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## Human Rights Council Working Group on Arbitrary Detention

### Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019

#### Opinion No. 23/2019 concerning Laaroussi Ndor (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 25 January 2019 the Working Group transmitted to the Government of Morocco a communication concerning Laaroussi Ndor. The Government replied to the communication on 16 April 2019. 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*

#### a. Context

4. Laaroussi Ndor is a Sahrawi journalist born on 24 July 1991 and a resident of Laayoune, in Western Sahara.

5. According to the source, Mr. Ndor is linked to the underground journalism movement Bentili Media Center. He is a photographer, video producer and editor of the Bentili online portal. He was the correspondent for Bentili during the Gdeim Izik trial in Sale from December 2016 to July 2017 and during the trial of Sahrawi students in Marrakech, from December 2017 to April 2018. Mr. Ndor is hard of hearing and uses a hearing aid.

#### b. Arrest and detention

6. The source reports that Mr. Ndor was arrested on 2 May 2018 at approximately 10.30 p.m. in a shop on Boulevard Mezwar by a group of Moroccan police officers who did not identify themselves. According to eyewitnesses, he was beaten by several police officers and forcibly taken to the central police station.

7. The source indicates that Mr. Ndor's family received no information about him from the authorities following his arrest. His family and friends were also prevented from visiting him. The source states that Mr. Ndor was beaten during the three days he was held in custody at the police station.

8. According to the source, Mr. Ndor was brought before the prosecutor at the Laayoune Court of Appeal on 4 May 2018. He was taken to the court under police escort. Mr. Ndor was not represented by a lawyer and his family was neither allowed to enter nor informed of the situation. On 5 May 2018, Mr. Ndor was brought before the Laayoune Court of Appeal for questioning. Once again, his family was not allowed to enter the court. Mr. Ndor was accused of violence against a police officer and carrying a knife. On this occasion, he was represented by a lawyer, but the lawyer was not allowed to meet his client before the hearing or consult with him in private during it. Mr. Ndor denied the accusations made against him before the court and it is stated that he found it difficult to hear the proceedings. The court ordered that Mr. Ndor be detained and the lawyer was not allowed access to his client.

9. After the hearing, Mr. Ndor was transferred to the local prison in Laayoune. His family subsequently tried to visit him in prison, unsuccessfully. His family was also prevented from bringing him food and blankets.

10. The source further explains that Mr. Ndor appeared again before the Laayoune Court of Appeal on 7 May 2018. This time, his family and colleagues were allowed to enter the court. Mr. Ndor came into the courtroom chanting slogans in support of self-determination for the Sahrawi people. Apparently, Mr. Ndor showed signs of torture. His face was covered in bruises, especially around the right eye. On the same day, Mr. Ndor informed his relatives that while in custody he had been tortured throughout the night until he began to vomit and lose consciousness. Afterwards, he had not been able to sleep for two nights because of the pain. Mr. Ndor also explained that the police had questioned him about a camera, for which they had searched his "entire body". Mr. Ndor did not explain what he meant by "torture" or "camera" or what a search of his "entire body" involved.

11. Apparently, the hearing at the court of appeal lasted only a few minutes. Mr. Ndor did not have his hearing aid and so was not able to hear the proceedings. The source states that the defence asked the court to defer proceedings until Mr. Ndor had received his hearing aid. The source also states that during questioning the presiding judge did not ask Mr. Ndor what had happened to him and did not investigate the cause of the bruises on his face. For the second time, his lawyer was denied a private meeting with his client. The lawyer also requested that Mr. Ndor be released on bail, but the judge rejected the request without giving reasons. The proceeding was deferred until 14 May 2018.

12. According to the source, on the same day, Mr. Ndor's mother was briefly allowed to visit him in prison. She reported that her son was in an alarming physical and psychological condition. He was being held in an overcrowded and unventilated cell with convicted prisoners. Mr. Ndor also explained that he had been forced to sign a confession while in custody. He reported that police officers had asked him if he had attacked the police with stones. He had replied in the negative, but the police officers had responded by saying "the accused admitted to attacking the police with stones" and that statement was taken down in the police records. Mr. Ndor was then tortured with various objects by several different police officers. After two days and two nights of torture, Mr. Ndor was forced to sign the police report.

13. The source explains that Mr. Ndor was once again brought before the Laayoune Court of Appeal on 14 May 2018. The court was guarded by many police officers. When they arrived, Mr. Ndor's family was prevented from entering the court, but his parents were eventually allowed inside. All observers from Sahrawi civil society were prevented from entering the court, although two European observers were permitted to enter. The hearing was deferred until 21 May 2018 as the civil claimant could not attend. Once again, the motion for interim release was rejected, with no reasons given.

14. On 21 May 2018, at the new hearing, another Sahrawi journalist was arrested in the court building and Mr. Ndor's sister was allegedly hit by the police as she tried to enter the court. Only Mr. Ndor's mother and two international observers were able to attend the hearing. Again, Mr. Ndor came into court chanting slogans in support of self-determination for the Sahrawi people. He was charged with violence against a police officer on duty (stone-throwing) and carrying a knife without good reason. The confession signed by Mr. Ndor while he was in custody is the only evidence against him. Mr. Ndor pleaded not guilty to these charges. He confirmed to the court that he had been arrested in a shop. He stated that he had not taken part in any demonstration and that no demonstration had been in progress at the time of his arrest. Mr. Ndor also informed the judge that he could not have taken part in a demonstration when he did not have his hearing aid. When he attempted to inform the judge of the torture and inhuman treatment to which he had been subjected while detained at the police station and how he had been forced to sign a confession under torture, the judge interrupted him to say that he was not permitted to talk about matters that were not in the police report.

15. The source also explains that the defence argued that there was no evidence of any criminal behaviour on the part of Mr. Ndor, that he had been arrested in a location where no demonstration had taken place and that the injured police officer had not identified or recognized Mr. Ndor as the attacker. The defence also confirmed that Mr. Ndor's hearing impairment prevented him from taking part in demonstrations.

16. The source indicates that, after 25 minutes of deliberation, the judges found Mr. Ndor not guilty of the charge of violence against a police officer but guilty of the charge of carrying a knife. He was accordingly sentenced to 3 months in prison and fined 10,000 dirhams.

17. The source explains that Mr. Ndor's detention conditions subsequently improved for two reasons: his mother was allowed to bring him clothes and also to pay him short visits. However, she was not allowed to bring him traditional Sahrawi clothes (daraa); the family made an official complaint about this to the Moroccan authorities. Furthermore, Mr. Ndor continued to be detained in an overcrowded cell.

18. The source also indicates that, on 21 June 2018, Mr. Ndor appeared before the Laayoune Court of Appeal. The source notes that Mr. Ndor's lawyer was not personally informed of the scheduled appeal; Mr. Ndor's family then had to find another lawyer. At the request of the defence, the case was deferred until 5 July 2018. At the hearing on 5 July 2018, the judge decided to release Mr. Ndor as he had already served two months and three days of his sentence.

19. The source also reports that, after Mr. Ndor's release, his house was placed under close surveillance by the police, who surrounded it for three days with the aim, in the source's opinion, of preventing other activists or friends from visiting him. The surveillance of Mr. Ndor then continued with his being followed by the police. The source states that Mr.

Ndor was allowed to travel abroad and took part in a conference in Algeria as a journalist for RASD TV, the official channel of the Sahrawi Arab Democratic Republic. However, on his return on 16 August 2018, Mr. Ndor was arrested at the same time as other activists from Western Sahara by the police and members of the intelligence services. He was detained at the airport for an hour and a half and the reasons for his detention were not explained. Mr. Ndor was apparently beaten, insulted and threatened with imprisonment by a police officer, who also threatened to “cut his head off” if he saw him in the street. Mr. Ndor suffered a back injury due to this ill-treatment. The police officer also confiscated some of his property. The source fears, in the light of this surveillance and arrest, that Mr. Ndor will be deprived of his liberty again or subjected to other forms of reprisals.

20. The source also indicates that, on 4 October 2018, two police officers and two officers of the Laayoune Court of Appeal came to Mr. Ndor’s residence. The police officers informed Mr. Ndor’s father that Mr. Ndor would be arrested if he failed to pay the fine of 10,000 dirhams. Mr. Ndor was not at home at the time. His father refused to take the documents and the police officers told him that they would arrest Mr. Ndor the next time they saw him.

c. Legal analysis

i. Category I

21. The source explains that Mr. Ndor was arrested without a warrant, ill-treated and detained for three days at the police station in complete isolation, from 2 to 5 May 2018. He was therefore held incommunicado for three days, outside the protection of the law. Mr. Ndor was brought before the Laayoune prosecutor on 4 May but no formal charges were laid against him and he was not represented by a lawyer. On 5 May, he was brought before the Laayoune Court of Appeal, this time with legal assistance, and the court informed him of the charges against him. Mr. Ndor was thus informed of the reason for his arrest and the charges against him three days after his arrest. He was then sent to prison, where he was kept in solitary confinement without contact with his lawyer or his family until 7 May 2018. Consequently, no member of his family or legal representative was allowed to see him or talk to him for five days.

22. The source also asserts that the Government failed to institute the formal procedures necessary to establish the legal basis for Mr. Ndor’s arrest. The source thus argues that Mr. Ndor’s arrest and detention were unfounded in law, in violation of article 9 of the Universal Declaration of Human Rights and article 9 (1) of the International Covenant on Civil and Political Rights, thereby falling within category I.

ii. Category II

23. The source recalls that Mr. Ndor is a Sahrawi national. According to the source, Western Sahara is a Non-Self-Governing Territory, which is subject to the right to self-determination in accordance with the principles contained in General Assembly resolutions 1514 (XV) and 1541 (XV).

24. The source asserts that freedom of the press is severely restricted in Western Sahara. Moroccan law prohibits independent journalism on the subject of Western Sahara. Morocco has also criminalized comments deemed harmful to its territorial integrity. The Moroccan Criminal Code provides that persons may be prosecuted and imprisoned for comments deemed harmful to Islam, the monarchy or the territorial integrity of the country.

25. The source explains that, owing to the criminalization of independent reporting, Sahrawi journalists are in conflict with Moroccan law and risk going to prison for doing their job. The source also states that these journalists are not permitted to join trade unions advocating for press freedom and the safety of journalists. Sahrawi journalists are thus forced to work “underground”, without any real protection.

26. The source also explains that Sahrawi journalists are often the only source of information on human rights violations that occur in Western Sahara, since international media and observers are often refused access to the region. The source asserts that the Moroccan authorities systematically target Sahrawi journalists who report such violations

committed by Moroccan forces. The source argues that these journalists are therefore persecuted, subjected to arbitrary arrest and detention, prosecuted on spurious criminal charges and convicted on the basis of confessions obtained under torture or coercion.

27. In this case, the source recalls that Mr. Ndor is a journalist working for the Bentili Media Center underground movement. In recent years, Mr. Ndor has been systematically harassed and threatened by the Moroccan police, has been a victim of the widespread police violence in Western Sahara and has been subjected to daily surveillance by the Moroccan authorities. He was arrested after Bentili Media Center publicly stated that it would not obey Moroccan law in its work, declaring that its journalistic activities were protected and guaranteed by international law. Mr. Ndor's arrest was apparently also related to his coverage of the Gdeim Izik trial in Sale and the trial of the group of Sahrawi students in Marrakech.

28. Consequently, the source argues that the deprivation of liberty is the result of the exercise by Mr. Ndor of his rights to freedom of expression and association as a Sahrawi journalist in Western Sahara, guaranteed by articles 19, 21, 22, 26 and 27 of the Covenant, rendering the detention arbitrary under category II.

### iii. Category III

29. The source recalls that Mr. Ndor was arrested without a warrant. The police officers who arrested him on 2 May 2018 did not inform him of the reasons. Mr. Ndor was then held in solitary confinement until 5 May, when he was transferred to the local prison in Laayoune. During that time, Mr. Ndor was tortured and forced to sign a confession. Mr. Ndor was thus held in solitary confinement for three days at the police station and was only informed of the charges against him three days after his initial arrest, in violation of articles 9 (2) and 14 (3) (a) of the Covenant.

30. Moreover, the source states that Mr. Ndor was subjected to torture and forced to sign a confession already prepared by the Moroccan authorities. As Mr. Ndor was held incommunicado, he had no access to a lawyer and could not see his family. This confession is the only evidence against him. The source recalls that Mr. Ndor was brought before the judge with obvious signs of torture on his body. As indicated by the jurisprudence of the Committee against Torture regarding article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it is enough for the victim to bring the facts to the attention of an authority of the State for the latter to be obliged to initiate a prompt and impartial investigation. In this case, it was the duty of the judge to initiate an investigation into the alleged torture, which did not occur, since Mr. Ndor was not allowed to complain about the acts of torture committed against him. Moreover, the confession obtained under torture was the only evidence against him, in contravention of articles 7 and 14 (3) (g) of the Covenant, and the authorities did not prove that the statements made by the accused had been given of his own free will, as required by paragraph 41 of Human Rights Committee general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial.

31. The source also asserts that Mr. Ndor was not given the opportunity to meet with his lawyer. The source stresses that the court rejected his request to consult his lawyer on two occasions, on 7 and 14 May 2018. Mr. Ndor was accordingly brought before the court on 21 May and given a custodial sentence without being able to speak to his lawyer. Mr. Ndor did not have a private and confidential meeting with his lawyer to discuss his case and prepare his defence for the charges against him. This constitutes a violation of article 14 (3) (d) of the Covenant, principle 17 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 Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

32. The source also argues that Mr. Ndor was effectively prevented from defending himself, insofar as he was not able to present his full case but was compelled to restrict his remarks to the content of the police report. The actions of the court constitute a miscarriage of justice as the only evidence against Mr. Ndor was the police report containing the confession supposedly made by Mr. Ndor. The result was that Mr. Ndor was prevented

from explaining to the court how he had been questioned and from challenging the only criminal evidence against him. This refusal by the court and the fact that the confession was signed under torture compromise the principle of the right of defence and more generally the right to a fair trial.

33. The source also asserts that the account of proceedings provided shows that the right to a public hearing was compromised, because the hearings were not open to the general public without discrimination. The source further states that observers who wished to attend the trial were faced with a heavy police presence and subjected to attacks, intimidation and harassment.

34. The source therefore argues that the international norms relating to the right to a fair trial were not observed. The proceedings against Mr. Ndor before the Laayoune Court of Appeal did not meet the requirements of international law in terms of the right to a fair trial under articles 9 and 14 of the Covenant. These violations render the deprivation of Mr. Ndor's liberty arbitrary under category III.

iv. Category V

35. The source reports that Mr. Ndor is a Sahrawi national and that Sahrawis have the right to self-determination, in accordance with the principles laid down in General Assembly resolutions 1514 (XV), 1541 (XV) and 2625 (XXV). However, Sahrawis advocating for the right to self-determination are apparently persecuted and systematically targeted by local Moroccan police and military forces.

36. According to the source, Mr. Ndor is a well-known Sahrawi journalist who speaks out against human rights violations in Western Sahara with the aim of putting an end to the practice of impunity. He advocates for the release of political prisoners and the exercise of the right to self-determination by the Sahrawi people. The source therefore argues that Mr. Ndor's arrest can be considered part of systematic attacks made against a network of Sahrawi journalists in retaliation for their coverage of human rights violations committed in Western Sahara. For the source, it is clear that Mr. Ndor was targeted and discriminated against because of his support for the Sahrawi people's right to self-determination, which makes his detention arbitrary under category V, as it constitutes discrimination in violation of international law, specifically of articles 1, 2, 26 and 27 of the Covenant. The source also stresses that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.<sup>1</sup>

*Response from the Government*

37. On 25 January 2019, the Working Group transmitted the allegations from the source to the Government of Morocco under its regular communications procedure. The Working Group requested the Government to provide further information, by 26 March 2019, regarding Mr. Ndor's situation since his arrest, including any comments it wished to make on the allegations contained in the communication. The Working Group also requested the Government to clarify the facts and legal provisions on which Mr. Ndor's deprivation of liberty is based, and their compatibility with the obligations of Morocco under international human rights law and particularly the treaties that the State has ratified. On 22 March 2019, the Government requested an extension of the time limit for its reply. The Working Group agreed to this and the Government responded on 16 April 2019.<sup>2</sup>

<sup>1</sup> Opinion No. 47/2012, para. 22.

<sup>2</sup> The Working Group notes that the following annexes were provided with the Government response: Annex 1, medical report from the Laayoune Regional Hospital Centre; Annex 2, transfer, incident, arrest and referral report; Annex 3, referral, seizure and custody report; Annex 4, transcript of interview at Laayoune police headquarters; Annex 5, transcript of interview at the prosecutor's office; Annex 6, bailiff's return that there is no property to be seized; Annex 7, authorization to extend the custody period from the public prosecution service; Annex 8, judgment No. 486/2018; Annex 9, ruling on offence No. 335; and Annex 10, certificate of non-appeal.

38. In its response, the Government first disputes the general political statements about Western Sahara and goes on to reaffirm its commitment to observing its international human rights obligations.

39. The Government also recalls that freedom of opinion and freedom of expression in Western Sahara are enshrined in the 2011 Constitution and are respected. Finally, it adds that many entities, including foreign delegations, have regular unrestricted access to the southern provinces of Morocco and so can ascertain the reality of these freedoms.

40. The Government gives details of Mr. Ndor's detention conditions and management of his health issues, showing them to be optimal.

41. The Government identifies the victim as Laaroussi Ndor, a Moroccan citizen born in 1991 and residing in Laayoune. During his education, he obtained qualifications in refrigeration and air conditioning, aluminium joinery and plumbing; he would therefore not appear to be a journalist. The Government also asserts that Mr. Ndor has never had a press card issued in line with the procedures for accreditation as a journalist.

42. The Government explains that Mr. Ndor was arrested and prosecuted because he had participated in a group assault on a police officer. The assault had apparently been recorded by a surveillance camera. According to the Government, Mr. Ndor fled the scene after the assault and was apprehended by police officers with the help of eyewitnesses and other anonymous sources.

43. Therefore, regarding the allegation of arbitrary deprivation of liberty under category I, the Government indicates that Mr. Ndor's arrest and detention were founded in fact and law. The Government indicates that Mr. Ndor was apprehended in flagrante delicto, a situation in which, by definition, police officers cannot show a warrant but are nonetheless authorized to make an arrest.

44. The Government also states that Mr. Ndor could receive visits and that his family was notified of his arrest by telephone. With regard to the alleged violation of the right to communicate with a lawyer, the Government indicates that Mr. Ndor did not request to do so and did not request legal assistance. The Moroccan authorities therefore assure the Working Group that the procedure followed in this case was in strict compliance with the law and under the direct and effective supervision of the prosecution service. The authorities also state that all the legal safeguards regarding the measures taken with respect to Mr. Ndor were rigorously observed.

45. The Government therefore rejects the general assessment that under category I Mr. Ndor's detention had no legal basis.

46. Regarding the alleged arbitrary deprivation of liberty under category II, the Government reiterates that the arrest, prosecution and conviction of Mr. Ndor were based only on ordinary criminal law and had no relation to his ideas or grievances.

47. The Government stresses that Mr. Ndor's activism is not related to the charges that resulted in his detention and that expressing an opinion would never constitute an offence under ordinary law. The Government thus rejects the allegation that Mr. Ndor's detention was arbitrary under category II because it resulted from the expression of his opinions.

48. Regarding the alleged arbitrary deprivation of liberty under category III, the Government first notes that all Mr. Ndor's rights of defence were ensured.

49. Regarding the right to communicate with a lawyer, the Government states that the right is stipulated in Moroccan law and that Mr. Ndor was informed of that fact while he was in custody but did not make a request to do so. According to the Government, Mr. Ndor's signature on the transcript stating that he had been informed of his rights refutes the source's argument that Mr. Ndor was not afforded the assistance of a lawyer from the time of his arrest.

50. The Government then recalls that Mr. Ndor was represented by a lawyer during his trial and appeal. It therefore rejects the allegation that Mr. Ndor was not able to consult his lawyer, considering it groundless.

51. Regarding the public nature of the proceedings, the Government provides various arguments to show that the hearings were open to the general public without discrimination. In particular, it notes the presence of the accused's mother, two Spanish nationals and members of the Sahrawi Association of Victims of Grave Violations of Human Rights Committed by the Moroccan State.

52. The Government cites the case of one individual who, as indicated by the source, did have to leave the courtroom at the request of the presiding judge for not observing the rules on audiovisual recording in court buildings.

53. The Government then turns to the allegation that Mr. Ndor was subjected to torture. The Moroccan authorities note that the prosecutor or investigating judge must order a medical examination of a person brought before them if that person requests it or if they find signs of torture or ill-treatment. However, the Government states that Mr. Ndor made the argument that his confession had been obtained under torture only before the court of appeal and that, at that stage of the proceedings, the decision to order an investigation falls within judicial discretion.

54. The Government also mentions that certain lawyers have a habit of making belated allegations of torture as a defence of last resort and denies any act of torture or ill-treatment against Mr. Ndor at the time of his arrest or subsequently.

55. Lastly, regarding the allegation that Mr. Ndor was arrested because of his ethnicity and his political opinions, the Government argues that the Constitution and Moroccan law prohibit all forms of discrimination and notes that Mr. Ndor was arrested following acts that constituted offences under ordinary law, unrelated to his opinions or ethnicity. Therefore, the Government considers that Mr. Ndor's detention cannot be characterized as arbitrary under category V on the basis of a discriminatory motive.

#### *Further comments from the source*

56. On 17 April 2019, the Working Group transmitted the Government's response to the source, who submitted the following additional comments on 24 April 2019.

57. The source mainly repeats the arguments set out in the communication.

58. In particular, the source stresses that Mr. Ndor was not informed at the time of his arrest of the reasons for his arrest, but that one of the police officers reportedly told Mr. Ndor that he had been arrested for belonging to the Frente Popular para la Liberación de Saguía el-Hamra y de Río de Oro (Frente POLISARIO) and for filming the police in the street. The source also provided some additional details on the acts of torture committed while Mr. Ndor was in custody in order to get him to sign a confession. The source reiterates that Mr. Ndor was kept in solitary confinement from 2 to 5 May and that, contrary to the Government's statements, his family could not communicate with him or visit him during that time.

59. The source also disputes the Government's argument that the offence was recorded by a camera, which was reportedly confirmed by other anonymous sources. The only evidence submitted before the judge was the police reports and the testimony of the police officer who had been injured. The police officer had apparently not identified Mr. Ndor as one of the attackers. As for the video, it was not disclosed during the trial, despite the motions to do so from the defence. It was referred to, however, when the judge told Mr. Ndor that the video showed him holding something in his hands, to which Mr. Ndor apparently replied that it was his telephone.

60. The source also provides details on the deplorable conditions of Mr. Ndor's detention, including the fact that the prison was overcrowded and infested with parasites.

61. The source reiterates that Mr. Ndor continued to be subjected to ongoing harassment after his release.

#### **Discussion**

62. The Working Group welcomes the cooperation by the parties in this case and will be able to examine the facts in line with the adversarial principle before adopting its opinion.



63. 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 disprove the allegations (see A/HRC/19/57, para. 68). The Working Group notes that in this case the Government enclosed materials from the case file in support of its response.

64. As a preliminary point, the Working Group notes that the source requests the application of both human rights law and international humanitarian law. However, at no point does the source submit arguments about the existence of an armed conflict within which the facts of the case occurred. The Working Group therefore rejects that request, which it considers irrelevant as presented.

65. The Working Group recalls its opinion No. 60/2018, particularly paragraphs 62 to 64, concerning the situation in Western Sahara. The Working Group also recalls the comments it made during its visit to Morocco, including to Laayoune in Western Sahara. In paragraph 63 of its mission report (A/HRC/27/48/Add.5), the Working Group noted that torture and ill-treatment were used to extract confessions and that protestors were subjected to excessive use of force by law enforcement officials. In paragraph 74, the Working Group further noted that despite the stipulation in article 22 of the Constitution that torture was a crime punishable by law, in cases related to State security, such as cases involving terrorism, membership in Islamist movements or supporters of independence for Western Sahara, there was a pattern of torture and ill-treatment during arrest and in detention by police officers. It also found that many individuals had been coerced into making a confession and had been sentenced to imprisonment on the sole basis of that confession.

66. The Working Group notes that the source's allegations partly coincide with its own observations. However, since the Government has disputed all the alleged facts, it will first be necessary to assess the facts of the case before considering the applicable law.

67. First of all, the Working Group observes that the parties agree on the date of the arrest, 2 May 2018. However, the Government asserts that Mr. Ndor was arrested in *flagrante delicto* and the legal documents provided in translation by the Government show that an arrest took place a few hours after an incident of stone-throwing at a police officer who was injured. The Working Group notes that nowhere in the legal file appended to the Government's response is it specified how the police officers identified Mr. Ndor before arresting him. The only evidence submitted for his alleged involvement in the incident appears to be the confession along with a video which was not provided to the source. The source alleges that the confession is the result of acts of torture committed during the first days of Mr. Ndor's detention and explains that the video would in fact be exculpatory evidence, as it would show Mr. Ndor with a telephone in his hand and not a stone. The documents provided by the Government indicate that Mr. Ndor confessed to the offence shortly after his arrest, when he had no legal assistance. It appears from the ruling of the court of appeal (Annex 9 of the Government's response) that the allegation of torture and other ill-treatment was reported by Mr. Ndor and that the prosecutor rejected it, stating that he had not seen any external signs of torture, while the court remained silent.

68. Secondly, the source reports that Mr. Ndor was acquitted of stone-throwing but convicted of carrying a knife. The Government corrected this by reversing the verdict, stating that Mr. Ndor was convicted of stone-throwing and acquitted of carrying a knife, which is consistent with the judgment and ruling supplied by the Government with its response. The Working Group was surprised to see the charge of carrying a knife included in the judgment, given that none of the police reports provided by the Government contain mention of a weapon being carried by Mr. Ndor or found on his person. This raises the question of where the charge came from. Unfortunately, an inconsistency of this kind casts doubt on the legal file provided by the Government, particularly its accurate representation of the facts and proceedings.

69. The Working Group also notes discrepancies regarding visits by Mr. Ndor's family and communication with them. The Government states that Mr. Ndor's mother visited him on 3 May 2018 but could not see him on 5 and 6 May because visits were not permitted at the weekend. The Working Group notes that the Government has not submitted any

evidence in support of these claims. In the police reports, it is also stated that the family was immediately informed by telephone of Mr. Ndor's arrest and detention, although no mention is made of any visits. The means of communication between the police and the family makes this claim difficult to verify and the Government has not submitted any evidence in support of it.

70. In the matter of legal assistance, the Working Group notes that the judgment and ruling mention two lawyers who apparently represented Mr. Ndor. However, the source asserts that the lawyers were not able to meet with Mr. Ndor outside the hearings. This claim is in no way contradicted by the evidence submitted by the Government; the Working Group considers it unrefuted and therefore accepted.

71. The Working Group notes that the source describes Mr. Ndor as a Sahrawi journalist. The Government maintains that Mr. Ndor is a Moroccan with a qualification in plumbing, joinery and refrigeration systems. This statement is not a serious argument against the source's claim and the Working Group is persuaded that Mr. Ndor is Sahrawi. As for his status as a journalist, the Government states that he is not registered with any appropriate professional organization. Freedom of expression and opinion, in the context of media in the digital age, is incompatible with such a prerequisite, as has been stated by the Human Rights Committee in paragraphs 44 and 45 of its general comment No. 34 (2011) on the freedoms of opinion and expression.

72. The Working Group observes that the source reports an arrest in August 2018 when Mr. Ndor returned from a trip to Algeria. The Government disputes this allegation, but only formally, since it confirms the trip and interaction with government officials at the airport, without providing supporting documentation. The Working Group has no reason to doubt the incident reported by the source, which it considers evidence of harassment against Mr. Ndor.

73. Finally, the source reports that police officers and two officers of the Laayoune Court of Appeal paid a visit to Mr. Ndor's residence in October 2018. When they arrived, they reportedly told Mr. Ndor's father that Mr. Ndor would be arrested if he did not pay the fine imposed on him. For its part, the Government asserts that a single bailiff went to his home, supported by a bailiff's report stating this, provided as an annex. The Working Group thus considers the event confirmed and notes that the official title of the parties has no impact on the conclusions given below.

74. In the light of this assessment of the facts, the Working Group will now address the arguments of the parties for each category.

75. Firstly, the arrest occurred on 2 May 2018 at approximately 10.30 p.m., roughly two hours after the stone-throwing incident. The Government affirms that the arrest took place in flagrante delicto. However, the parties agree that the incident had finished some time before the arrest. In this regard, the Working Group notes that it has consistently found that an offence is flagrant if the accused is either apprehended during the commission of a crime or immediately thereafter, or is arrested in hot pursuit shortly after a crime has been committed.<sup>3</sup> With this definition in mind, the Working Group considers that the circumstances of the case cannot be deemed to show the applicability of flagrante delicto to the offence as argued by the Government, since the incident was over and the arrest did not occur in the same location as the incident. Accordingly, an arrest warrant should have been shown or the arrested person informed of the reasons for his arrest. In this case, no such information was provided, at least not regarding the acts for which Mr. Ndor was later questioned then tried.

76. The Working Group further notes that the police custody lasted three days, including the 2 hour extension. The trial was then held on 21 May 2018, but the Government has not provided any information about the legality of the detention for the period between 5 and 21 May. The Working Group thus finds that Mr. Ndor was not brought before a judge to review the legality of his arrest and detention. That is a violation of Mr. Ndor's rights that renders the detention arbitrary under category I.

<sup>3</sup> Opinion No. 9/2018, para. 38.

77. The Working Group also notes that the facts as reported by the source indicate links between Mr. Ndor and the political situation in Western Sahara. The source attests to Mr. Ndor's association with the political movement for the independence of Western Sahara, stating that he was chanting slogans in support of self-determination for the Sahrawi people as he entered the courtroom of the Laayoune Court of Appeal. Moreover, the events in question and his arrest took place in that region. Finally, the source reports the harassment to which he was subjected after his release, while the Government failed to persuade the Working Group that it should not consider this allegation substantiated.

78. The Working Group recalls that the expression of a political opinion, including in support of self-determination for Western Sahara, is protected in international law by article 19 of the Covenant. The Working Group also recalls that Mr. Ndor's status as a journalist is protected under international law. It is convinced, in the light of all the circumstances of the case, that the arrest, detention and prosecution of Mr. Ndor result from his enjoyment of the duly protected rights listed above. The Working Group thus concludes that Mr. Ndor's detention was arbitrary under category II.

79. In this situation, there could be no justification for a trial. However, a trial did take place, and the Working Group will now consider the specific circumstances of that trial.

80. The Working Group recalls that the right of the accused to a fair trial is central to the criminal justice system. In the present case, this international norm seems to have been violated in two different ways. Firstly, Mr. Ndor claims to have suffered treatment which forced him to make the confession used against him. Secondly, during the first days of his detention, including when the confession was taken, Mr. Ndor did not receive the assistance of a lawyer.

81. The Working Group recalls that forced confessions must be excluded from a criminal case, in accordance with article 14 (3) (g) of the Covenant.<sup>4</sup> In this case, the documents provided show that Mr. Ndor reported the forced nature of his confession during the trial. This claim does not seem to have led to any action by the authorities and no medical report was produced during the detention to prove otherwise. Since Mr. Ndor reported this treatment to the trial judge, who did not conduct any further investigation as to the truth of the statement, it was dangerous to rely on this confession for the conviction.

82. The Working Group also recalls that all accused persons have the right to legal assistance and representation from the moment of their arrest. The presence of a lawyer is particularly important to protect the rights of the accused when the accused chooses to confess. In this case, the Working Group considers that legal assistance was lacking at the time of the confession and during the interview with the prosecutor on 4 May, as shown by the authorization from the public prosecution service to extend the custody period, provided as an annex to the Government's response.

83. Consequently, the Working Group finds that the right to a fair trial has been violated and that the violation is sufficiently severe to render the detention of Mr. Ndor arbitrary under category III.

84. Based on the arguments of the parties, the Working Group finds that Mr. Ndor was in fact targeted owing to his association with the movement for self-determination in Western Sahara, as is shown by the remarks stating that Mr. Ndor belonged to the Frente POLISARIO made by a police officer at the time of the arrest and by the subsequent arrest of Mr. Ndor at the airport, the basic fact of which the Government did not dispute. The Working Group does not rule out the possibility that the initial arrest related to the stone-throwing incident for which he was prosecuted was also based on this type of discrimination. In this regard, the Working Group recalls its previous opinions, in which it found similar practices used against Sahrawis.<sup>5</sup> Since this discrimination led to an arrest and to deprivation of liberty, even if that was of limited duration, it is contrary to international law and renders the detention arbitrary under category V.

<sup>4</sup> Opinion No. 1/2014, para. 22; and opinion No. 40/2012, para. 48.

<sup>5</sup> See, inter alia, opinions No. 60/2018, No. 58/2018, No. 31/2018 and No. 11/2017.

85. The nature of the facts in this case prompts the Working Group to refer the case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

### **Disposition**

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

The deprivation of liberty of Laaroussi Ndor, being in contravention of article 9 of the Universal Declaration of Human Rights and of articles 1, 2, 14, 19, 26, and 27 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

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

88. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to annul the criminal conviction and the resulting fine, on the understanding that the rights of the injured police officer would not be affected. The Working Group also requests the Government to take the steps necessary to ensure that Mr. Ndor will never again be a victim of judicial harassment.

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

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

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

### **Follow-up procedure**

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

(a) Whether compensation or other reparations have been made to Laaroussi Ndor;

(b) Whether an investigation has been conducted into the violation of Laaroussi Ndor's rights and, if so, the outcome of the investigation;

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

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

93. 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.

94. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of the 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.

95. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and 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>6</sup>

*[Adopted on 2 May 2019]*

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<sup>6</sup> See Human Rights Council resolution 33/30, paras. 3 and 7.