



# General Assembly

Distr.: General  
29 January 2019  
English  
Original: French

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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-third session, 19–23 November 2018

#### Opinion No. 85/2018 concerning Toufik Bouachrine (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 mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30 of 30 September 2016.

2. In accordance with its methods of work (A/HRC/36/38), on 2 August 2018, the Working Group transmitted to the Government of Morocco a communication concerning Toufik Bouachrine. The Government replied to the communication on 28 September and 3 October 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. Mr. Bouachrine is a Moroccan citizen. He is a journalist and publisher, and co-founder of the Moroccan daily newspaper *Akhbar al-Youm*. This newspaper is an independent publication that is not affiliated with any political party. According to the source, it is widely read in Morocco. Mr. Bouachrine is also known for his reporting on controversial subjects in Morocco and has written editorials criticizing the Government.

### *Arrest and detention*

5. According to the source, Mr. Bouachrine was arrested and detained on 23 February 2018 in Casablanca, Morocco. Representatives of the national authorities, including at least 20 police officers, came to the headquarters of Mr. Bouachrine's newspaper to arrest him and, in the days that followed, summoned female journalists and newspaper employees. The source indicates that Mr. Bouachrine was arrested two days after publishing an editorial that was critical of the Prime Minister and the Minister of Agriculture.

6. The source also reports that, on 26 February 2018, the assistant prosecutor attached to Casablanca Court of Appeal issued an order for his detention on charges of human trafficking, abuse of a position of vulnerability, rape and attempted rape, sexual harassment and other offences. Mr. Bouachrine remains deprived of his liberty despite the appeals against his detention filed with the court and the prosecution service.

7. The source states that Mr. Bouachrine and his defence team have maintained that the accusations are groundless and were made in retaliation for his work as a journalist and the criticisms he had made of the Government in his publications.

8. The source also reports that Mr. Bouachrine's arrest has raised serious concerns regarding the protection of journalists and freedom of the press. On 24 February, following Mr. Bouachrine's arrest, representatives of the Moroccan National Press Union went to the National Police Division in Casablanca to express the Union's concern about the arrest of Mr. Bouachrine, which the Union went on to condemn. Several media outlets made the connection between Mr. Bouachrine's arrest and the critical tone of his editorials directed at the worlds of politics and finance.<sup>1</sup>

9. The source also notes that Mr. Bouachrine had already been prosecuted in retaliation for his work as a journalist, which demonstrates a propensity on the part of the Government for stifling his freedom of expression. Specifically, the source recalls that in 2015 Mr. Bouachrine was charged with defamation in a case brought by the Minister of Finance. The Minister attempted to have Mr. Bouachrine banned from working as a journalist for 10 years. He was also targeted for his work a few days before his arrest, when he was charged and then found guilty of defamation in a case involving two Government ministers.

10. The source indicates that Mr. Bouachrine is being treated in the same way as other journalists. Such treatment has been condemned by human rights organizations in several reports on the systematic intimidation of journalists and violations of freedom of expression and press freedom that occur in Morocco by means of prosecutions and charges inculpatng journalists on both a personal and professional level.<sup>2</sup>

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<sup>1</sup> See Committee to Protect Journalists, "Critical Moroccan journalist arrested on several charges", 27 February 2018, available at <https://cpj.org/2018/02/critical-moroccan-journalist-arrested-on-several-c.php>; and Charlotte Bozonnet, "Au Maroc, le procès du patron de presse Taoufik Bouachrine jette le trouble", *Le Monde*, 10 June 2018, available at [www.lemonde.fr/afrique/article/2018/06/10/au-maroc-le-proces-d-un-patron-de-presse-jette-le-trouble\\_5312603\\_3212.html](http://www.lemonde.fr/afrique/article/2018/06/10/au-maroc-le-proces-d-un-patron-de-presse-jette-le-trouble_5312603_3212.html).

<sup>2</sup> The source is referring to Amnesty International, "Morocco/Western Sahara" in *Report 2017/18* (London, 2018), available at <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> and Human Rights Watch, "Morocco/Western Sahara", in *World report 2018: Events of 2017*, available at <https://www.hrw.org/world-report/2018/country-chapters/morocco/western-sahara>.

*Violations of the right to a fair trial*

11. The source claims that Mr. Bouachrine's right to a fair trial, including the right to be tried by an independent and impartial tribunal, has been violated. The source also reports that a number of serious irregularities have infringed the provisions of Moroccan criminal procedure. The source explains that the most blatant irregularities rendering Mr. Bouachrine's detention arbitrary should be analysed in the light of articles 73, 419, 608 and 611 of the Code of Criminal Procedure.

12. Regarding the violation of articles 73 and 419 of the Code, the source indicates that, on 26 February 2018, 72 hours after Mr. Bouachrine was taken into custody, the Casablanca assistant prosecutor issued an order for his detention, deciding to have him brought before the Casablanca criminal chamber. The hearing was held on 8 March, under the summary trial procedure provided for in article 419 of the Code, i.e. approximately 12 days after the arrest.

13. According to the source, none of the required conditions for application of the summary trial procedure were met in the case of Mr. Bouachrine. The source indicates that article 419 allows the prosecutor attached to the Court of Appeal to bring an accused person before the criminal chamber directly only if the mandatory conditions established under article 73 are satisfied, including the requirement that the accused person be caught in flagrante delicto and that the case be ready for trial. However, this was never a case of in flagrante delicto, either in reality or according to the evidence gathered during the preliminary investigation. The source also reports that the categorization of the case as in flagrante delicto led the president of the bar association to file with the Court of Cassation's criminal chamber a complaint of forgery and use of forged documents on the part of the Casablanca prosecution service, which had apparently added the term "in flagrante delicto" (*flagrance* in French) to the indictment in order to give the false impression that the provisions of article 73 of the Code of Criminal Procedure were met.

14. The source reports that the prosecutor refused to investigate the complaint, without justification. However, according to the source, the prosecution service later admitted in writing, during the trial, that the inclusion of the term "in flagrante delicto" (*flagrance*) in the indictment had been a typing error. Therefore, the requirement that the accused person be caught in flagrante delicto was not met. Nonetheless, Mr. Bouachrine remains deprived of his liberty for an indefinite period, despite the lack of a legal basis for his deprivation of liberty.

15. The source then reports that, according to the prosecution service, the case was ready to be tried under the summary procedure at the time of the hearing on 8 March 2018 and that the prosecution had sufficient evidence, thus fulfilling the second condition for application of the summary trial procedure. The source disputes this claim on the grounds that the court has held more than 40 hearings, several of which took place at night and lasted until dawn, without managing to conclude the investigation and consideration of the case. Furthermore, at the start of July 2018, the prosecution asked the court for an expert evaluation of the videos in the case file, which are the only evidence supporting the charge against the journalist. The source indicates that the trial has been suspended since this time and that the journalist remains deprived of his liberty, arbitrarily, since the second condition established under article 73 of the Code of Criminal Procedure has not been met. In this regard, the source condemns the lack of clarity and the uncertainty as to the length of the trial.

16. Moreover, the source states that under Moroccan law Mr. Bouachrine has the right to have the basis for his detention and the charges against him examined by a judge before the case is tried, unless the evidence against him is clearly conclusive and none of the items of evidence are contested. In his case, the evidence is strongly contested and is clearly not conclusive. Rather, the source claims that the Moroccan authorities are relying on evidence that has been obtained illegally and consists of fabricated elements of proof acquired by intimidating a potential witness and victim. This is evident in the video statement made on 24 April 2018 by an alleged victim who was supposedly harassed by Mr. Bouachrine. In the video, the woman explains that she was summoned by the police to sign a statement accusing Mr. Bouachrine of having harassed her. When she disputed the harassment

allegation contained in the pre-drafted statement she had been forced to sign and said that the allegation was false, the Moroccan authorities subjected her to criminal proceedings in retaliation. After she opposed the harassment allegation and filed a complaint against the detective who had forced her to sign the pre-drafted statement, her complaint was dismissed and she was arrested and sentenced to 6 months' imprisonment for providing false information and defaming and insulting a law enforcement officer. Reportedly, she was not given the opportunity to raise a defence. Even though the video contradicts the harassment allegation, the allegation is still one of the trial charges.

17. According to the source, the fact that the prosecutor has not withdrawn this allegation from the charges against Mr. Bouachrine and is relying solely on an item of evidence that was obtained illegally is an indication that Mr. Bouachrine's right to a fair trial has been violated. Furthermore, the prospects of a fair trial for Mr. Bouachrine are doubtful, given that the Moroccan authorities are alleged to have used abusive techniques to force a woman to falsely accuse Mr. Bouachrine of criminal offences.

18. In addition, the source states that other alleged victims who did not wish to testify were intimidated and forced to appear before the court. This can be seen in the video of a female journalist being forcibly taken to the hearing of 6 June 2018.<sup>3</sup> This journalist reportedly made a statement exonerating Mr. Bouachrine. She was then arrested and placed in custody on the instructions of the crown prosecutor attached to Rabat Court of Appeal, despite the lack of a legal basis for such a decision. Another alleged victim is reported to have been hospitalized following similar treatment.

19. The source also states that the supposed video statements and the corresponding transcripts have been the subject of several petitions challenging their authenticity and alleging forgery and use of forged evidence, which the court refused to consider, without justification and without even recording the refusal in a separate judgment as required by law. The defence appealed against these refusals.

20. The source also reports that, during the hearing on 21 May 2018, the prosecution, supported by the judges, refused to provide the defence team with exculpatory items of evidence that would have exonerated Mr. Bouachrine. Specifically, Mr. Bouachrine's lawyers had petitioned the court for information which would have proved, in a detailed and exhaustive manner, that the journalist was not present in the location where the alleged offences were committed. However, the prosecution refused to hand over the telephone call log containing this information.

21. Regarding the violation of articles 608 and 611 of the Code of Criminal Procedure, the source indicates that the order for Mr. Bouachrine's detention issued by the prosecution service cannot serve as a substitute for a court order issued by an investigating or other judge, as judges are the only officials with the authority under article 117 of the Constitution and article 608 of the Code of Criminal Procedure to restrict a person's liberty and issue orders to that effect. The source cites article 611 of the Code of Criminal Procedure, according to which any official who perpetrates or is complicit in a detention not based on one of the court orders provided for in article 608 is considered to be guilty of arbitrary detention.

22. The source adds that the judges and the prosecution service have refused to examine the procedural irregularities more fully. According to the source, following his deprivation of liberty, which the source describes as arbitrary and without legal basis, Mr. Bouachrine's defence team sought redress through multiple avenues. On 15 March 2018, it filed with the Court of Cassation's criminal chamber a complaint against the crown prosecutor attached to Casablanca Court of Appeal, his deputy and the warden of Ain Borja prison. The complaint was declared inadmissible on 11 April, on the grounds that it should have been addressed to the crown prosecutor attached to the Court of Cassation. On 21 March, the defence filed with the crown prosecutor attached to the Court of Cassation a complaint against the crown

<sup>3</sup> Kifache TV, "Qadiyat Toufik Bouachrine: Amal al-Houari tadhkoulou el-mahkama" (Toufik Bouachrine case: Amal Houari entering court), video, 6 June 2018. Available at [www.youtube.com/watch?v=rw-aP\\_Ml-F8](http://www.youtube.com/watch?v=rw-aP_Ml-F8).

prosecutor attached to Casablanca Court of Appeal, the assistant prosecutor and the warden of Ain Borja prison regarding the offence committed by the crown prosecutor attached to Casablanca Court of Appeal and his deputy. The complaint about the first two persons was dismissed without follow-up and without justification on 22 March. The prosecutor simply declared that there was “no reason” for the complaint to be examined by the criminal chamber of the Supreme Court. The complaint about the warden of Ain Borja prison was dismissed without justification by the crown prosecutor attached to Casablanca Court of Appeal on 23 March. The defence then instituted judicial misconduct proceedings against the three judges on the judicial panel before the first chamber of the Court of Cassation. These proceedings are ongoing.

23. The source also asserts that the fact that, in Morocco, it is not possible to petition a judge to examine the lawfulness of a detention ordered by the prosecutor contravenes article 9 (4) of the Covenant.

24. In addition, the source indicates that the likelihood of Mr. Bouachrine receiving a fair trial is also undermined by the fact that his Moroccan lawyer has been threatened with prosecution and harassed by the national authorities in an attempt to force him to stop representing Mr. Bouachrine. The source notes that the proceedings against the lawyer were initiated immediately after he filed with the Court of Cassation the complaint of forgery committed by the Casablanca prosecution service during the indictment of Mr. Bouachrine.

25. According to the source, these intimidating tactics are similar to those used against Mr. Bouachrine, as they are designed to hamper his work as a lawyer and human rights defender. These actions limit the capacity of Mr. Bouachrine’s lawyer to act, thereby compromising Mr. Bouachrine’s right to consult freely with a lawyer.

26. Furthermore, the source reports similar abusive and threatening tactics being used against Mr. Bouachrine’s wife. She informed Mr. Bouachrine’s lawyer that she had been summoned on 24 April 2018 by the police, who arrived at her home at approximately 9 p.m. She was accused of having sent a text message to one of the supposed victims although there was no evidence to support this allegation. A statement was presented for her to sign, with a date prior to that of the text message, but she refused to comply.

27. The repeated cases of intimidation and coercion on the part of the national authorities are indicative of the measures taken to secure the conviction of Mr. Bouachrine. These actions undermine his right to a fair trial. According to the source, the judges have not taken any steps to end these illegal and harmful actions, provide redress and ensure a fair trial for Mr. Bouachrine. However, the judges would have been aware of the procedural irregularities owing to the repeated attempts by Mr. Bouachrine to appeal against the proceedings and the various applications for redress filed before different courts. The source notes that the judges allowed the prosecution to continue on the basis of contested evidence and took no measures to exclude illegally obtained evidence. Moreover, the judges have demonstrated that they are willing to condone these tactics of coercion and retaliation against alleged victims and to participate in them. They have also convicted an alleged victim who refused to allow the national authorities to use a pre-drafted statement that she had been forced to sign. Lastly, they allowed the police to use force to bring the alleged victims to court and compel them to testify.

28. The source also reports that the judges in Mr. Bouachrine’s trial decided that, as of the week beginning 7 May 2018, members of the public and international observers would no longer be permitted to follow the proceedings in court. Considering that a general rule of international law is that criminal trials should be open to the public in order to ensure transparency and public oversight, this decision was taken without sufficient justification to overrule the right of the accused to a public hearing, as set out in international conventions and Moroccan domestic law.

29. According to the source, these actions on the part of the judges are all indicative of a blatant failure to act objectively and comply rigorously with domestic laws and procedures and international obligations intended to guarantee Mr. Bouachrine a fair and public hearing.

30. In conclusion, according to the source, Mr. Bouachrine's detention clearly falls under category III. This deprivation of liberty is arbitrary insofar as the authorities have not respected the basic right under international law to a fair trial. In particular, Mr. Bouachrine is being denied access to an independent and impartial tribunal; to a public hearing that would guarantee him a transparent trial; to the lawyer of his choice, without let or hindrance; to protection against the use of evidence illegally obtained through coercion; and to strict compliance with procedural safeguards. He has also been unable to contest procedural irregularities.

*Response of the Government*

31. Morocco submitted its replies regarding the communication on 28 September 2018. On 3 October, the Government submitted a revised version of its initial submission.

32. Firstly, regarding the claim that Mr. Bouachrine was arrested on 23 February 2018 in order to restrict his freedom of expression after he published an article criticizing the Prime Minister and the Minister of Agriculture, the Government asserts that Mr. Bouachrine was arrested on criminal charges and that his arrest has nothing to do with his work as a journalist. According to the Government, his arrest resulted from a complaint lodged on 12 February 2018 by a woman who preferred to remain anonymous. She stated that a journalist with whom she works sexually assaulted her at work and threatened to post pictures of the assault if she dared to file a complaint against him.

33. In addition, the Government explains that two women lodged complaints on 16 and 22 February 2018, accusing someone of having sexually assaulted them in an office and having threatened to post photographs of the assault. Consequently, the competent prosecutor's office ordered that an investigation be initiated immediately. The investigative police raided the premises concerned on 23 February to confiscate the equipment used by Mr. Bouachrine to record videos in his office and document his sexual encounters with 11 women. A number of victims were identified when the police watched the recordings. Eight women stated that Mr. Bouachrine had abused his authority to subject them to sexual exploitation at work and had threatened to post photographs and videos showing them in intimate situations. Two women stated that they had consensual intercourse with him, while another denied being involved in the case in any way. The Government notes that Mr. Bouachrine's lawyer moved to contest the validity of the videos at the heart of the case. The court admitted the motion and ordered that the videos be examined by technical experts; it has not yet ruled on the expert examination.

34. Concerning the claim that Mr. Bouachrine was brought before the criminal court of first instance in Casablanca before being brought before the investigating judge even though he had not been caught in flagrante delicto and there was no basis on which to adjudicate the case, the Government submits that the procedure followed is in line with articles 49 and 73 of the Code of Criminal Procedure, which authorize the prosecutor assigned to the court of appeal to immediately refer an accused person to the criminal court when of the view that a case is ready to be tried. According to the Government, the prosecutor found that the case was ready for trial and did not require an investigation. In such cases, an investigation is optional and the competent prosecutor has the discretion either to initiate one or to proceed otherwise. The decision to proceed in this way was taken because there were witnesses (the victims) and recordings had been seized from the accused's office. The public prosecution service did not invoke flagrante delicto, which in any case is not a precondition for direct referral to the court, although, in cases of flagrante delicto, an accused person can be directly referred to the court without a prior investigation.

35. In any event, the defence raised the issue before the criminal court in accordance with the law. A preliminary decision was rendered and the judicial procedure was approved. It should be noted that this decision can be appealed jointly with the judgment on the merits. The person concerned is always free to file a legally admissible appeal, and the parties have no other choice but to comply with whatever decision the courts take.

36. Regarding the claims that the indictment included false testimony and that testimony against Mr. Bouachrine was coerced, the Government responds that these allegations are wholly unfounded since all the victims who were questioned at the preliminary hearing

testified unbidden, freely and voluntarily that they had been sexually exploited by Mr. Bouachrine. Their depositions, as they appear in the hearing record, are signed. It is worth noting that two of the witnesses stated that the video showed consensual intercourse with Mr. Bouachrine. Consequently, their files are not part of the case against Mr. Bouachrine.

37. Concerning the claim that one of the alleged victims retracted her statement and lodged a complaint against the detective, stating that he made her read out a pre-drafted statement displayed on a computer screen, the Government notes that the complaint was dismissed by the Court of Cassation because it was not submitted in line with the legal procedure applicable to judicial actions brought against individuals who are subject to exceptional rules of jurisdiction under article 268 of the Code of Criminal Procedure. Furthermore, the woman was sentenced to 6 months' imprisonment after the detective filed a complaint of defamation in the media based on false accusations. The investigation confirmed that the woman had lied. The detective against whom the complaint was lodged submitted a video showing the woman reading out the deposition contained in the hearing file from a piece of paper, not a computer. The woman did so voluntarily and unbidden and did not oppose the deposition which stated, according to her subsequent assertions falsely, that she was sexually harassed by Mr. Bouachrine. The Government further notes that during Mr. Bouachrine's trial, two video recordings showing the woman having sexual intercourse with Mr. Bouachrine were found. This, according to the Government, explains her reaction and reveals the secret reason behind her attempt to retract a statement she had made voluntarily and unbidden during the preliminary investigation.

38. As for the claim that some witnesses were forced to testify before the court, the Government notes that the criminal chamber of first instance of Casablanca Court of Appeal, which is hearing the case, decided, after noting that some witnesses had not testified despite having received several summonses, to exercise its authority under articles 339, 422 (2) and 424 of the Code of Criminal Procedure and have these witnesses brought before the court by law enforcement personnel.

39. The Government also notes that the source does not mention the fact that a witness was found hidden in the luggage compartment of a car in the garage of Mr. Bouachrine's lawyer. This points to collusion between the defence team and certain witnesses who did not appear before the court to give their statements and help it to establish the facts.

40. In addition, with regard to the claim that the prosecutor's office prevented Mr. Bouachrine from presenting information about his telephone calls as evidence, the Government stresses that this is a spurious claim which Mr. Bouachrine is trying to spread. In fact, in an effort to protect personal data in accordance with Act No. 09-08 on the protection of individuals in the processing of personal data, the national investigative police sorted the telephone call log in order to identify those calls that were directly linked with the case. This explanation was shared with the court and, on 11 May 2018, the criminal chamber of first instance of the Casablanca Court of Appeal dismissed the defence's request that all of the telephone records be added to the case file.

41. Concerning the source's claim that restrictions were imposed on the defence team and that judicial proceedings were initiated against one of the members of the team in a bid to dissuade him from exercising his functions, the Government notes that some members of the defence team violated the ethics, customs and traditions of the legal profession and, regrettably, made offensive statements about the court, the prosecutor's office and the persons suing for damages. This led the bar association to condemn their conduct. The court took steps to address their conduct and drafted a report which was transmitted to the competent bar associations so that they could look into the violations committed by the defence team during the judicial proceedings. Furthermore, an investigation is under way into a member of the defence team who allegedly hid a witness in his home to prevent the person from appearing before the court. Contrary to the source's claims, while this lawyer is indeed being prosecuted before the Casablanca court of first instance, it is for his involvement in another, unrelated case.

42. Lastly, regarding the claim that the hearings were held in camera as of 7 May 2018, the Government recalls that a court may decide, for reasons of security, public order or public morality, to hold closed hearings. In the present case, public hearings were held until

the time came to watch the video recordings and for the victims to take the stand. This was not challenged by the defence or the prosecution owing to the nature of the case, which included video recordings of a sexual nature that could compromise public morality, as well as the private life and honour of the alleged victims, some of whom are married. Once the decision to hold the hearings in camera had been taken, only the parties were authorized to attend the hearings.

43. In addition, the Government notes that the source's complaint was submitted while the case was still pending before the court and before any decision could be handed down. This is a manipulative attempt by the defence to disrupt the course of the judicial proceedings.

*Further information from the source*

44. The Government's initial and revised responses were transmitted to the source for additional comment on 1 October and 3 October 2018, respectively. The source submitted a reply on 15 October.

45. The source repeats the fact that multiple criminal proceedings have been initiated against Mr. Bouachrine for exercising, in his capacity as a journalist, his fundamental rights to freedom of opinion, freedom of expression and freedom to impart information as defined in article 19 of the Covenant. The source specifies that these proceedings are often disguised as proceedings for ordinary offences with the aim of masking the fact that they are, in reality, an attack on freedom of the press. This is corroborated by several precedents, which have been detailed in international reports.<sup>4</sup>

46. The source notes that the link between this case and the criticism that Mr. Bouachrine levelled at the Minister of Agriculture is illustrated by the following points:

(a) The first complainant is a member of the cabinet of the Minister of Tourism, who is a member of the bureau of a party whose president is the Minister of Agriculture;

(b) The complaint is dated 16 February 2018 and the place of drafting is given as Rabat. The complainant supposedly filed the complaint that same day with the prosecutor's office in Casablanca. Yet, it takes two hours to travel from central Rabat to the office in Casablanca;

(c) The complainant gave a statement to officers of the national investigative police in Casablanca at noon on 16 February 2018 (the time and date are included in the record), yet the offices of the national investigative police are an hour away from the prosecutor's office in Casablanca;

(d) The complainant does not specify any dates in her complaint and does not provide any details of the circumstances of her alleged assault by Mr. Bouachrine. No medical evidence is provided in support of her complaint even though it would be customary in this type of case;

(e) The thoroughness with which the complaint was processed, despite the lack of detail, and the decision to entrust the investigation to the national investigative police demonstrate that the complainant received exceptional treatment to the detriment of the presumption of innocence which Mr. Bouachrine ought to have enjoyed;

(f) The prosecutor's office in Casablanca accused Mr. Bouachrine of trafficking in human beings with regard to the complainant, even though she never worked for him and failed to corroborate the charge in any way. (The complainant acknowledges that she does not appear anywhere in the video recordings at the heart of the proceedings for forgery and use of forged evidence currently before the Court of Cassation.)

47. Furthermore, concerning Mr. Bouachrine's immediate referral to the criminal chamber in Casablanca for a hearing on 8 March 2018, the source reiterates that, under

<sup>4</sup> See, for instance, United States Department of State, Morocco 2014 Human Rights Report in *Country Reports on Human Rights Practices for 2014*. Available at: <https://www.state.gov/documents/organization/236826.pdf>.



article 419 of the Code of Criminal Procedure, the prosecutor assigned to the court of appeal is authorized to refer an accused person directly to the criminal chamber only in cases falling under article 73 of the Code, which requires that three conditions be met, including, first and foremost, that the person has been caught in flagrante delicto and that the case be ready for trial. However, the prosecution service retained only that the case had to be ready for trial, thereby manipulating the provisions of article 73, which are clearly written in the law. Besides, even this condition was not met: the source notes that it was in fact the prosecution that asked the court to authorize a technical evaluation of the videos, which are the sole piece of evidence against Mr. Bouachrine, all the while claiming that the case had been ready for trial since 8 March 2018. Moreover, the source notes that the court held over 55 hearings, including 45 in camera, sometimes at night and lasting until dawn, before the investigation or the consideration of the case could be completed.

48. The trial was suspended from 27 June to 10 September 2015, supposedly because delivery of the report on the technical evaluation of the videos requested by the prosecution had been delayed. During this period, the source notes that Mr. Bouachrine remained in custody despite his repeated applications for release.

49. Furthermore, the source refutes the Government's account that all the complainants confirmed the report of their depositions before the court. According to the trial record, 5 of the 14 complainants came to the court to confirm the charges, but the others refused to do so despite having been forcibly brought to court by the police. In addition, four complainants stated before the court that the video recordings had nothing to do with them and that they did not recognize Mr. Bouachrine in them.

50. In this context, the source submits that the prosecution has no witnesses against Mr. Bouachrine for the following reasons: (a) all the complainants sued for damages as soon as the summonses to the trial were issued; (b) by law, persons suing for damages cannot testify; (c) several women who were presented by the prosecution as complainants have categorically denied, both before the court and in public statements, having been in any way assaulted by Mr. Bouachrine. The source recalls that one of the women was sentenced to 6 months' imprisonment for having lodged a complaint against a detective for falsifying her deposition. She even made a public statement about the complaint. The source indicates that the claim that the woman was pressured is borne out by the fact that the same prosecution service initiated legal proceedings against her for insulting the honour of a law enforcement officer on 12 March 2018, in other words before the Court of Cassation rendered its decision on her complaint against the detective.

51. The source also notes that, by stating in its response that it has "two video recordings showing her having sexual intercourse" with Mr. Bouachrine, the Government unnecessarily slanders the complainant by making a gratuitous, unfounded and defamatory claim about her. In addition to the fact that the claim is false, it is completely pointless since the woman concerned is merely a witness in the case and the court has yet to rule on any of the video recordings. According to the source, the claim is a typical example of the pressure being exerted on all the other women who refused to incriminate Mr. Bouachrine as they, too, are being defamed in the media. The source provides further examples of the threats of prosecution made against these women.<sup>5</sup>

52. Regarding the case of the female journalist who refused to incriminate Mr. Bouachrine, the source provides a link to the online video of her being brought by force to the court, at around midnight, for the hearing of 6 June 2018.<sup>6</sup> The Government's reply is inaccurate because it refers to this journalist as a witness when in fact she is suing for damages in the case. The source notes that, after publicly stating that she would not incriminate Mr. Bouachrine for any misconduct against her and having written to the

<sup>5</sup> See, for instance, Lamiaa al-Dilami, "Ibtissam Machkour: hal tanjou min fakh difaa Bouachrine?" (Will Ibtissam Machkour outsmart the trap of the Bouachrine defence?), Ahdath.info, 7 May 2018. Available at: <https://ahdath.info/385338>.

<sup>6</sup> Kifache TV, "Qadiyat Toufik Bouachrine: Amal al-Houari tadhkoulou el-mahkama" (Toufik Bouachrine case: Amal Houari arriving at the courthouse), video, 6 June 2018. Available at: [www.youtube.com/watch?v=rw-aP\\_Ml-F8](http://www.youtube.com/watch?v=rw-aP_Ml-F8).

authorities to report the pressure to which she was being subjected, the journalist in question decided to seek refuge at the home of one of the defence lawyers' relatives. However, she was still brought by force to the aforementioned hearing and was later detained immediately after giving her statement as a person suing for damages and testifying to Mr. Bouachrine's innocence. She was then placed in police custody with no explanation.

53. The source further notes that, at the hearing of 21 May 2018, the defence submitted a motion designed to prove that on the dates and times the videos were supposedly recorded, Mr. Bouachrine was somewhere else entirely. The motion was filed on the basis of geolocation data linked to the international mobile equipment identity number of the mobile device appearing in Mr. Bouachrine's telephone records, which Maroc Télécom transmitted to the national investigative police. The prosecution refused to submit the records to the court unaltered. Instead, the national investigative police and the prosecution submitted a revised version of the phone records from which all of Mr. Bouachrine's communications and geolocation data for the dates and times of the videos in which he is accused of appearing had been systematically deleted. However, the defence team is able to demonstrate, through such documents as fines for traffic violations and hospital records of a surgical procedure, that it could not be him in the videos as he was somewhere else at the time they were recorded. There was, therefore, a real need to obtain the unaltered phone records in order to prove his innocence and have it officially recognized. However, the motion was dismissed without a reason being provided. In this connection, the source recalls that the Code of Criminal Procedure prohibits investigative police officers from altering the statements they collect under any circumstances, subject to criminal penalties for forgery and use of forged documents. The source infers from this that the investigation by the national investigative police was biased and focused on proving Mr. Bouachrine's guilt at all costs, that the prosecution service covered up this unlawful burying of exculpatory evidence and that the court seriously undermined the right of the defence to obtain information held by the prosecution that would exculpate Mr. Bouachrine.

54. The source also notes that the prosecution service initiated proceedings against the president of the bar association after he processed the complaints against the Casablanca prosecution service and the investigative police detective. In addition, the prosecution service questioned the president's wife and placed two of his children in police custody for over 24 hours because the aforementioned journalist had gone to their home.

55. The source submits that the provisions of the Code of Criminal Procedure in force prior to 12 September 2018 did not give persons suing for damages the right to request that hearings be held in camera. In fact, this provision entered into force on 12 September 2018 and did not apply to hearings held prior to that date, including the hearings held as of 7 May 2018. Mr. Bouachrine's right to a public trial was, therefore, severely undermined.

56. Lastly, the source repeats that the detention order issued by the prosecution service cannot under any circumstances serve as a substitute for a court order issued by an investigating or other judge, who are the only officials with the authority to issue orders to restrict a person's liberty under article 117 of the Constitution and article 608 of the Code of Criminal Procedure. The source recalls that it is not possible, in Morocco, to appeal a detention order or to have the lawfulness of a detention examined by a judge when it was ordered by the prosecution service.

## Discussion

57. The Working Group welcomes the cooperation of the parties, which enables it to take a decision based on opposing arguments.

58. Firstly, the Working Group recalls that, contrary to the Government's assertions, domestic remedies do not have to be exhausted for a complaint to be submitted.<sup>7</sup> The fact that a case is still before a domestic court does not limit the Working Group's jurisdiction.

<sup>7</sup> See opinions No. 11/2000, No. 19/2013 and, more recently, No. 41/2017. It should be noted that opinion No. 19/2013 also concerned Morocco.

59. In determining whether Mr. Bouachrine'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). In its rebuttal, the Government is free to submit whatever evidence it considers necessary to support its claims, on the understanding that it is often in a much better position to produce procedural documents.

60. In the present case, the Government responded by refuting all of the claims, except the fact of Mr. Bouachrine's arrest and continued detention and the offences with which he is charged. However, the Government did not challenge the source's claims in any specific manner. As the Working Group has stated in past cases concerning Morocco, a *pro forma* objection does not suffice to refute a source's credible claims, especially when the source has provided considerable evidence in support of those claims, for instance in the form of judicial documents and other publicly available documents, including translations when the documents were in Arabic. The Working Group can do little else but note that the Government has chosen to settle for a *pro forma* rebuttal without substantiating its version of the events and that, accordingly, credence should go to the source, provided that no cause to doubt the source arises.

61. Mr. Bouachrine is a journalist by profession and sometimes writes investigative pieces; many of his articles criticize the Government. The source reports that Mr. Bouachrine has already been tried twice for defamation on account of his work for the sole purpose of muzzling him. In the source's view, this new case is no different, except for the extent to which evidence has been fabricated and the collusion of the authorities. Now that the context has been provided, the Working Group will proceed to assess the claims under the relevant categories.

62. Under category I, the source claims that the police custody was excessively long and that the accused was not brought before a judge in a prompt manner.

63. The source submits that police custody in Morocco cannot exceed 48 hours (an initial period of 24 hours that can be extended for a further 24 hours) but that, in this case, it lasted 72 hours. During these 48 hours, a detainee must be brought before a judge for the detention to be extended. The Government did not reply directly to this argument, instead focusing on the matter of *flagrante delicto* and the case's readiness for trial.

64. The facts of the case do not lend themselves to the concept of *flagrante delicto*. According to the source, it appears that the prosecution used the concept in its documents as justification for extending the police custody beyond the statutory limit, only to later claim it was a typing error. This would be a very odd error to make, especially if *flagrante delicto* was the only argument for extending the custody beyond 48 hours, as it would remove all justification for imposing the restriction of liberty. In its reply, the Government submits that there was actually no need to invoke *flagrante delicto* because the case was ready for trial. However, the case has still not been closed to this day and Mr. Bouachrine remains in detention, not to mention that some of the evidence was submitted for expert assessment or found after his arrest. Even if the case had been ready, this would not be justification for pretrial detention, which remains an exceptional measure that should be based on other criteria, such as a risk of flight or a risk that the integrity of the evidence may be compromised. Moreover, the justification provided by the Government was not raised at the time and did not, therefore, count as grounds for extended detention.

65. While it is established that arrest and initial detention (i.e. police custody) do not have to be ordered by a judge, the provisions of article 9 of the Covenant require that arrested or detained persons be brought before a judge promptly to give them an opportunity to challenge the lawfulness of their detention. This rule implies that detention should never extend beyond police custody without a judicial order. Thus, any detention that continues beyond police custody and without judicial oversight ceases to be founded in law. This is what happened in the present case, and the Government has failed to convince the Working Group otherwise. All of the violations of article 9 lead to the conclusion that

Mr. Bouachrine's arrest and detention beyond the 48 hours of police custody are arbitrary under category I with regard to the lack of legal basis.

66. Concerning category II, the source claims that the proceedings initiated against Mr. Bouachrine are a continuation of the defamation proceedings brought against him in the past. This time, however, the source claims that the authorities fabricated evidence to support the various charges. The Government vehemently denies this claim by merely repeating the charges. However, the source provides a number of pieces of evidence to support its assertions, including the retractions of some of the women who had filed complaints against Mr. Bouachrine and who later stated that they had been pressured to do so. One of the women even made a complaint of forgery and use of forged documents, to which the Government responds that parallel proceedings were initiated against her for making false accusations against an investigative police detective but without providing any material evidence. In addition, it is strange that the authorities took such pains to arrest an individual in the absence of any concern that he might resist or of any other concern. On this matter, the Government has again chosen to remain silent.

67. Under these circumstances, the Working Group is of the opinion that Mr. Bouachrine is being subjected to judicial harassment attributable to nothing other than his investigative journalism, in violation of the protection to which he is entitled under article 19 of the Covenant. Mr. Bouachrine is, therefore, being detained arbitrarily under category II.

68. Moreover, in the light of Mr. Bouachrine's occupation, the Working Group will transmit its finding in respect of the above claim to the relevant special mandate holder, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

69. It should follow from the above finding that no trial of Mr. Bouachrine can be justified. However, judicial proceedings are under way, and the source has submitted arguments regarding its unfair nature. The Working Group will, therefore, consider these facts as well.

70. The source reports that some of the evidence was tampered with or fabricated. For example, some of the alleged victims were reportedly forced to testify and Mr. Bouachrine's wife was pressured to, *inter alia*, sign an antedated record of her questioning. Furthermore, as part of his defence, Mr. Bouachrine submitted geolocation data to support his alibi, but the police reportedly modified the data to reduce their relevance. The source refers to fabricated videos whose authenticity is the object of a verification procedure that the Government does not deny. For its part, the Government asserts that some of the alleged victims admitted to having consensual intercourse with Mr. Bouachrine but does not provide any evidence to support the claim that others had non-consensual intercourse with him. It continues to hide behind the pretext of protecting their privacy, even though it is well-known that some of the women have publicly spoken of their situation as alleged victims of either Mr. Bouachrine or of the State.

71. The source also reports that the authorities used intimidation against anyone who supported Mr. Bouachrine. Some of the women who had filed complaints reported that they had been pressured, in particular one who was subject to parallel proceedings. Mr. Bouachrine's lawyer himself was subject to parallel proceedings before the bar association and the courts, as confirmed by the Government. It is particularly important to note that the president of the bar association is Mr. Bouachrine's lawyer, a fact that the Government failed to point out. Such proceedings against a defence witness and lawyer no doubt undermined the defence's ability to focus, thereby infringing Mr. Bouachrine's right to raise a defence in violation of article 14 (3) of the Covenant.

72. The Working Group notes that Mr. Bouachrine's defence team presented all of these facts, including the irregularities, to the judges, who either did not examine them or found them inadmissible without a substantive assessment. The Government has not refuted this claim in a substantiated manner. The Working Group cannot accept such a *pro forma* rebuttal and considers that the judges' attitude objectively leads to doubt as to their independence in this case. Worse still, the judges decided that the hearings would be held in camera from 7 May 2018. The Government explains that this was necessary to protect the

victims. Even if providing such protection is a justifiable concern, completely closed hearings cannot conceivably be the solution since this measure infringes an accused's right to a public trial and practice establishes several other means of protecting the privacy of alleged victims of sexual violence. It is worth noting that some of the victims are suing for damages and have made public statements about what happened to them, which ought logically to have lessened the need for in camera hearings. It was in the interest of the State that non-State observers attend the hearings, and the decision to hold closed hearings, insofar as it infringed the accused's right to a public trial, is regrettable.

73. In the light of all these violations which substantially undermined the right to a fair trial, the Working Group finds that Mr. Bouachrine's detention is arbitrary under category III.

74. The Work Group is aware of the charges in the case and of the rights of the people who, claiming to be victims, brought the case to the attention of the authorities. It is particularly important to combat violence against women, and State officials have an obligation, in the interest of the victims, to not breach the rights of defendants and to ensure that they receive a fair trial. The Working Group is confident that the national justice system is capable of ensuring justice for victims whenever cases of violence come to light.

### **Disposition**

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

The deprivation of liberty of Toufik Bouachrine, being in contravention of articles 9, 14 and 19 of the International Covenant on Civil and Political Rights, to which the State is a party, is arbitrary and falls within categories I, II and III.

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

77. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Bouachrine immediately and accord him an enforceable right to compensation and a guarantee of non-repetition, in accordance with international law.

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

79. 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 for appropriate action.

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

### **Follow-up procedure**

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

82. 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.

83. 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.

84. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>8</sup>

*[Adopted on 23 November 2018]*

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<sup>8</sup> See Human Rights Council resolution 33/30 paras. 3 and 7.