the legal provisions in force, from 28 September to 1 October 2013, with the period of custody being extended an additional 24 hours with the agreement and authorization of the competent prosecutor. At the time of his arrest, Mr. Daoudi was informed of all his rights, including his right to remain silent, to have access to a lawyer and to contact his family. In addition, his family was informed of his arrest.

46. With regard to the allegations that Mr. Daoudi was arrested for his "political activism", the Government stresses that national law guarantees the right of all Moroccan nationals to freedom of opinion and expression, on an equal footing and on the basis of the same approach to all regions of Morocco without distinction, in accordance with the provisions of the Moroccan Constitution. This right is guaranteed provided that public order in Morocco and the territorial integrity of Morocco are respected. The Government further alleges that the issue relating to the situation in Western Sahara falls exclusively within the purview of the Security Council and is not under the mandate of the Working Group.

47. With regard to the allegations of non-compliance with fair trial standards, the Government notes that Mr. Daoudi enjoyed all the guarantees of a fair trial in accordance with the legal provisions in force. In this regard, the Government reports that Mr. Daoudi was assisted by lawyers from the Agadir and Laayoune bars, whose names the Government supplies.

48. In addition, in parallel with the proceedings brought against him before the military court, he had been prosecuted by the Crown Prosecutor of the Guelmim Court of First Instance for publicly wearing a regulation uniform and for unlawful interference in a post regulated by law, which necessitated his transfer to the local prison in Guelmim to facilitate making him available to the Guelmim prosecutor's office.

49. The Government also disputes the allegations relating to forced confessions and points out that Mr. Daoudi looked over the minutes of the hearing without making any objections, remarks or additions. Furthermore, Mr. Daoudi entered his name voluntarily and by his own hand and signed these minutes. The Government further specifies that no evidence of violence or torture was found after Mr. Daoudi's appearance before the military court, nor had he filed a complaint, personally or through his defence counsel, through whom he could have expressed a desire to be examined by a doctor and have a forensic medical report drawn up in accordance with the provisions of article 74 of the Moroccan Code of Criminal Procedure, or to be transferred to a hospital.

50. Furthermore, the military court prosecution, which is required by law to record any obvious signs of violence on the accused person appearing before it, observed nothing on Mr. Daoudi, who was in a completely normal state of health and showed no particular marks that could be likened to torture or ill-treatment.

51. With regard to Mr. Daoudi's alleged removal from the hearing of 8 February 2016, it should be noted that his lawyers had asked the court for him to be granted mitigating circumstances and he was the last to speak before the deliberations on this case.

52. With regard to the allegations relating to Mr. Daoudi's arrest and detention on the grounds of his "Sahrawi ethnicity", the Government points out that Mr. Daoudi is a former member of the Royal Armed Forces who knows that no one can enlist and join the ranks of the Moroccan army if he is not Moroccan or, like any other Moroccan national, he does not enjoy all his rights. Mr. Daoudi joined the Moroccan army in 1975 as a private in accordance with the relevant legal requirements, including the requirement to have Moroccan nationality. He retired after a regular administrative career and left the Royal Armed Forces in 2008 having reached the rank of warrant officer. Consequently, the Moroccan authorities, who are surprised to see the allegations made by the person concerned in connection with "Sahrawi ethnicity", categorically reject these allegations, which defy common sense and logic given that Mr. Daoudi had been welcomed into the Moroccan army after voluntarily choosing to serve his country as a Moroccan soldier. Whether as a Moroccan national or soldier, he has enjoyed and continues to enjoy all his rights and the same treatment as any other Moroccan national, without any discrimination.

Further information from the source

53. On 17 July 2018, the Working Group transmitted the Government's response to the source, which submitted the following additional comments on 31 July 2018.

54. First, in view of the Government's response, the source withdraws its allegations of double jeopardy. However, the source states that Mr. Daoudi remained unaware of the referral of the case and the criminal charges against him, as it was understood that the case before the military court was closed and Mr. Daoudi had been informed of his release.

55. As the Government has commented on the conditions of detention and the applicant's state of health, the source indicates that Mr. Daoudi is being held in Bouizakarne prison, in his own cell block, isolated from other inmates. Furthermore, the source reports that, contrary to the Government's statements, Mr. Daoudi's state of health is critical because he suffers from heart disease and has been admitted to hospital on several occasions.

56. As for the rest, the source reiterates the allegations made in the communication and refutes the Government's arguments.

57. In particular, the source states that Mr. Daoudi was indeed represented by counsel in some proceedings but did not have a lawyer in the majority of the proceedings brought against him. The source claims that Mr. Daoudi has never been represented by or even heard of some of the lawyers mentioned by the Government.

58. Lastly, with regard to Mr. Daoudi's status as a "Moroccan soldier", the source points out that, during the first years of armed conflict between Morocco and the Frente POLISARIO, it was compulsory to serve in the Moroccan army. Mr. Daoudi, who lives in southern Morocco in Guelmim, was therefore forced to join the Moroccan army in 1975. The source also reports that Mr. Daoudi was arrested on 29 February 1982 and detained for two years and three months after attempting to join the Frente POLISARIO. After his release, Mr. Daoudi returned to the Moroccan army before retiring in 2008 and becoming a Sahrawi political and human rights activist.

Discussion

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

60. 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 (A/HRC/19/57, para. 68). As the Working Group has often pointed out, including in cases concerning Morocco,² it is not enough to make a formal objection to the allegations: the State is in possession of all the material relating to the proceedings and should be able to provide any evidence that it deems necessary to support each of its counterarguments.

61. In the present case, the Working Group notes that Morocco has once again merely denied the allegations without providing any evidence, while corroborating some of the facts reported by the source. Such an approach to the proceedings before the Working Group is not productive because it does not demonstrate the legality of the procedure followed by public officials in the performance of their duties. In addition, the Working Group notes that the source, for its part, has accepted certain facts mentioned by the State to revise its conclusions, thereby demonstrating its good faith.

62. First of all, in this case concerning Western Sahara, the Working Group took note of the position expressed by Morocco regarding the political status of this territory and the fact that the Government claims that the situation in Western Sahara falls exclusively within the competence of the Security Council and is not under the Working Group's mandate.

63. 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. The competence of the Security Council is not affected by the competence of the Working Group to receive, consider and deliberate on the validity of allegations of human rights violations in this territorial area. In this regard, the International Court of Justice has made it clear that the Security Council's competence in matters of international peace and security is not exclusive, even if it bears primary responsibility, as the Charter of the United Nations states.³ In addition, the findings of the Working Group on the alleged violations do not affect the substance of the question of Western Sahara.

² See, in particular, opinions Nos. 11/2017 and 27/2016.

³ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151, see at p. 163 in particular. Moreover, it is well established that people in Western Sahara claim the right to self-determination, and the international community, with the participation of Morocco, recognized this right in the agreement on a referendum by allowing it to be exercised (see General Assembly resolutions 3292 (XXIX) with Morocco voting in favour; 34/37, para. 1; 35/19, para. 1; and 72/95, adopted without a vote; and Security Council resolutions 2285 (2016), 2351 (2017) and 2414 (2018)). See also the case law of the International Court of Justice: *Western Sahara, Advisory Opinion*, I.C.J. Reports 1975, p. 12, in particular paragraph 36; and the decisions of the Organization of African Unity AHG/Dec.114 (XVI) (A/34/552, p. 95) and AHG/Dec.118 (XVII) (A/35/463/Corr.1, p. 2); and decision of the Assembly of the African Union Assembly/AU/Dec.693 (XXXI).

64. In the light of the above, the Working Group affirms that its work⁴ cannot in any way contradict or interfere with the fact that the situation of Western Sahara, as a matter of international peace and security, is currently under consideration by the Security Council. 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. The territory is subject to the right to self-determination in conformity with the principles contained in General Assembly resolutions 1514 (XV) and 1541 (XV).

65. In the complaint, the source presents arguments relating to four categories of arbitrary detention. The Working Group will now assess these arguments one by one.

Category I

66. The Working Group notes that the parties agree that the arrest took place on 28 September 2013. However, the source alleges that no warrant was produced and that Mr. Daoudi was not informed of the reasons for his arrest. The Government claims that the arrest was made following a house search in connection with a robbery case involving a son of Mr. Daoudi, which resulted in the discovery of a firearm, probably for hunting, with cartridges and other items. The arrest would therefore be linked to this discovery. However, the Government does not provide evidence of the initial basis for the intrusion into Mr. Daoudi's home or of the results of the search, or evidence that Mr. Daoudi had been informed thereof at the time of his arrest. Therefore, even if possession of these weapons is in violation of the law, their discovery should not lead to an arrest and detention that does not comply with the procedural rules required by international standards on the rights of the defence, including the right to information and judicial supervision of the arrest and subsequent detention.

67. Furthermore, the source claims that Mr. Daoudi was held incommunicado during the first four days of detention just when he was being interrogated and subjected to various forms of abuse, with his two children arrested at the same time, knowing that each of them could have witnessed the violence perpetrated against the other two. The Government does not dispute the date of the arrest and remains silent on the period from 28 September to 1 October 2013 when it states that Mr. Daoudi appeared before the Director of Military Justice. Such a lack of information, vagueness and lack of evidence on the part of the Government leads the Working Group to consider the source's allegations as credible. The Working Group therefore considers that Mr. Daoudi remained without communication with the outside world during this period and that he did not receive the assistance of a lawyer to challenge the legality of his detention, whereas he was reportedly brought before a judge only in January 2014.

68. Lastly, the source claims that Mr. Daoudi was not released on 5 September 2015 when the initial sentence resulting from the military judgment expired. His detention reportedly continued until 27 October 2015 when his case was brought before a civil court. The Government failed to refute this allegation and there is no reason not to believe the source, which would mean that, between the two dates, 5 September to 27 October 2015, Mr. Daoudi was detained without legal grounds.

69. In conclusion, the Working Group notes that the situation constitutes a violation of article 9 (1) of the Covenant and article 9 of the Universal Declaration of Human Rights and that Mr. Daoudi's detention is therefore arbitrary under category I.

Category II

70. The Working Group has no doubt that Mr. Daoudi is a Sahrawi on the one hand and a human rights defender on the other, including an advocate for the self-determination of the Sahrawi people. The Government's arguments to refute such a status are not relevant,

⁴ In accordance with Commission on Human Rights resolutions 1991/42 and 1997/50 and Human Rights Council resolution 33/30 in particular.

but the Working Group will return to them later when it discusses category V. Mr. Daoudi's notoriety and the positions he may have taken are in the public domain and the Working Group is convinced of his commitment to the cause. It is not difficult to perceive that this fight is not to the Government's liking because of his political position in the Western Sahara crisis.

71. Accordingly, the Working Group questions the merits of the proceedings against Mr. Daoudi and the charges brought against him. For the charges of wearing a uniform (even though Mr. Daoudi is a former soldier) and possessing a hunting weapon, combined with certain other items, he faces a vast number of legal proceedings and has remained in detention since 28 September 2013. In view of these circumstances, the Working Group considers that Mr. Daoudi's publicly expressed political opinion is in fact the cause of the judicial proceedings against him, especially since such use of the criminal justice system to silence dissent has been reported several times to the Working Group (see Opinions Nos. 19/2013 and 11/2017), while other bodies have made the same observations (see CAT/C/MAR/CO/4).

72. However, Mr. Daoudi has the right to express a political opinion, including advocating for the self-determination of the Sahrawis. This right derives from article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights, and any arrest and detention resulting from the exercise of this right is arbitrary under category II.

Category III

73. In principle, given that Mr. Daoudi's detention falls within category II, he should not be tried. However, since several trials have taken place and the source has submitted arguments in that regard, the Working Group will assess those arguments as an additional consideration.

74. The right to a fair trial is a right with multiple dimensions that can begin even before the individual's arrest and can relate to institutions. In the present case, the source has presented several facts that the Government has not been able to truly refute.

75. First of all, there is no doubt that Mr. Daoudi did not always have a lawyer during the various proceedings he faced. This was apparent from the time of his arrest and then at various points in the proceedings, including during some trials. The Government provides a list of his lawyers as if this were sufficient to refute the allegation. However, the absence of a lawyer to assist the suspected or accused person makes it almost impossible for that person to defend himself or herself fairly.

76. Secondly, the source reports abuses that led to the confession that the court used to convict Mr. Daoudi. The Government says that allegations of torture such as this one have become a classic argument of complainants. However, this response is insufficient to refute this allegation, especially since the Government has not provided any evidence demonstrating Mr. Daoudi's state of health. In addition, the Working Group notes that the practice of torture in the Moroccan judicial system has been documented, in particular for all persons linked to the Sahrawi cause. The Working Group has repeated this on several occasions on the basis of credible information made available to it (see, for example, A/HRC/27/48/Add.5). However, other bodies have done the same, including the Committee against Torture (CAT/C/MAR/CO/4) and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/22/53/Add.2, paras. 84 and 85).

77. Lastly, Mr. Daoudi, a civilian, was prosecuted in a military court before being transferred to a civilian court for the same reason for which he had already been given a sentence that had come to an end. The Working Group has consistently stated that a civilian cannot be tried by a military court and that this would always constitute a violation of the right to a fair trial (A/HRC/30/37, para. 55).

78. These three violations of the right to a fair trial (art. 14 of the Covenant and art. 10 of the Universal Declaration of Human Rights) are sufficiently serious to invalidate all proceedings, and there is no need to rule on the other allegations even if they could be substantiated.

Category V

79. Lastly, the source alleges that Mr. Daoudi has been subjected to discrimination because of his Sahrawi identity. The Government challenges this allegation by saying that Mr. Daoudi is Moroccan and voluntarily enlisted in the Royal Army, so that it is misleading for him now to assert such an identity. However, the Working Group does not see this as a contradiction.

80. In these circumstances, and taking into account the previous conclusion on category II, there is no doubt in the Working Group's view that the accusations Mr. Daoudi has faced to date stem from his Sahrawi identity and his political opinion in favour of self-determination. If he were not Sahrawi and did not express his views on the political crisis in Western Sahara, the proceedings in question probably would not have taken place. This is the very essence of category V of arbitrary detention that characterizes his situation.

81. In conclusion, the Working Group is concerned about the allegations of abuse relating to Mr. Daoudi's two children. Even if they were not directly the subjects of this complaint, the Working Group wishes to stress that some of the conclusions could extend to them. In any case, the Working Group considers that allegations of abuse against the persons concerned should be referred to the competent special procedure.

Disposition

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

The deprivation of liberty of Mr. Mbarek Daoudi, being in contravention of articles 7, 9, 14, 19 and 26 of the International Covenant on Civil and Political Rights and articles 9, 10 and 19 of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

83. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture.

84. The Working Group requests the Government of Morocco to take the steps necessary to remedy the situation of Mr. Daoudi without delay and bring it into conformity with the relevant international norms, including those set out in the International Covenant on Civil and Political Rights.

85. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Daoudi immediately and accord him an enforceable right to reparation, including compensation and a guarantee of non-repetition, in accordance with international law, and to provide him with medical care as needed and appropriate for his condition.

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

87. The Government should disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

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

- (a) Whether Mr. Daoudi has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Daoudi;
- (c) Whether an investigation has been conducted into the violation of Mr. Daoudi's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Morocco with its international obligations in line with the present opinion;

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

89. 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.

90. 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.

91. 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.⁵

[Adopted on 24 August 2018]

⁵ See Human Rights Council resolution 33/30, paras. 3 and 7.