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Human Rights Council Working Group on Arbitrary Detention

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Opinion No. 50/2023 concerning Mehdi Ben Gharbia (Tunisia)

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 51/8.
2. In accordance with its methods of work,¹ on 12 May 2023 the Working Group transmitted to the Government of Tunisia a communication concerning Mehdi Ben Gharbia. The Government has not replied to the communication. 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).

¹ [A/HRC/36/38](#).



1. Submissions**(a) Communication from the source**

4. Mehdi Ben Gharbia, born on 19 June 1973 in Bizerte, is a Tunisian businessman and politician.

5. A former minister and deputy of the Assembly of People's Representatives, Mr. Ben Gharbia was elected deputy for the Democratic Progressive Party in 2011, then re-elected in 2014. In 2016, he became Minister of Relations with Constitutional Institutions, Civil Society and Human Rights Organizations. In 2018, he resigned to focus on establishing a new political party. In 2019, he was re-elected as a deputy for the then Prime Minister's party. In October 2019, the Prime Minister's opponent won the presidential election. At the same time, Mr. Ben Gharbia is understood to head several companies.

6. Since 2016, Mr. Ben Gharbia has reportedly been the target of smear and defamation campaigns organized on social media by business competitors and detractors.

(i) Arrest and detention

7. According to the source, on 30 September 2021, Mr. Ben Gharbia was summoned by the National Guard's second central investigation brigade to be questioned as a suspect. The interview apparently took place from 10.30 a.m. until 1.20 a.m., and details of its content were immediately published on social media.

8. On 16 October 2021, Mr. Ben Gharbia's home was reportedly searched by the National Guard brigade on the orders of the Public Prosecutor of the court of first instance of Sousse, in connection with suspicions of money-laundering and forgery. Mr. Ben Gharbia was arrested at his home during the search and taken into custody at the brigade's headquarters in Tunis. He was interrogated from 9 p.m. until 4 a.m. on the night of 16 to 17 October 2021, after which he had to be rushed to hospital with heart complications. The source points to inconsistencies in the reports drawn up by the Tunisian authorities while Mr. Ben Gharbia was apparently in police custody, and to the fact that they were not signed and were drawn up in his absence.

9. By an order dated 17 October 2021, the Public Prosecutor of the court of first instance of Sousse reportedly instructed Mr. Ben Gharbia to be placed in police custody, on the basis of article 13 bis of the Code of Criminal Procedure.

10. On 20 October 2021, Mr. Ben Gharbia was reportedly transferred directly from hospital to the court of first instance of Sousse and brought before the Public Prosecutor, who requested that a judicial inquiry be opened against Mr. Ben Gharbia. On the same day, Mr. Ben Gharbia was brought before the investigating judge, who issued a committal order without questioning him, as Mr. Ben Gharbia's state of health meant that he needed to be hospitalized for a further two days. He was apparently taken to Messadine prison on 22 October 2021.

11. On 14 December 2021, after a series of investigations, the bulk of the charges against Mr. Ben Gharbia were reportedly dropped by the investigating judge of the court of first instance of Sousse, who ordered Mr Ben Gharbia's release and the lifting of the committal order. However, it seems that the Public Prosecutor's Office appealed against this decision, and that Mr. Ben Gharbia was not released. The indictment division prolonged the process and, on 10 May 2022, decided to refer him to trial, keeping him in detention in the meantime. Since then, Mr. Ben Gharbia's trial has reportedly been adjourned several times and his requests for release rejected. According to the source, Mr. Ben Gharbia is accused of forgery and use of forgeries committed by a person other than a public official or similar person, of drawing up a certificate or deed stating materially inaccurate facts, of laundering money derived from the opportunities arising from the exercise of his function or his professional or social activity and of carrying out commercial transactions using fraudulent means.

12. On 18 April 2022, Mr. Ben Gharbia's counsel apparently submitted an application for compulsory release due to the expiry of the legal time limit of pretrial detention. According to the source, approximately 10 applications for release have been made, all of which have been rejected.

13. On 8 December 2022, Mr. Ben Gharbia reportedly appeared by videoconference before the court of first instance of Sousse, which adjourned the case until 5 January 2023. Mr. Ben Gharbia's request for release during this hearing was rejected, preventing him from spending the end-of-year festivities with his son.

14. On 5 January 2023, it is alleged that the criminal division of the court of first instance of Sousse adjourned consideration of Mr Ben Gharbia's case again, this time until 16 February 2023. The new request for release made at this hearing was rejected once more. On 23 February 2023, it seems that the criminal division once again adjourned consideration of the case until 27 April 2023, and rejected the fresh request for release made at the hearing. The 27 April 2023 hearing was further adjourned to 25 May 2023 due to a pending appeal lodged by a co-defendant against the rejection of a request for release. The source notes that the reasons for the adjournment of the hearing are entirely unrelated to the trial of Mr. Ben Gharbia's case. As a result, Mr. Ben Gharbia has been kept in pretrial detention at Messadine prison for more than 18 months, his requests for conditional release having been systematically rejected.

(ii) *Legal analysis*

15. The source has submitted that Mr. Ben Gharbia's detention is arbitrary under categories I, II and III.

a. *Category I*

16. The source asserts that Mr. Ben Gharbia's arrest and placement in police custody are unlawful and contrary to article 9 of the Covenant and rule 7 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

17. The source notes that article 35 of the Tunisian Constitution stipulates that no person may be arrested or detained except by virtue of a judicial decision. Any person who is arrested must be informed immediately of his or her rights and of the charges he or she is facing, and has the right to be represented by a lawyer. Article 13 bis of the Code of Criminal Procedure stipulates that officers of the criminal investigation police may detain a suspect only with the authorization of the Public Prosecutor.

18. In this case, Mr. Ben Gharbia was allegedly arrested without a valid warrant during a search of his home on 16 October 2021, then taken to the headquarters of the National Guard's second central investigation brigade in El Aouina, Tunis, without being brought before a judge or notified that he was being taken into police custody. During the first 24 hours of his detention, he was informed neither of his rights nor of the reasons for his arrest.

19. According to the source, no competent body authorized Mr. Ben Gharbia's detention on 16 October 2021. The police custody report was not drawn up until 12 p.m. on 17 October 2021. The source notes that, as indicated by the fax in which the custody order and the police custody report were transmitted, the brigade that arrested Mr. Ben Gharbia did not send a request for police custody to the Public Prosecutor's Office until 4 p.m. on 17 October 2021, four hours after the report was issued. The Public Prosecutor's Office apparently sent its custody order to the brigade on 18 October 2021, at 4.44 a.m.

20. The source explains that a member of Mr. Ben Gharbia's family was informed of his placement in police custody before the order from the Public Prosecutor's Office was even issued, having been instructed by the brigade to sign the information notice even though it did not indicate either the time or date of notification of the decision to place him in custody.

21. The source therefore concludes that Mr. Ben Gharbia's placement in police custody and his ensuing detention are manifestly unlawful.

22. The source further asserts that Mr. Ben Gharbia's police custody is unlawful because the legal time limits have not been observed. The source notes that, according to general comment no. 35 (2014) of the Human Rights Committee, any person arrested or detained on a criminal charge shall be brought promptly before a judge; 48 hours is ordinarily sufficient to satisfy this obligation, and any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. The source adds that article 13 bis of

the Code of Criminal Procedure stipulates that the period of police custody may not exceed 48 hours, after which the individual must immediately be interviewed by the Public Prosecutor. The source provides that police custody can be extended once for 48 hours, by decision of the Public Prosecutor justified in fact and in law.

23. In this case, the source claims that the legal time limits were disregarded on two occasions. Firstly, Mr. Ben Gharbia was allegedly detained and questioned by the central investigation brigade starting on 16 October 2021, even though the custody order issued by the Public Prosecutor specified that the period of police custody was to be 5 days starting at 12 p.m. on 17 October 2021. Secondly, the committal order against Mr. Ben Gharbia was issued on 20 October 2021, meaning that his detention in police custody ultimately lasted 4 days, which is contrary to both the Code of Criminal Procedure and the order issued by the Public Prosecutor's Office.

24. The source therefore asserts that the placement of Mr. Ben Gharbia in police custody was illegal and arbitrary, as was his subsequent detention.

25. The source alleges that the investigating judge did not comply with the conditions applicable to placing persons in pretrial detention, in violation of article 9 (2) of the Covenant and guideline 5 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.²

26. In this respect, the source stresses that an arrested person must be informed immediately of the reasons for his or her arrest, in particular by being given a copy of the arrest warrant or detention order, as well as the case file. The source also notes that the arrested person must have access to the case file and any other information relating to the reasons he or she is being deprived of liberty,³ and adds that article 80 of the Code of Criminal Procedure allows the investigating judge, after questioning the accused, to issue a committal order if the alleged acts carry a prison sentence.

27. In this case, the source asserts that, on 20 October 2021, the Public Prosecutor filed an application to open an investigation. Mr. Ben Gharbia was brought before the investigating judge at 9.30 p.m. the same day, in a worrying state. The source notes that Mr. Ben Gharbia appeared before the investigating judge while still in police custody, according to the Prosecutor's order. The investigating judge decided to postpone the case until 10 a.m. on 26 October 2021, but immediately issued a committal order without questioning Mr. Ben Gharbia, thus rendering his placement in pretrial detention unlawful.

28. The source also considers the length of Mr. Ben Gharbia's detention to be disproportionate and arbitrary. The source points out that, according to general comment No. 35 (2014) of the Human Rights Committee, courts must consider whether alternative measures, such as bail, might make detention unnecessary. The source adds that articles 84 and 85 of the Code of Criminal Procedure provide that pretrial detention is an exceptional measure that can be ordered only under the following conditions: (a) in the case of felonies or misdemeanours discovered in flagrante delicto; (b) whenever, due to the existence of serious prima facie evidence, detention seems necessary; and (c) as a security measure to prevent further offences from being committed. The source notes that, in practice, pretrial detention can be ordered against individuals only if there is serious prima facie evidence against them and if detaining them would help prevent further offences from being committed. Pretrial detention must be justified in fact and in law and may not exceed 6 months. It can be extended only once for 3 months in the case of a misdemeanour, and twice for 4 months in the case of a felony.

29. In this case, Mr. Ben Gharbia has reportedly been held by the authorities since 16 October 2021, kept in detention since 20 October 2021 and incarcerated in Messadine prison since 22 October 2021, i.e., for more than a year, on charges essentially of forgery and money-laundering. The source asserts that no evidence presented at the time he was placed in detention substantiated these charges, and his detention therefore constitutes a

² A/HRC/30/37, annex.

³ See *Engo v. Cameroon* (CCPR/C/96/D/1397/2005).

disproportionate measure. Moreover, on 14 December 2021, the first investigating judge of the fifth investigating office of the court of first instance of Sousse issued an order terminating proceedings in which he declared the judicial inquiry closed. He is understood to have ordered Mr. Ben Gharbia's release and the lifting of his committal order. However, the Public Prosecutor's Office lodged an appeal, meaning that Mr. Ben Gharbia was kept in detention, and the court of appeal responsible for overseeing the investigation filed a series of actions, adjournments and requests, keeping the investigation artificially open for a further 6 months and in this way ensuring Mr. Ben Gharbia's continued detention.

30. On 18 April 2022, although Mr. Ben Gharbia should have been released upon expiry of the initial 6-month period at the end of which his pretrial detention could be renewed, the investigating judge of the court of first instance of Sousse reportedly ordered a 4-month extension to his pretrial detention on the sole grounds that the formalities required by the indictment division had not been completed.

31. The source adds that, on 10 May 2022, the indictment division referred Mr. Ben Gharbia for trial before the criminal court, this time to be tried on all charges, even though the additional investigative measures had not been carried out. The trial, initially scheduled for 7 July 2022, was postponed until 13 October 2022, then again until 8 December 2022, and subsequently until 5 January, 16 February, 27 April and 25 May 2023. Mr. Ben Gharbia's requests for release were apparently all rejected without any explanation.

32. The source asserts that Mr. Ben Gharbia has therefore been in pretrial detention for more than a year on suspicion of forgery and money-laundering, even though freedom is the general rule and Mr. Ben Gharbia presents no threat to witnesses or to public order and there is no risk of him influencing investigations or reoffending. The source stresses the absence of any justification of the need to detain Mr. Ben Gharbia and the failure to impose a measure less detrimental to his freedoms, such as placing him under court supervision, which would ensure his presence at the relevant judicial proceedings.

33. The source notes that Mr. Ben Gharbia's detention continues to grow increasingly disproportionate as he remains in detention pending trial.

34. Finally, the source claims that the inhuman and degrading treatment suffered by Mr. Ben Gharbia is contrary to article 10 of the Covenant and renders his detention unlawful. The source notes that the Working Group has, in the past, called for the release of a person who had been detained for more than 8 months and who was in a very worrying state of health on account of the hunger strike he was staging to protest against the conditions of his detention and the ill-treatment he had suffered.⁴ The source highlights the frequency with which hunger strikes are staged to denounce human rights abuses in Tunisia and points out that the international community, including the World Organisation against Torture, has widely denounced torture and ill-treatment of detainees staging hunger strikes in Tunisia. The source argues that poor health must be taken into account, as it may compromise a person's ability to participate in court proceedings.⁵

35. In this case, Mr. Ben Gharbia reportedly went on hunger strike in November 2021, and again in April 2022, to protest against the treatment to which he was being subjected by the prison administration, in particular the fact that he was being isolated from the outside world and deprived of his right to be visited by family members. According to the source, on 9 May 2022, following a new and serious deterioration in his health and having lost more than 15 kg, Mr. Ben Gharbia was transferred to hospital for a fifth time. The source maintains that Mr. Ben Gharbia's continued detention in such conditions is arbitrary.

36. The source also points out that rules 47 and 48 of the Nelson Mandela Rules prohibit the use of chains, irons or other instruments of restraint which are inherently degrading or painful. Other means of restraint may be used, but only if authorized by law and in specific circumstances justifying the use of such measures, such as an escape, or by order of the prison director to prevent individuals from injuring themselves or others. The source notes that the

⁴ See opinion No. 34/2017.

⁵ Opinions No. 46/2014, para. 37; No. 29/2017, para. 63; No. 59/2019, para. 69; and No. 31/2022, para. 99.

use of means of restraint implies that no lesser form of control would be effective to address the risks posed by unrestricted movement, must involve the least intrusive method possible and must be limited only to cases in which restraint is necessary and reasonable in order to control the prisoner's movement. According to the source, the Tunisian prison law manual recognizes the need to prioritize means other than restraint that meet security requirements and comply with medical ethical standards.

37. In this case, during his detention, Mr. Ben Gharbia has allegedly been exposed to verbal and psychological violence constituting inhuman and degrading treatment, despite being in a very fragile state of health. The source adds that Mr. Ben Gharbia's feet have apparently been handcuffed to his hospital bed on several occasions, preventing him from sleeping. Mr. Ben Gharbia reportedly complained about this treatment when he met the prison's deputy director on 28 December 2021, and told him that he wanted to return to prison so as not to be exposed to such treatment again.

38. The source claims that Mr. Ben Gharbia was also assaulted by balaclava-clad officers inside the hospital, after refusing to put his handcuffs back on. This assault reportedly caused him injuries, but, even though the representative of the hospital's security staff was informed, no action has been taken to put an end to the practice. Lastly, the source notes that Mr. Ben Gharbia is being subjected to psychological torture because, since his arrest, he has been separated from his 6-year-old son, for whom he has been the sole parent since the death of his wife.

39. The source is of the view that the authorities have therefore violated Mr. Ben Gharbia's right to private and family life, as enshrined in article 17 of the Covenant and principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In particular, the source notes that restrictions imposed on detainees' contact with family members constitute a violation of their right to communicate with the outside world. The source also points out that article 18 of Act No. 2001-52 of 14 May 2001 on the organization of prisons guarantees the right of all detainees to maintain family and social ties through visits from their loved ones.

40. In this case, the source claims that Mr. Ben Gharbia has been denied visits with his 6-year-old son, despite the death of his son's mother. From the beginning of his imprisonment, Mr. Ben Gharbia has been prevented from seeing his child, initially without physical barriers between them and then absolutely. In order to register his opposition to the alleged violation of his visitation rights, Mr. Ben Gharbia began a new hunger strike on 15 November 2021, but his protests were in vain. Each visit apparently requires the judge's authorization, which is subject to acceptance by the prison administration, whose response to each request is slow in coming. As a result, Mr. Ben Gharbia is authorized to see his son only once a month, causing suffering for both individuals.

b. Category II

41. The source asserts that Mr. Ben Gharbia's arrest and detention result directly from the exercise of his right to freedom of association and his right to take part in the conduct of public affairs in his country, which are guaranteed by articles 22 and 25 of the Covenant, respectively.

42. In this connection, the source notes that Mr. Ben Gharbia's arrest and detention are part of a broader trend of declining public freedoms and weakening of the rule of law in Tunisia since the election of President Kaïs Saïed. The source also highlights the use of the justice system as a tool to eliminate the main opponents of the current Government, in the guise of a purported fight against corruption. In support of its allegations, the source denounces the many investigations, detentions and house arrests of various political figures, including former ministers and deputies of political parties.

c. Category III

43. The source states that the proceedings against Mr. Ben Gharbia do not meet the requirements of the right to a hearing by an independent and impartial tribunal, guaranteed

by article 14 of the Covenant.⁶ The source highlights the interference of the President of the Republic and the executive branch in the workings of the Tunisian justice system, and in particular in the proceedings concerning Mr. Ben Gharbia. According to the source, the President of the Republic has expressed his personal aversion to businesspeople, whom he believes symbolize the reign of impunity and the power of money.

44. In addition, the source explains that article 117 of the Tunisian Constitution provides that the judiciary is an independent power and that, under the terms of article 120, judges are appointed by presidential decree with the approval of the High Council of the Judiciary. However, the source claims that, on 5 February 2022, the President of the Republic dissolved the High Council of the Judiciary and replaced it with a provisional High Council, the members of which he appointed by a decree-law not open to appeal.⁷ On 1 June 2022, the President of the Republic reportedly adopted a decree dismissing 57 members of the judiciary, including the investigating judge who had declared the judicial inquiry against Mr. Ben Gharbia closed and ordered his release. The source submits that interference of this kind by the executive branch is likely to undermine the right to a hearing by an impartial tribunal. The source also points out that the General Committee for Prisons and Rehabilitation is under the supervision of the Ministry of Justice and Human Rights, which counts its President among its staff.

45. The source claims that the lack of impartiality of the judicial authorities towards Mr. Ben Gharbia has manifested itself on several occasions. The source explains that, even before proceedings were brought against him, Mr. Ben Gharbia was the target of a smear and defamation campaign by the media, which the source believes to be acting in collusion with the authorities. The source also points out that none of the complaints lodged on behalf of Mr. Ben Gharbia have received a response.

46. According to the source, the bias shown by the Public Prosecutor handling Mr. Ben Gharbia's case has resulted in acts undermining the independence of the judiciary. The source claims that, after opening an investigation on grounds of straightforward defamation, and not a complaint or a report by a supervisory body, the Public Prosecutor decided, in November 2021, to submit new facts that had apparently been overlooked by the court in Tunis to the same investigating judge. Apparently, he had deliberately failed to include elements of the criminal investigation in the case file and, during the appeal against the order closing the judicial inquiry, had submitted his closing arguments late in order to cause the appeal hearing to be adjourned and Mr. Ben Gharbia to be kept in detention. The source also claims that the Public Prosecutor interfered with certain exculpatory evidence, an allegation brought by Mr. Ben Gharbia in a complaint to the President of the High Council of the Judiciary on 3 February 2022.

47. The source further notes the many times hearings have been adjourned and the requests by the indictment division of the court of appeal in Sousse for fresh actions to be carried out, such as assessments of electronic documents to be made by a handwriting expert, or the repeated questioning of a witness who has already taken the stand. The source stresses that such actions and adjournments have effectively prolonged Mr. Ben Gharbia's time in detention. Furthermore, the indictment division reportedly accepted the appeal lodged by the Public Prosecutor's Office without first verifying its admissibility. According to the source, such actions, which are intended to keep Mr. Ben Gharbia in detention, violate his right to be tried without undue delay and reflect the lack of impartiality of the indictment division.

48. Lastly, the source draws attention to the role of the General Committee for Prisons and Rehabilitation, an agency of the Ministry of Justice and Human Rights, and the Public Prosecutor, in Mr. Ben Gharbia's treatment by the prison administration. On 3 February 2022, Mr. Ben Gharbia lodged a complaint with the General Inspectorate of the Ministry of Justice and Human Rights, the High Council of the Judiciary and the Inspector General, in which he

⁶ See also Human Rights Committee, general comment No. 32 (2007); and [A/HRC/30/37](#), annex, principle 6.

⁷ Decree-law No. 2022-11 of 12 February 2022 on the creation of the provisional High Council of the Judiciary.

denounced the procedural failings and acts committed against him. These complaints have gone unanswered.

(b) Government reply

49. On 12 May 2023, the Working Group transmitted a communication to the Tunisian Government requesting it to provide detailed information on Mehdi Ben Gharbia by 11 July 2023 at the latest. Specifically, the Working Group requested the Government to clarify the legal provisions justifying Mr. Ben Gharbia's continued detention and their compatibility with the obligations of Tunisia under international human rights law, in particular with the treaties that the State has ratified. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Ben Gharbia.

50. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

2. Discussion

51. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

52. In determining whether the deprivation of liberty of Mr. Ben Gharbia 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 law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations.⁸ In the present case, the Government has chosen not to challenge the *prima facie* credible allegations made by the source.

(a) Category I

53. The source asserts that Mr. Ben Gharbia's arrest and placement in police custody are arbitrary and contrary to article 9 of the Covenant and rule 7 of the Nelson Mandela Rules.

54. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case. This is typically⁹ done through an arrest warrant or order, or equivalent document.¹⁰ In addition, article 9 (2) of the Covenant provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for the arrest and shall be promptly informed of any charges against him or her. Respect for these rights is essential to the exercise of the other rights set out in article 9 of the Covenant and articles 3 and 9 of the Universal Declaration of Human Rights, since all individuals must know the reasons for their arrest in order to be able to effectively challenge it, and must be brought before a court or judge in order to be able to lodge an appeal.

55. According to the source, Mr. Ben Gharbia was arrested without a valid warrant during a search of his home on 16 October 2021. During the first 24 hours of his detention, he was informed neither of his rights nor of the reasons for his arrest. The source asserts that, on 20 October 2021, the Public Prosecutor filed an application to open an investigation. Mr. Ben Gharbia was brought before the investigating judge the same day, in a worrying state. In the absence of a response from the Government, the Working Group finds that Mr. Ben Gharbia was not informed of the reasons for his arrest or promptly informed of any charges against him, in violation of article 9 (2) of the Covenant and articles 3 and 9 of the Universal Declaration of Human Rights.

56. Moreover, the source submits that Mr. Ben Gharbia was and continues to be denied his right to be released pending trial, in violation of article 9 (3) of the Covenant and principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any

⁸ A/HRC/19/57, para. 68.

⁹ Human Rights Committee, general comment No. 35 (2014), para. 23.

¹⁰ In cases of arrest in *flagrante delicto*, obtaining an arrest warrant is generally not an option.

Form of Detention or Imprisonment. The source considers the length of Mr. Ben Gharbia's detention to be disproportionate and arbitrary.

57. According to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the rule, and should be ordered for the shortest time possible.¹¹ It must be based on an individualized determination that it is reasonable and necessary for such purposes as to prevent flight, interference with evidence or the recurrence of crime.¹² The courts must examine whether alternatives to pretrial detention, such as release on bail, would render detention unnecessary.¹³ In determining whether the conditions governing pretrial detention have been met, the Working Group focuses on whether the national courts have taken into account the particular circumstances of the person concerned but does not check whether there are risks that would make detention necessary.¹⁴

58. In the absence of a response from the Government justifying Mr. Ben Gharbia's continued pretrial detention or providing an individualized determination of the alternatives to pretrial detention, such as release on bail, and of the risks associated with releasing him pending trial, the Working Group finds that the authorities have violated article 9 (3) of the Covenant.

59. Moreover, according to article 9 (3) of the Covenant, anyone arrested or detained on a criminal charge shall be brought promptly before a judge. The Human Rights Committee has observed that 48 hours is ordinarily sufficient to satisfy this obligation, and any longer delay must remain absolutely exceptional and be justified under the circumstances.¹⁵ As the Working Group has stated, a prosecutorial body cannot be considered a judicial authority for the purposes of article 9 (3) of the Covenant.¹⁶ In the present case, the Government has not provided any justification for the four-day period that elapsed between Mr. Ben Gharbia's arrest and his appearance before the investigating judge. The Working Group therefore finds that the Government has also violated article 9 (3) of the Covenant in this respect. The Working Group notes that judicial oversight of deprivation of liberty is a fundamental safeguard of personal liberty and is essential in ensuring that detention has a legal basis.¹⁷ Given that Mr. Ben Gharbia was unable to challenge the legality of his detention, his right to an effective remedy under article 2 (3) of the Covenant and article 8 of the Universal Declaration of Human Rights was also violated.

60. In the light of these findings, the Working Group considers Mr. Ben Gharbia's detention to have no legal basis, contrary to article 9 of the Covenant and articles 3 and 9 of the Universal Declaration of Human Rights, and thus to be arbitrary under category I.

(b) Category II

61. The source alleges that Mr. Ben Gharbia's arrest and detention result directly from the exercise of his right to freedom of association and his right to take part in the conduct of public affairs in his country, which are guaranteed by articles 22 and 25 of the Covenant, respectively. The source notes that Mr. Ben Gharbia is a Tunisian businessman and politician, and asserts that his arrest is part of a broader trend of declining public freedoms and weakening of the rule of law in Tunisia intended to eliminate the main opponents of the

¹¹ [A/HRC/19/57](#), paras. 48–58; and opinions No. 5/2019, para. 26; No. 62/2019, paras. 27–29; and No. 64/2020, para. 58.

¹² Human Rights Committee, general comment No. 35 (2014), para. 38.

¹³ See, for example, opinion No. 64/2020, para. 58.

¹⁴ Opinions No. 46/2020, para. 62; No. 37/2021, para. 72; and No. 15/2022, para. 66.

¹⁵ Human Rights Committee, general comment No. 35 (2014), para. 33. See also [CAT/C/TUN/CO/3](#), para. 10; and opinion No. 67/2019, para. 64.

¹⁶ Opinions No. 64/2020, para. 56; and No. 31/2022, para. 81; Human Rights Committee, general comment No. 35 (2014), para. 32; and [A/HRC/45/16/Add.1](#), para. 35 (in which the Working Group notes that prosecutorial bodies do not possess the requisite degree of independence to assess the necessity and proportionality of detention).

¹⁷ Opinions No. 35/2018, para. 27; No. 83/2018, para. 47; No. 32/2019, para. 30; No. 33/2019, para. 50; No. 44/2019, para. 54; No. 45/2019, para. 53; No. 59/2019, para. 51; and No. 65/2019, para. 64; and [A/HRC/30/37](#), annex, principle 3.

current Government, in the guise of a purported fight against corruption. The Government has chosen not to contest these allegations although it had the opportunity to do so.

62. The Working Group notes that article 22 of the Covenant protects the right to freedom of association, and article 25 guarantees the right to take part in the conduct of public affairs. These rights are also protected by articles 20 and 21 of the Universal Declaration of Human Rights.

63. The Working Group takes note of the source's allegations, which have not been contested by the Government, that, since 2016, Mr. Ben Gharbia has been the target of smear and defamation campaigns organized on social media by business competitors and detractors. Moreover, Mr. Ben Gharbia has allegedly been the target of a smear and defamation campaign by the media, which the source believes to be acting in collusion with the authorities.

64. The Working Group additionally notes that there is no reason to believe that the restrictions authorized in relation to the aforementioned rights apply in this case. Nor has the Government provided any explanation as to why Mr. Ben Gharbia was arrested and detained. In the absence of any response from the Government to refute the *prima facie* credible allegations made by the source, the Working Group considers that Mr. Ben Gharbia's detention results from the exercise of his rights under articles 22 and 25 of the Covenant and articles 20 and 21 of the Universal Declaration of Human Rights. Accordingly, his detention is arbitrary under category II.

(c) Category III

65. Given its finding that Mr. Ben Gharbia's detention is arbitrary under category II, the Working Group emphasizes that no trial should take place.

66. The source asserts that Mr. Ben Gharbia's detention is arbitrary under category III, since it is contrary to the provisions of article 14 of the Covenant.

67. Firstly, the source alleges that the Government violated Mr. Ben Gharbia's right to be tried as expeditiously as possible. Mr. Ben Gharbia has reportedly been held by the authorities since 16 October 2021, and has therefore been in pretrial detention for almost two years. The source further notes the many times hearings have been adjourned and the requests by the indictment division of the court of appeal in Sousse for fresh actions to be carried out. The source stresses that such actions and adjournments have effectively prolonged Mr. Ben Gharbia's time in detention. The Government has chosen not to contest these allegations although it had the opportunity to do so.

68. The Working Group recalls that under article 14 (3) (c) of the Covenant, and as reiterated by principle 38 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and by the Human Rights Committee,¹⁸ any person accused of a criminal offence has the right to be tried without undue delay. In the absence of an explanation from the Government justifying Mr. Ben Gharbia's detention without trial since 16 October 2021, the Working Group considers that the authorities have violated article 14 (3) (c) of the Covenant.

69. The source also states that the proceedings against Mr. Ben Gharbia do not meet the requirements of the right to a hearing by an independent and impartial tribunal, guaranteed by article 14 of the Covenant. The source highlights the interference of the President of the Republic and the executive branch in the workings of the Tunisian justice system. According to the source, the President of the Republic has expressed his personal aversion to businesspeople, in particular in the proceedings concerning Mr. Ben Gharbia.

70. The Working Group notes the source's submissions, which have not been contested by the Government, alleging that the President of the Republic had adopted a decree dismissing 57 members of the judiciary, including the investigating judge who had declared the judicial inquiry against Mr. Ben Gharbia closed and ordered his release.

¹⁸ Human Rights Committee, general comment No. 32 (2007), para. 35.

71. The Working Group considers that the interference by the executive branch in an ongoing judicial process and, in this case, in the proceedings against Mr. Ben Gharbia, impedes his right to be tried by an independent and impartial tribunal. The Working Group draws attention to the concluding observations of the Human Rights Committee on the sixth periodic report of Tunisia, in which the Committee expressed concern about the interference of the executive branch in the administration of justice.¹⁹ In addition, the source claims that Mr. Ben Gharbia was detained following the opening of an investigation on grounds of straightforward defamation, and not a complaint or a report by a supervisory body. Complaints lodged to denounce procedural failings, including alleged interference with certain exculpatory evidence and acts committed against Mr. Ben Gharbia, have reportedly gone unanswered. Noting the absence of a response from the Government contesting these allegations, the Working Group considers that the authorities have violated article 14 (1) of the Covenant and article 10 of the Universal Declaration of Human Rights.

72. Lastly, the source claims that Mr. Ben Gharbia has been subjected to inhuman and degrading treatment. During his detention, his feet have apparently been handcuffed to his hospital bed on several occasions, preventing him from sleeping. He was also allegedly assaulted by balaclava-clad officers inside the hospital, after refusing to put his handcuffs back on. The source also notes that Mr. Ben Gharbia is being subjected to psychological torture because, since his arrest, he has been separated from his 6-year-old child, for whom he has been the sole parent since the death of his wife. Mr. Ben Gharbia reportedly went on hunger strike in November 2021, in April 2022 and on 9 May 2022 to protest against the treatment to which he was being subjected by the prison administration, in particular the fact that he was being isolated from the outside world and deprived of his right to be visited by family members.

73. The Working Group is gravely concerned by the allegations of inhuman and degrading treatment suffered by Mr. Ben Gharbia. It notes the absence of a response from the Government disputing these serious allegations. The Working Group recalls that poor health or poor conditions of detention may impair a person's ability to prepare a defence and compromise his or her chances of a fair trial.²⁰

74. Therefore, the Working Group finds that the violations of Mr. Ben Gharbia's right to a fair trial are of such gravity as to give his deprivation of liberty an arbitrary character under category III.

(d) Concluding remarks

75. The Working Group notes the assertions put forward by the source, which have not been refuted by the Government, that Mr. Ben Gharbia has been refused visits with his 6-year-old child owing to severe restrictions on his right to be visited by his family. In particular, each visit apparently requires the judge's authorization, which is subject to acceptance by the prison administration, whose response to each request is slow in coming. As a result, Mr. Ben Gharbia is allegedly authorized to see his child only once a month, causing suffering for both individuals. Noting that the Government has not provided any explanation to justify such restrictions, the Working Group considers that these restrictions are incompatible with Mr. Ben Gharbia's right to private and family life, as enshrined in article 17 of the Covenant, and with his right to be visited, in particular by members of his family, and to communicate with the outside world, as enshrined by rules 43 (3), 58 (1) and 106 of the Nelson Mandela Rules and principles 15 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

76. Furthermore, the Working Group takes note of the allegations made by the source, which have not been contested by the Government, concerning Mr. Ben Gharbia's health and his conditions of detention in an overcrowded cell, without access to the necessary medical care. The Working Group takes this opportunity to remind the Government of its obligation under article 10 (1) of the Covenant to ensure that all persons deprived of their liberty are

¹⁹ CCPR/C/TUN/CO/6, para. 43.

²⁰ Opinions No. 46/2014, para. 37; No. 29/2017, para. 63; No. 59/2019, para. 69; and No. 31/2022, para. 99.

treated with humanity and respect for the inherent dignity of the human person. It also recalls that, under rules 24 and 118 of the Nelson Mandela Rules, any person deprived of liberty must be allowed to receive the same standards of health care that are available in the community, and to be visited and treated by his or her own doctor if there are reasonable grounds for the application and he or she is able to pay any expenses incurred. The Working Group urges the Government to ensure that conditions in all places of deprivation of liberty in Tunisia are compatible with international standards.

3. Disposition

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

The deprivation of liberty of Mehdi Ben Gharbia, being in contravention of articles 3, 8, 9, 10, 20 and 21 of the Universal Declaration of Human Rights and articles 2, 9, 14, 22 and 25 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

78. The Working Group requests the Government of Tunisia to take the steps necessary to remedy the situation of Mr. Ben Gharbia 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 Covenant.

79. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Ben Gharbia immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

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

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

4. Follow-up procedure

82. 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. Ben Gharbia has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Ben Gharbia;
- (c) Whether an investigation has been conducted into the violation of Mr. Ben Gharbia'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 Tunisia with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

83. 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.

84. 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.

85. 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.²¹

[Adopted on 30 August 2023]

²¹ Human Rights Council resolution 51/8, paras. 6 and 9.