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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its 64th session (27–31 August 2012)

No. 40/2012 (Morocco)

Communication addressed to the Government on 28 February 2012

Concerning: Mohamed Hajib

The Government replied to the communication on 11 April 2012.

The State is party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established by the former Commission on Human Rights in its resolution 1991/42. Its mandate was clarified and extended by the Commission in resolution 1997/50. The Human Rights Council took over the mandate in its decision 2006/102 and extended it for a further period of three years by its resolution 15/18 of 30 September 2010. Acting in accordance with its methods of work (A/HRC/16/47, annex), the Working Group addressed the above communication to the Government.

2. The Working Group considers the deprivation of liberty to be 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 sentence or despite an amnesty law applicable to him) (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 International Covenant on Civil and Political Rights (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 the international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability or other status, and which aims towards or can result in ignoring the equality of human rights (Category V).

Information received

Communication by the source

3. Mr. Mohamed Hajib (hereinafter Mr. Hajib), of dual German and Moroccan nationality, graduated in economics at the University of Duisburg and was doing business in Germany when the facts occurred.

4. In July 2009, Mr. Hajib was allegedly arrested in Pakistan while he was participating in religious activities for the Jamaat Al Tabligh (or Tablighi Jamaat), a religious organization which is active in many countries. One month after his arrival in Pakistan, Mr. Hajib allegedly decided to interrupt his trip and return to Morocco.

5. As he was on his way to Iran, a police check was apparently conducted in the bus that Mr. Hajib was travelling in. After checking his identity papers, the Pakistani police reportedly told him to leave the bus and took him by force on board another vehicle. Mr. Hajib was allegedly imprisoned for 5 days before being transferred with other prisoners to Quetta, where he allegedly remained in detention for 6 months.

6. Although Mr. Hajib had not been charged, the source reports that he was held in detention for 6 months in particularly harsh conditions. At the time, he started a hunger strike on 3 February 2010 as a protest against his conditions of detention. He was allegedly released without trial a few days later, after a senior Pakistani police official had told him that no charges had been brought against him, though without giving him the reasons for his arrest and detention. On 17 February 2010, Mr. Hajib reportedly flew to Frankfurt in Germany.

7. According to reports received, at Frankfurt airport Mr. Hajib was met by two police officers, who had been told to expect "the arrival of a dangerous individual". Mr. Hajib allegedly told them then that he intended to leave immediately for Morocco, where his family was waiting for him.

8. When Mr. Hajib arrived at Casablanca airport, five men were apparently waiting for him and he was immediately handcuffed and taken by force to the police station of El Maarif, where he was allegedly tortured. His family was apparently informed of Mr. Hajib's detention only four days later, when the judicial police contacted his parents, informing them that he was at El Maarif police station.

9. It is reported that Mr. Hajib was detained at El Maarif police station for 12 days, before being brought before the investigating judge of the court of Salé on the charge of belonging to a terrorist group and criminal conspiracy.

10. According to information received, when he appeared before the court of Salé, Mr. Hajib told the investigating judge that he had been subjected to torture at El Maarif police station, in order to force him to sign a document which did not tally with the statement he had made. According to the source, the judge did not take his statement into account.

11. The source reports that, despite the lack of evidence, Mr. Hajib was placed in pretrial detention in the Salé prison.

12. In protest against the prosecution proceedings, Mr. Hajib allegedly went on hunger strike again on 10 May 2010. On 24 June 2010, after 46 days of hunger strike, he was apparently brought before a court. It is reported that Mr. Hajib was sentenced, following a summary trial, to 10 years' imprisonment for having fought in Afghanistan against the armed forces of the United States and Pakistan. The source asserts that the judges merely referred to the police reports without taking any account of Mr. Hajib's statements before the investigating judge and before the court. According to the source, no evidence was produced by the prosecution and no inquiry was opened into the allegations of torture.

13. According to the source, following a protest movement in the Salé prison, Mr. Hajib was transferred, in May 2011, to the prison of Toulal and held in secret detention for 15 days. The German consulate apparently finally discovered his whereabouts and informed his family.

14. After that transfer, Mr. Hajib was allegedly subjected to torture and threatened with rape. Fifteen days after his return to Salé prison, Mr. Hajib is said to have tried to commit suicide and to have been taken to the emergency services of the hospital. According to his family, he was still to this day being subjected to ill-treatment in Salé prison.

15. The source considers that Mr. Hajib's deprivation of liberty is arbitrary and contrary to the International Covenant on Civil and Political Rights (the Covenant) to which Morocco is party.

16. According to the source, the present detention of Mr. Mohamed Hajib is in breach of article 9, paragraph 1, of the Covenant, according to which: "Everyone has the right to liberty and security of person"; "No one shall be subjected to arbitrary arrest or detention", and "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." According to the second paragraph of that article: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." According to the information received, Mr. Hajib never received any such notification at the time of his arrest at the airport of Casablanca and was not brought within a reasonable delay before a judicial authority to hear the charges against him.

17. The source also alleges that Mr. Hajib's detention is contrary to article 14, paragraph 1, of the Covenant, which stipulates that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, which shall decide whether any criminal charge brought against the person is well founded. Mr. Hajib was reportedly unable to avail himself of his means of defence, right from the start of the hearing, since the judges refused to take account of his statements to the effect that he had been tortured at the police station of Maarif.

18. The source also maintains that Mr. Hajib's deprivation of liberty was the consequence of his exercising the right to express his religious convictions, therefore in violation of article 18, paragraph 1, of the Covenant, whereby: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Urgent appeal concerning Mr. Hajib's case

19. Mr. Hajib's case had already led to an urgent appeal on 30 August 2011, addressed to the Government of the Kingdom of Morocco by the Chairperson-Rapporteur of the

Working Group on arbitrary detention, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Working Group thanked the Government of Morocco for its reply to the urgent appeal of 3 October 2011.

20. In its reply, the Government of Morocco said that Mr. Hajib had been arrested by the police strictly in accordance with the law and under the effective supervision of the prosecution service for “belonging to a criminal group established for the purpose of preparing and perpetrating terrorist acts aimed at seriously undermining public order by intimidation, violence and terror, belonging to an unrecognized religious movement and forgery and using forgeries”. The Government made it clear that the investigation and hearings in the case were conducted with full respect for Mr. Hajib’s rights. The Government further denied all allegations of physical ill-treatment and torture against Mr. Hajib, who it said had undergone a medical examination that showed no trace of violence.

Reply by the Government

21. By letter of 11 April 2012, the Government of Morocco informed the Working Group that Mr. Hajib had been arrested by the police at the Mohammed V airport of Casablanca and later transferred to the department of criminal investigation, where he had been interrogated regarding his connections with terrorist acts. During the preliminary interrogation, he admitted that he was a follower of the jihadist salafist ideology and that he had encouraged other persons to purchase arms to commit acts of terrorism.

22. The Government of Morocco states that Mr. Hajib was brought before the prosecutor on 1 March 2010 and then taken to appear before the investigating judge. The latter interrogated Mr. Hajib in the presence of his lawyer, Mr. Mohamed Al-Sabbar of the Rabat bar. Mr. Hajib then said that his only purpose in going to Afghanistan or to any other country was to spread the word of God. He said that he was not linked to any jihadist organization and had no intention of undertaking any jihadist act in Morocco. He thus rejected the accusations made against him.

23. The Government also says that when the hearing was over the investigating judge decided to prosecute Mr. Hajib on the grounds of his intention to form an association with a view to planning and committing terrorist acts, as part of a jihadist commitment to seriously disrupt public order. He was also charged (under articles 218-1 (9), 218-4 and 218-7 of Anti-Terrorism Act No. 03-03) with gathering funds with the intention to commit a terrorist act. The investigating judge transferred the case to the criminal court of first instance, which — after examining the police report and the statements made by the accused to the investigating judge — decided that the defendant had committed the acts of which he was charged and condemned him to a firm prison sentence of 10 years, taking account of mitigating circumstances. The case was then brought before the criminal appeal court, which confirmed the sentence, judging it to be well founded.

24. According to the Government’s reply, the Public Prosecutor’s Office and the defence counsel tried to challenge the decision of the criminal court. The Court of Cassation annulled the judgement and returned the case to the court of appeal. Criminal appeal case No. 39/11/82 was opened and on 9 January 2012 the court of appeal confirmed the decision of the criminal court but reduced the sentence to a firm prison sentence of 5 years. Mr. Hajib is serving his sentence in the Salé 2 prison on the charge of committing terrorist acts (articles 218-1 (9) and 218-4 of Anti-Terrorism Act No. 03-03).

25. Thus, according to the Government’s reply, all the necessary guarantees of a just and equitable trial were granted to Mr. Hajib, with full consideration for the rights and liberties of the defence.

26. Regarding the conditions of detention, the Government reports that, in view of the damage caused to the Salé prison on 16 and 17 May 2011, the general commissariat of the department of prison administration and rehabilitation transferred Mr. Hajib and other prisoners who took part in acts of vandalism to the district prison of Meknès, where conditions comply with applicable legal standards. On 21 May 2012, Mr. Hajib was transferred to the Salé prison, close to the appeal court of Rabat, before which he was due to appear. In the Salé prison, Mr. Hajib enjoys all the rights to which he is legally entitled as a prisoner and he regularly receives the visits of family members and of his lawyer.

27. In this connection, the Government points out that, under article 55 of Act No. 23-98 governing the functioning of prisons, Mr. Hajib has been subjected to disciplinary sanctions (45 days in solitary confinement) for the riots and vandalism that occurred in the Salé prison on 16 and 17 May 2011.

28. According to the Government, Mr. Hajib is currently serving his sentence under the conditions provided by law. He has never been subjected to violence or torture. Moreover, he has not attempted suicide and has therefore not been hospitalized for treatment.

Comments by the source

29. The source maintains in his observations of 21 August 2012 that Mr. Hajib was convicted solely on the basis of confessions obtained under torture.

30. According to the source, it emerges from the reply of the Government of Morocco that Mr. Hajib, after his arrest by the police at the Mohammed V Casablanca airport, was supposed to have confessed in the course of the preliminary investigation to having been influenced by jihadist salafist thinking and to have persuaded other persons to use funds to purchase arms with a view to committing a terrorist act. It appears from that same reply of the Government that Mr. Hajib, at his first hearing before the investigating judge in the presence of counsel, denied having ever intended to go to Afghanistan or any other country in order to join any jihadist organization, or to intend to perpetrate terrorist acts in Morocco.

31. It has been established, moreover, that at no stage of the investigation proceedings did the prosecution produce any material evidence whatsoever confirming the charges against the victim. The Government's reply confirms the absence of any other material evidence in the case which could substantiate the charges against Mr. Hajib.

32. According to the source, the Government's reply confirms that Mr. Hajib was indeed convicted solely on the grounds of police reports drawn up during his 12-day stay in police custody, in the course of which — shut off from the outside world — he was subjected to physical and psychological torture, of which he is still suffering the after-effects. It also emerges from the Government's reply that Mr. Hajib was blamed for holding his religious beliefs and opinions. Both during the preliminary investigation and during the procedural investigation and the different stages of the proceedings, the latter was in effect essentially interrogated concerning his religious opinions and beliefs and his adherence to the Tabligh movement, which he never denied.

33. The source recalls that this militant religious movement is recognized in Pakistan and has never been classified by the Security Council of the United Nations as a terrorist organization. It would appear, however, that the Moroccan authorities tend to confuse the Tabligh movement with Al-Qaida or the Taliban, which could have inclined them to arrest Mr. Hajib.

34. According to the source, the Government's reply thus confirms that Mr. Hajib was arrested on account of his allegiance to the Tabligh movement, that he was essentially interrogated about his religious convictions and convicted on the basis of confessions obtained under torture. His deprivation of liberty is clearly of an arbitrary nature,

corresponding to categories III and V of the categories of arbitrary detention to which the Working Group refers when examining cases submitted to it.

35. The source also refers to a letter of 7 July 2011 from the Ministry of Foreign Affairs of Germany, stating that the consular assistance office of the German embassy in Rabat had appealed to the Moroccan authorities to comply with the standard minimum rules for the treatment of prisoners, which prohibit physical ill-treatment, and to ensure access to medical care and legal aid. Mr. Hajib spoke of ill-treatment in an interview with the staff of the German consulate, which corroborates the allegations put forward by the source in the present case before the Working Group.

Discussion

36. The Working Group notes that, according to the Government's reply, Mr. Hajib was convicted on the basis of confessions made in the course of a preliminary hearing. He confessed to having spread the jihadist salafist ideology and to having encouraged other persons to purchase arms with a view to committing acts of terrorism. The confessions were made by Mr. Hajib after his arrest at Casablanca airport, while he was held in police custody, when he did not have access to a lawyer and in the absence of any material evidence.

37. When Mr. Hajib appeared later before an investigating judge with the assistance of counsel, he rejected all the accusations made against him, as well as the confessions, saying that they had been obtained under torture.

38. The Government denies that any torture took place. Yet the reports of the German consular staff obtained in meetings with Mr. Hajib contain allegations of torture.

39. The Working Group recalls the concluding observations of the Committee against Torture, following consideration of Morocco in 2011, in which "the Committee is concerned by the fact that, under the State party's current system of investigation, confessions are commonly used as evidence for purposes of prosecution and conviction. The Committee notes with concern that convictions in numerous criminal cases, including terrorism cases, are based on confessions, thus creating conditions that may provide more scope for the torture and ill-treatment of suspects (arts. 2 and 15)".¹

40. The Committee asked the State party to:

"[...] take all steps necessary to ensure that criminal convictions are based on evidence other than the confession of the persons charged, especially when such persons retract their confessions during the trial, and to make certain that, except in cases involving charges of torture, statements made under torture are not invoked as evidence in any proceedings, in accordance with the Convention."²

41. In particular, the Committee requested the State party to:

"[...] review criminal convictions that have been based solely on confessions in order to identify cases in which the conviction was based on confessions obtained under torture or ill-treatment. The State party is also invited to take the appropriate remedial measures and to inform the Committee of its findings."³

42. The present case involves an individual who was arrested, charged, judged and convicted on the basis of confessions obtained under torture. He did not have a lawyer

¹ CAT/C/MAR/CO/4, para. 17.

² Ibid.

³ Ibid.

during his interrogation and he retracted his confession as soon as he received legal assistance. He was convicted exclusively on the basis of those statements.

43. The guarantees of a fair and equitable trial laid down in article 11 of the Universal Declaration of Human Rights and in article 14 of the International Covenant on Civil and Political Rights exclude self-incrimination and grant the right to legal assistance and representation and to other measures of protection in order to ensure that no evidence is obtained by confession. Under article 14, paragraph 3 (g), of the Covenant, no person may be compelled to testify against himself or to confess guilt. In its jurisprudence, the Human Rights Committee stated that this clause “must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt”.⁴ In communication No. 1769/2008, *Bondar v. Ouzbekistan*,⁵ the Committee found violations of article 14, paragraph 3 (b) and (d), on the grounds that the victim was not provided with a lawyer during the interrogation and his right to have the assistance of the lawyer of his own choosing was denied.⁶ The Committee also found a violation of article 14, paragraph 3 (g) owing to a confession being obtained under torture.⁷

44. The Working Group recalls that in its general comment No. 32 (2007), the Human Rights Committee stated that:

“[...] article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will” (*quotations omitted*) (para. 41).

45. The Working Group takes note of the recent judgment by the International Court of Justice in the case *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*. In paragraph 99 of its judgment rendered on 20 July 2012, the Court expressed the opinion that:

“[...] the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution

⁴ Human Rights Committee, communication No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; also, communications No. 253/1987, *Kelly v. Jamaica*, para. 5.5; No. 330/1988, *Berry v. Jamaica*, para. 11.7; No. 912/2000, *Deolall v. Guyana*, para. 5.1.

⁵ See also the jurisprudence of the Inter-American Court of Human Rights, in particular the cases *Tibi v. Ecuador*, Series C, No. 114, 7 September 2004, para. 146; *Maritza Urrutia v. Guatemala*, Series C, No. 103, 27 November 2003, para. 93; *Cantoral-Benavides v. Peru*, Series C, No. 69, 18 August 2000, para. 104.

⁶ See Human Rights Committee, communication No. 1769/2008, *Bondar v. Ouzbekistan*, para. 7.4.

⁷ *Ibid.*, para. 7.6.

3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora”.⁸

46. Similarly, the Working Group endorses the concerns and recommendations of the Committee against Torture and the Sub-Committee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In drawing attention to article 2 of the Convention against Torture, the Working Group recalls the reasoning of the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, according to which: “The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented”.⁹ Similarly, the Committee against Torture recalled that: “The obligation to prevent torture in article 2 is wide-ranging,”¹⁰ adding that its content is not static since the most effective methods “are in a process of continual evolution” (para. 4) and are “not limited to those measures contained in [...] articles 3 to 16” (para. 1). That obligation to prevent applied to all the contracting parties, particularly when they assess the risk of torture and cruel, inhuman or degrading treatment to which individuals may be subjected in a third country.

47. Lastly, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment agrees with the view that:

“Interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law. It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention. Any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court. No statement of confession made by a person deprived of liberty, other than one made in presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by unlawful means.”¹¹

48. One of the aims of the provisions of article 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights is to provide guarantees against all forms of direct or indirect, physical or psychological pressure by the authorities on the accused with a view to obtaining a confession. The right not to be compelled to testify against oneself or to confess guilt and access to counsel and legal aid are not only measures intended for the protection of the interests of the individual, but also measures of the interest of society as a whole, of the trust in and the effectiveness of the judicial process, and of the reliability of evidence. Confessions made in the absence of legal counsel are not admissible as evidence in criminal proceedings, and this applies especially to confessions made during the time spent in police custody.

⁸ International Court of Justice, *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, merits, judgment of 20 July 2012, para. 99.

⁹ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, merits, judgment of 26 February 2007, para. 429.

¹⁰ Committee against Torture, general comment No. 2 (2008) on Implementation of article 2 by States parties.

¹¹ E/CN.4/2003/68, para. 26 (e).

49. In the case in hand, Mr. Hajib's confessions were made in the course of investigation proceedings without a lawyer or legal aid. This constitutes a violation of article 11 of the Declaration and article 14 of the Covenant.

50. Lastly, the Working Group notes the fact that the allegations of torture are confirmed by the reports of the German consular staff. In its reply to the Working Group, the Government of Morocco merely denies that any confession was obtained through torture without showing that any independent, transparent enquiry was held into those allegations. Moreover, no material evidence was put forward during the trial and the confessions were obtained without a lawyer being present. The Working Group therefore finds violations of article 5 of the Declaration and article 7 of the Covenant, in direct connection with articles 9, 10 and 11 of the Declaration and articles 9 and 14 of the Covenant. The Working Group considers that the violations of the right to a just and equitable trial to which Mr. Hajib has been subjected are sufficiently serious to render his detention arbitrary. In conclusion, Mr. Hajib's detention corresponds to category III of the categories of arbitrary detention to which the Working Group refers when examining cases submitted to it.

Opinion and recommendations

51. In the light of the above, the Working Group renders the following Opinion:

The detention of Mr. Mohamed Hajib is arbitrary because it contravenes the provisions of articles 5, 9, 10 and 11 of the Universal Declaration of Human Rights and articles 7, 9 and 14 of the International Covenant on Civil and Political Rights. His detention corresponds to category III of the categories of arbitrary detention to which the Working Group refers when examining cases submitted to it.

52. For this reason, the Working Group requests that the Government of Morocco proceed immediately to release Mr. Hajib and grant him adequate compensation pursuant to article 9, paragraph 5, of the Covenant.

53. The Working Group decides to bring the allegations of acts of torture to the attention of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

[Adopted on 31 August 2012]