

PETITION TO
UNITED NATIONS
WORKING GROUP ON ARBITRARY DETENTION

Chair-Rapporteur: Ms. Leigh Toomey (Australia)
Vice-Chair: Ms. Elina Steinerte (Latvia)
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HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY

In the Matter of
SULTANA KHAYA AND LUARA KHAYA

Sisters and Sahrawi Activists of Western Sahara

v.

The Government of Morocco

Petition for Relief Pursuant to Resolutions 1997/50, 2000/36, 2003/31, 6/4, 15/18, 20/16, 24/7,
33/30, and 42/22¹

Submitted by

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July 7, 2021

¹ Resolutions 1997/50, 2000/36, and 2003/31 were adopted by the U.N. Commission on Human Rights extending the mandate of the Working Group on Arbitrary Detention. The Human Rights Council, which “assume[d] . . . all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights” pursuant to U.N. General Assembly Resolution 60/251, G.A. Res. 60/251, at ¶ 6 (Mar. 15, 2006), has further extended the Working Group’s mandate through Resolutions 6/4, 15/18, 20/16, 24/7, 33/30, and 42/22.

INTRODUCTION

As set forth in this petition, the Government of Morocco is arbitrarily depriving Sultana Khaya and Luara Khaya of their liberty. The Khaya sisters are Sahrawis from the Non-Self-Governing Territory (NSGT) of Western Sahara, whose right to self-determination has been articulated in United Nations General Assembly resolutions and reaffirmed by the Security Council.² Both sisters identify as part of a greater movement of Sahrawi women human rights defenders who peacefully advocate for the self-determination of Western Sahara. Sultana's activism has been particularly public; she is widely known for her dedication to nonviolent resistance.

On November 19, 2020, Sultana and Luara were both placed under *de facto* house arrest when they were shoved inside their family's home by the Moroccan police and military, who were acting without a warrant and without any criminal charges having been filed. Neither sister was informed of the reasons for her arrest and detention when she was forced under *de facto* house arrest. Both sisters remain under *de facto* house arrest today in deplorable conditions. Sultana and Luara have been raped by Moroccan agents, brutally beaten, and repeatedly threatened with rape and death. Their belongings were stolen, and their furniture was destroyed. They now sleep on the floor and Moroccan agents have shut off their electricity.

The Khaya sisters' detention is politically motivated and directly connected to their civil society work. Both sisters are members of prominent Sahrawi human rights organizations which advocate for the independence of Western Sahara. Their house arrest began during a wider crackdown on Sahrawi human rights defenders and civil society following the end of a ceasefire between the Government of Morocco and the Polisario Front of Western Sahara on November 13, 2020. Since being placed under *de facto* house arrest, both sisters have continued to demonstrate by peacefully waving the Western Sahara flag from the rooftop of their house. To prevent the Khaya sisters from demonstrating in this way, their house is continuously surrounded by an estimated 30 Moroccan police, military members, and plainclothes intelligence agents, and two gigantic construction cranes that aim to rip down the rooftop flag.

Sultana and Luara's arbitrary detentions are just two recent examples of the long-standing abuse that the Moroccan government has perpetrated against Sahrawi human rights defenders. Accordingly, it is hereby requested that the attached Petition be considered a formal request for an opinion of the Working Group on Arbitrary Detention pursuant to Resolution 1997/50 of the UN Commission on Human Rights, as reconfirmed by Resolutions 2000/36 and 2003/31, and UN Human Rights Council Resolutions 6/4, 15/18, 20/16, 24/7, 33/30, and 42/22.

² Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514(XV), *adopted* Dec. 14, 1960; Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73(e) of the Charter, G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541(XV), Dec. 15, 1960; and U.N. Security Council Resolution 2468 (2019), S.C. Res. 2468, U.N. Doc. S/RES/2468, *adopted* Apr. 30, 2019.

QUESTIONNAIRES FOR SULTANA AND LUARA KHAYA³

Sultana Khaya

I. IDENTITY

1. **Family name:** Khaya
2. **First name:** Sultana
3. **Profession and/or activity (if believed to be relevant to the arrest/detention):** Sultana Khaya is a peaceful activist and human rights defender who demonstrates by, e.g., flying the Western Sahara flag from her rooftop. Her role as a well-known peaceful Sahrawi activist and membership in two prominent Sahrawi human rights NGOs – the Sahrawi Organ Against Moroccan Occupation (ISACOM) and the League for the Defense of Human Rights and Protection of Natural Resources – are believed to be the main reasons for her detention. The Moroccan police and military have attacked Sultana while she was peacefully demonstrating on five previous occasions.
4. **Address of usual residence:** The Khaya family's home, located at Avenue Al Morabitaine, Boujdour.

II. ARREST

1. **Date of arrest:** November 19, 2020
2. **Place of arrest:** At around 6:30 pm local time on November 19, Sultana was traveling by car from El Aaiún to her family's home in Boujdour when she was stopped at the city's entrance checkpoint by the Moroccan military and police. The military and police forced Sultana to exit her car and to get into a different one driven by the police. The police then drove her to a local station, where she was interrogated and vaginally and anally searched without a warrant in front of a male police commissioner, Hakim Amer. Following the warrantless search, Hakim Amer told Sultana that she could continue to Boujdour, but that she would be arrested and tortured if she left her family's home. Sultana arrived in Boujdour at approximately 8:15 pm, and Colonel Muhammad Al-Madfai of the Moroccan military shoved her inside the house. Sultana has remained under house arrest ever since.
3. **Forces who carried out the arrest or are believed to have carried it out:** Hakim Amer, the police commissioner for the city of Boujdour, ordered Sultana to be stopped and interrogated. Colonel Muhammad Al-Madfai is responsible for beating and shoving Sultana inside the Khaya family home.
4. **Did they show a warrant or other decision by a public authority?** No.
5. **Authority who issued the warrant or decision:** N/A.
6. **Reasons for the arrest imputed by the authorities:** Unknown. Sultana has never been told that she was officially under arrest or informed of any reasons for being searched and interrogated at the police station. At the station, Hakim Amer told Sultana that she had two options. She could either remain home and not speak about politics with anybody, or he would do things to her that "God only knows." Sultana replied that she would exercise her right to peaceful protest. Hakim Amer then responded, "if you leave your house or do any activities, I will arrest and torture you."
7. **Legal basis for the arrest including relevant legislation applied (if known):** Unknown. Sultana asked police commissioner Hakim Amer at the time she was searched whether he

³ Based upon MODEL QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY ARREST OR DETENTION, U.N. WORKING GROUP ON ARBITRARY DETENTION, accessed May 22, 2021, available at <http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx>.

had a warrant and he responded that he did not. The military and police members also did not provide an explanation for forcing Sultana inside her family's home. There is a provision under Moroccan law criminalizing speech or actions which "incite against Morocco's territorial integrity"⁴ and has been used against Western Saharan activists, but it was not invoked against Sultana during the time when she was searched, interrogated, or forced inside the house. There is a provision of the Moroccan Law on Associations which prohibits associations (such as NGOs) which undermine "the integrity of national territory or the monarchical regime," but again, it was not invoked against Sultana as a basis for her arrest.

III. DETENTION

1. **Date of detention:** November 19, 2020
2. **Duration of detention:** Ongoing and indefinite. To date, it has been 231 days.
3. **Forces holding the detainee under custody:** An estimated 30 total agents of the Moroccan police, the Moroccan military, and plainclothes intelligence agents all hold Sultana under house arrest.
4. **Place of detention:** The Khaya family home in Boujdour, Western Sahara.
5. **Authorities that ordered the detention:** Unknown, but presumably the local governor of Boujdour, Brahim Ben Brahim, and the national government ordered Sultana's detention. Sultana was initially stopped and interrogated by the local police commissioner, Hakim Amer, at the entrance checkpoint to Boujdour. Colonel Al-Madfai forced Sultana to stay inside the Khaya home on November 19, 2020. On several occasions, the Moroccan military and police cited "orders" to prevent Sultana from leaving the house. There has been a constant Moroccan military and intelligence presence outside the Khaya home.
6. **Reasons for the detention imputed by the authorities:** Unknown. The Moroccan police and military have routinely threatened to arrest Sultana, but she has been neither formally arrested nor detained in connection with a formal arrest.
7. **Relevant legislation applied (if known):** Although Sultana was not informed of the reasons for her being placed under *de facto* house arrest at the time of her arrest and detention, Article 267-5 of the Moroccan Penal Code criminalizes speech or actions that "incite against territorial integrity," and punishes offenses with up to two years in prison.⁵ Articles 267-1 to 267-4 punish offenses against state symbols and emblems with up to five years in prison.⁶ In a March 2021 letter to Amnesty International, Morocco denied that Sultana is under house arrest and argued that her detention was justified by COVID-19 regulations.⁷ Morocco declared a state of emergency for the COVID-19 pandemic on March 23, 2020 and issued

⁴ Moroccan Penal Code, Nov. 26, 1962, at Art. 267-5, available at <https://adala.justice.gov.ma/production/legislation/fr/Nouveautes/code%20penal.pdf> [in French].

⁵ *Id.*; see also MOROCCO: SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE, 118TH SESSION, 17 OCTOBER – 14 NOVEMBER 2016, Sept. 2016, at 22, available at <https://www.amnesty.org/download/Documents/MDE2948582016ENGLISH.PDF>.

⁶ Moroccan Penal Code, *supra* note 4, at Arts. 267-1 to -4; see also THE RED LINES STAY RED: MOROCCO'S REFORMS OF ITS SPEECH LAWS, HUMAN RIGHTS WATCH, May 4, 2017, available at <https://www.hrw.org/report/2017/05/04/red-lines-stay-red/moroccos-reforms-its-speech-laws>.

⁷ See Letter from Morocco to Amnesty Int'l Concerning the Allegations of Sultana Khaya, Mar. 19, 2021, at 2, available at <https://www.amnesty.org/download/Documents/MDE2939372021ENGLISH.PDF> [in French].

Royal Decree No. 2-20-293, which bans public protests and punishes violators with up to one year in prison.⁸

Luara Khaya

I. IDENTITY

1. **Family name:** Khaya
2. **First name:** Luara
3. **Profession and/or activity (if believed to be relevant to the arrest/detention):** Luara is Sultana's sister, a peaceful activist, and a member of the League for the Defense of Human Rights and Natural Resources. Luara's role as a peaceful Sahrawi activist and relationship to Sultana are believed to be the main reasons for her detention.
4. **Address of usual residence:** Luara resides in the Khaya family home in Boujdour.

II. ARREST

1. **Date of arrest:** November 19, 2020
2. **Place of arrest (as detailed as possible):** At 7:55 pm on November 19, half an hour before Sultana's arrival at the Khaya family home, Colonel Muhammad Al-Madfai beat Luara, shoved her inside the house, and would not let her leave.
3. **Forces who carried out the arrest or are believed to have carried it out:** Colonel Muhammad Al-Madfai shoved Luara inside the Khaya family home on November 19.
4. **Did they show a warrant or other decision by a public authority?** No.
5. **Authority who issued the warrant or decision:** N/A.
6. **Reasons for the arrest imputed by the authorities:** Unknown. Luara has not been formally arrested and has not been charged with any crime.
7. **Legal basis for the arrest including relevant legislation applied (if known):** Unknown. There is a provision under Moroccan law which criminalizes speech or actions that "incite against territorial integrity," but it was not invoked against Luara.

III. DETENTION

1. **Date of detention:** November 19, 2020
2. **Duration of detention (if not known, probable duration):** Ongoing and indefinite. To date, it has been 231 days.
3. **Forces holding the detainee under custody:** The Moroccan police, the Moroccan military, and plainclothes intelligence agents are all holding Luara under *de facto* house arrest. When Luara has tried to open the door to receive guests or to leave the house, she has been beaten and dragged back inside. Additionally, Luara fears she will be disappeared and tortured if she leaves the Khaya home. The Moroccan police have told Luara's family members that they will abduct Luara if she steps outside the house.
4. **Place of detention (indicate any transfer in the present place of detention):** The Khaya family home in Boujdour, Western Sahara.
5. **Authorities that ordered the detention:** Unknown, but presumably the local governor of Boujdour, Brahim Ben Brahim, and the national government ordered Luara's detention. Colonel Al-Madfai forced Luara inside the Khaya home on November 19, 2020 and beat her when she tried to exit. On May 13, 2021, agents of the Ministry of the Interior threatened Luara's family that it would forcibly separate Luara from Sultana if the family did not

⁸ Royal Decree No. 2-20-293, Mar. 24, 2020, *available at* https://covidlawlab.org/wp-content/uploads/2020/06/Morocco_Health-Emergency-Law.pdf [in Arabic].

convince Luara to leave the house. The Moroccan police who threatened to abduct Luara reportedly received the order to do so from the Ministry of the Interior in Boujdour.

6. Reasons for the detention imputed by the authorities: Unknown.

7. Relevant legislation applied (if known): Although Luara was not informed of the reasons for her being placed under *de facto* house arrest at the time of her arrest and detention, relevant legislation may include the provision of the Moroccan Penal Code, Article 267-5, which criminalizes incitement against territorial integrity, punishes violators with up to two years in prison. Articles 267-1 to 267-4 punish offenses against state symbols and emblems with up to five years in prison. In a March 2021 letter to Amnesty International, Morocco denied that Sultana and Luara are under house arrest and argued that their house arrest is justified by COVID-19 regulations. Morocco declared a state of emergency for the COVID-19 pandemic on March 23, 2020 and issued Royal Decree No. 2-20-293, which banned public protests and punishes violators with up to one year in prison. There is a provision of the Moroccan Law on Associations which prohibits associations (such as NGOs) which undermine “the integrity of national territory or the monarchical regime,” but it was not invoked against Luara.

I. CIRCUMSTANCES SURROUNDING THE ARREST AND DETENTION OF THE KHAYA SISTERS

A. Statement of Facts

1. History of the Conflict in Western Sahara

Western Sahara is home to the indigenous Sahrawi people.⁹ After Morocco gained independence in 1956, Morocco and Mauritania placed competing claims on Western Sahara’s territory.¹⁰ Between 1971 and 1973, the Sahrawi liberation movement, the Polisario Front, formed to fight against Spanish, Moroccan, and Mauritanian forces.¹¹ Spain partitioned Western Sahara between Morocco and Mauritania in 1976.¹² Mauritania and the Polisario Front reached a peace agreement in 1978, but fighting continued between the Polisario Front and Morocco.¹³

International and regional actors have made numerous attempts to end the conflict in Western Sahara. In 1988, the UN and Organization of African Unity (OAU) mediated a ceasefire

⁹ *World Directory of Minorities and Indigenous Peoples: Saharawis*, MINORITY RIGHTS GROUP INT’L, accessed May 10, 2021, available at <https://minorityrights.org/minorities/saharawis/> [hereinafter *Minority Rights Group*].

¹⁰ *Id.*; see also *Western Sahara*, BRITANNICA, accessed May 10, 2021, available at <https://www.britannica.com/place/Western-Sahara> [hereinafter BRITANNICA].

¹¹ *Western Sahara*, *supra* note 10. The Polisario Front has been previously described by the UN General Assembly as the representative of the people of Western Sahara. See Question of Western Sahara, G.A. Res. 34/37, U.N. Doc. A/RES/34/37, adopted Nov. 21, 1979.

¹² Although the question of Western Sahara’s independence is not the subject of this petition, Spain’s partition of Western Sahara followed a finding by the International Court of Justice that neither Morocco nor Mauritania had ties of sovereignty to Western Sahara. See *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16), available at <https://www.icj-cij.org/en/case/61> and Declaration of Principles on Western Sahara, Mauritania-Morocco-Spain, 988 U.N.T.S. 257, entered into force Nov. 19, 1975, at ¶¶ 1–2.

¹³ *Minority Rights Group*, *supra* note 9; see also KEEPING IT SECRET: THE UNITED NATIONS OPERATION IN THE WESTERN SAHARA, HUMAN RIGHTS WATCH, Oct. 1995, available at <https://www.hrw.org/reports/1995/Wsahara.htm>.

between both sides that was signed in 1991.¹⁴ The UN also created a Mission to administer a referendum on Western Sahara's self-determination (MINURSO).¹⁵ In 2007 and 2018, the UN Security Council called for renewed peace talks between the Polisario Front and Morocco, but the parties have failed to reach an agreement and a referendum on self-determination still has not been held.¹⁶

Despite peace efforts, war resumed in Western Sahara in November 2020 after the 1991 ceasefire ended between the two parties.¹⁷ On October 21, 2020, Saharawi supporters of the Polisario Front demonstrated along a trade route in an area monitored by the UN. Although the demonstrations were reportedly peaceful, in response, Morocco deployed military personnel.¹⁸ The Polisario Front then formally ended the ceasefire.¹⁹ Clashes ensued and in January 2021, the Moroccan government claimed legal jurisdiction over Western Sahara's territorial waters.²⁰ Today, at least 150,000 Sahrawis remain displaced in refugee camps, and Moroccan authorities violently crack down on Sahrawi human rights defenders and civic space.²¹

2. Situation of Human Rights Defenders in Western Sahara

Sultana and Luara's detention must be understood within the context of a brutally hostile environment for human rights defenders (HRDs) in Western Sahara. Both UN Secretary-General António Guterres and the UN Working Group on Arbitrary Detention (WGAD) have found that Sahrawi human rights defenders have been subjected to violence, torture, and arbitrary detention by the Moroccan authorities.²² On five prior occasions, the WGAD found that Sahrawi HRDs were arbitrarily detained by the Moroccan authorities – none of whom were provided with a warrant or

¹⁴ REPORT OF THE SECRETARY-GENERAL ON THE SITUATION CONCERNING WESTERN SAHARA, U.N. SECURITY COUNCIL, U.N. Doc. S/21360, June 18, 1990, available at <https://undocs.org/S/21360>.

¹⁵ The Situation Concerning Western Sahara, S.C. Res. 690, U.N. Doc. S/RES/690, adopted Apr. 29, 1991, at Clause 4 (creating a UN mission for an independence referendum).

¹⁶ See *Sahrawis Campaign for Independence in the Second Intifada, Western Sahara, 2005–2008*, GLOBAL NONVIOLENT ACTION DATABASE, Nov. 27, 2011, available at <https://nvdatabase.swarthmore.edu/content/sahrawis-campaign-independence-second-intifada-western-sahara-2005-2008>; *Western Sahara*, supra note 10; U.N. Security Council Resolution 2468 (2018), S.C. Res. 2440, U.N. Doc. S/RES/2440 (2018), adopted Oct. 31, 2018; and U.N. Security Council Resolution 1754 (2007), S.C. Res. 1754, U.N. Doc. S/RES/1754, adopted Apr. 30, 2016.

¹⁷ *Time for International Re-engagement on Western Sahara*, INT'L CRISIS GROUP, Mar. 11, 2021, at 9, available at <https://d2071andvip0wj.cloudfront.net/b082-western-sahara-.pdf>.

¹⁸ *Id.*

¹⁹ *Polisario Leader Says Western Sahara Ceasefire With Morocco Is Over*, REUTERS, Nov. 14, 2020, available at <https://www.reuters.com/article/us-morocco-westernsahara/polisario-leader-says-western-sahara-ceasefire-with-morocco-is-over-idUSKBN27U0GE>.

²⁰ *Morocco Adds W. Sahara Waters to Its Maritime Territory*, ARAB NEWS, Jan. 22, 2020, available at <https://www.arabnews.com/node/1616821>.

²¹ *Sahrawi Refugees Living in Algeria: The Forgotten Crisis*, THE BORGES PROJECT, Apr. 26, 2021, available at <https://borgenproject.org/sahrawi-refugees-living-in-algeria/>.

²² REPORT OF THE SECRETARY-GENERAL ON THE SITUATION CONCERNING WESTERN SAHARA, U.N. SECURITY COUNCIL, U.N. Doc. S/2020/938, Sept. 23, 2020, at ¶ 69; *Report of the Working Group on Arbitrary detention: Mission to Morocco*, U.N. HUMAN RIGHTS COUNCIL, U.N. Doc. A/HRC/27/48/Add.5, Aug. 4, 2014, at ¶ 64 [hereinafter *WGAD Mission to Morocco*].

rationale for their arrest at the time of detention.²³ In the first two weeks of May 2021 alone, the Moroccan authorities detained a total of 13 Sahrawi HRDs.²⁴

The WGAD has highlighted the pattern of torture and ill-treatment in cases related to pro-independence Sahrawi HRDs: “During their transfer to or upon their arrival at a police station, [HRDs] are beaten, insulted and forced to reveal the names of other protestors.”²⁵ There are also allegations that Moroccan police forces regularly raid the homes of known supporters of Western Sahara’s self-determination.²⁶ Moroccan police have beaten and harassed activists both in custody and on the streets, sentenced them in trials marred by due process violations and torture, impeded their freedom of movement, and subjected them to monitoring and surveillance.²⁷ Some HRDs assert that the prison administration treats those accused of “questioning the territorial integrity of the country” even more harshly.²⁸

Furthermore, many Sahrawi HRDs are women, and physical aggression against them is often accompanied by police-initiated defamation campaigns. For instance, Sahrawi activist and journalist Nazha El-Khalidi reported that websites and social media slandered her as a “loose woman” when the police confiscated her cell phone and leaked its contents online.²⁹

3. Morocco’s Crackdown on Civic Space in Western Sahara

Sultana and Luara’s detention must also be understood within the context of declining civic space in Western Sahara. Freedom House rated both freedom of assembly and freedom for NGOs in Western Sahara as a zero out of four.³⁰ Reporters Without Borders described Western Sahara as a “desert for journalists.”³¹ There are several reasons for these poor assessments.

First, in 2016, the Moroccan government amended its Penal Code to include provisions which criminalize challenging Morocco’s “territorial integrity,” including reference to Western Sahara’s self-determination.³² Consequently, the Government of Morocco has suppressed Sahrawi demonstrations. Protests in 2020 in Western Sahara had a higher ratio of security forces to protestors.³³ For instance, on November 13, 2020, when mostly peaceful pro-independence

²³ *Walid El Batal v. Morocco*, Opinion No. 68/2020, U.N. Doc. A/HRC/WGAD/2020/68, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 24, 2020, at ¶¶ 10, 91; *Ali Salem Bujmaa v. Morocco*, Opinion No. 52/2020, U.N. Doc. A/HRC/WGAD/2020/52, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Aug. 26, 2020, at ¶¶ 7, 9, 76; *Laaroussi Ndor v. Morocco*, Opinion No. 23/2019, U.N. Doc. A/HRC/WGAD/2019/23, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* May 2, 2019, at ¶¶ 21, 86; *Brahim Moussayih v. Morocco*, Opinion No. 67/2019, U.N. Doc. A/HRC/WGAD/2019/67, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 20, 2019, at ¶¶ 26, 77; and *Mbarek Daoudi v. Morocco*, Opinion No. 60/2018, U.N. Doc. A/HRC/WGAD/2018/60, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Aug. 24, 2018, at ¶ 66.

²⁴ Appendix I, Letter of Concern of 286 Human Rights NGOs to the OHCHR.

²⁵ *WGAD Mission to Morocco*, *supra* note 22, at ¶ 64.

²⁶ *Id.*, at ¶¶ 64–65.

²⁷ *Western Sahara: Harassment of Independence Activist*, HUMAN RIGHTS WATCH, Mar. 5, 2021, *available at* <https://www.hrw.org/news/2021/03/05/western-sahara-harassment-independence-activist>.

²⁸ *Morocco, in 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES*, U.S. DEP’T OF STATE, Mar. 30, 2021, *available at* <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/morocco/> [hereinafter *State Department Human Rights Report*].

²⁹ WESTERN SAHARA: A DESERT FOR JOURNALISTS, REPORTERS WITHOUT BORDERS, June 11, 2019, at 3, 18 *available at* <https://rsf.org/en/news/rsf-report-western-sahara-news-blackhole>, [hereinafter *RWB*].

³⁰ *Freedom in the World 2020: Western Sahara*, FREEDOM HOUSE, *accessed* July 6, 2021, *available at* <https://freedomhouse.org/country/western-sahara/freedom-world/2020#PR> [hereinafter *Freedom House*].

³¹ *RWB*, *supra* note 29.

³² *Freedom House*, *supra* note 30.

³³ *State Department Human Rights Report*, *supra* note 28.

Sahrawis demonstrated, the Moroccan security forces deployed armed forces to activists' neighborhoods and raided their homes.³⁴ In contrast, the Moroccan government allowed large demonstrations in December 2020 supporting the US's recognition of Morocco's sovereignty over Western Sahara.³⁵

Second, NGOs must obtain clearance from the Moroccan government to conduct their activities, and the UN has observed that Sahrawi human rights or independence associations are routinely denied this authorization.³⁶ Article 3 of the Moroccan Law on Associations prohibits associations which undermine "the integrity of national territory or the monarchical regime."³⁷ In 2020, Sahrawi NGOs reported that Moroccan government officials arbitrarily cancelled organizations' events and obstructed their registration by refusing to accept their applications.³⁸ In September 2020, the King's Prosecutor announced it would investigate ISACOM, the organization of which Sultana is a member, arguing that its activities threaten territorial integrity.

4. Biographies of the Khaya Sisters, Sahrawi Human Rights Defenders

Sultana was born on November 1, 1979. She is a prominent Sahrawi human rights defender who is known for her nonviolent activism in support of Western Sahara's self-determination, despite decades of punishment for her work. She is a member of ISACOM, a collective of renowned Sahrawi human rights defenders, and the League for the Defense of Human Rights and the Protection of Natural Resources. Members of ISACOM organization have been subjected to extensive surveillance and even house arrest.³⁹

The Moroccan police have attacked and tortured Sultana while she was peacefully demonstrating on numerous previous occasions before placing her under *de facto* house arrest in 2020. In 2007, she was attacked in Marrakesh at a peaceful student demonstration – the police launched teargas at the protesters and beat Sultana, and as a result she lost her right eye.⁴⁰ In 2011, the police beat Sultana while she peacefully demonstrated alongside other Sahrawis calling for the release of detained members of the Gdeim Izik Group. In 2013, Sultana was peacefully protesting in El Aaiún to advocate for the UN-administered referendum when she was abducted by the police, tortured, and injected with an unknown substance. She was later dumped in the desert. In 2016, Sultana and other Sahrawi women protested in El Aaiún and they were all attacked by the police. In

³⁴ *Western Sahara: Morocco Cracks Down on Activists*, HUMAN RIGHTS WATCH, Dec. 18, 2020, available at <https://www.hrw.org/news/2020/12/18/western-sahara-morocco-cracks-down-activists> [hereinafter *Morocco Cracks Down on Activists*].

³⁵ *Id.*

³⁶ REPORT OF THE SECRETARY-GENERAL ON THE SITUATION CONCERNING WESTERN SAHARA, U.N. SECURITY COUNCIL, U.N. Doc. S/2018/277, Mar. 29, 2018, at ¶ 68, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2018_277.pdf.

³⁷ FREEDOM TO CREATE ASSOCIATIONS: A DECLARATIVE REGIME IN NAME ONLY, HUMAN RIGHTS WATCH, Oct. 2009, at 5, available at <https://www.hrw.org/sites/default/files/reports/morocco1009webwcover.pdf>.

³⁸ *State Department Human Rights Report*, *supra* note 28.

³⁹ Appendix I, *supra* note 24.

⁴⁰ Sultana discusses her experiences being beaten by the Moroccan police for peacefully protesting in 2007 in a 2018 documentary by DemocracyNow! Her testimony begins at 32:50 in the documentary. See *Four Days in Occupied Western Sahara: A Rare Look inside Africa's Last Colony*, DEMOCRACYNOW!, Aug. 31, 2018, available at https://www.democracynow.org/2018/8/31/four_days_in_occupied_western_sahara; see also *Testimony of Sultana Khaya Sidi Brahim, Sahrawi Student Tortured*, AUSTRALIA WESTERN SAHARA ASSOCIATION, May 21, 2007, available at <https://awsa.org.au/testimony-of-sultana-khaya-sidi-brahim-saharawi-student-tortured/>.

2018, Sultana was once again beaten by the police while peacefully protesting the renewed EU-Morocco trade accords.⁴¹ Nonetheless, Sultana remains committed to nonviolent demonstration.

Luara was born in 1972 and, like Sultana, identifies as a Sahrawi human rights defender dedicated to nonviolent protest. She is a member of the League for the Defense of Human Rights and Protection of Natural Resources (a Sahrawi NGO of which Sultana is also a member). Luara was also the former organizer of a music group in Boujdour that celebrates Sahrawi holidays by wearing traditional Sahrawi clothing and waving the flag of Western Sahara.

5. The Arrest and Detention of the Khaya Sisters⁴²

a. Arrest

Sultana Khaya was arbitrarily arrested at both the entrance to the city of Boujdour and when she was placed under *de facto* house arrest. After returning from Spain, Sultana arrived in El Aaiún, Western Sahara on November 18. The next day, November 19 at 3:00 pm local time, she traveled by car from El Aaiún to Boujdour, where her family lives. As she was leaving El Aaiún, she learned that the police were arriving at the family's home. At 6:30 pm, Sultana arrived at the entrance checkpoint at Boujdour and was stopped by the Moroccan police and military. They forced Sultana to exit her car and to enter a police car that drove her to a local police station and parked in an isolated area.

Once inside the police station, Sultana was interrogated and sexually assaulted when she was vaginally and anally searched without a warrant. While male police commissioner Hakim Amer watched, a female officer ordered Sultana to fully undress. Sultana pled with Amer to look away, but he did not. The female officer then searched Sultana's vagina and anus. Afterwards, the police searched Sultana's purse and suitcase, and confiscated both her facemask, which had a Western Sahara flag printed on it, and the small flag that she was carrying with her. Sultana asked Amer why she was being searched, and whether the police had a legal basis for searching her. According to Sultana, Amer responded that he did not have a warrant to search her. Instead, Amer told Sultana that she could either stay home and not speak to anyone, or he would do things to her that "God only knows." Sultana responded that she would continue to defend her rights in a peaceful manner. As Sultana was leaving the police station, Amer warned that he would arrest and torture Sultana if she left the Khaya home.

Luara Khaya was placed under *de facto* house arrest while Sultana was in transit from the police station to the Khaya home. At 7:55 pm, Colonel Al-Madfai, a Moroccan military officer stationed outside the house, pushed Luara inside the Khaya home. As soon as Luara opened the door to request medical assistance for her mother, Colonel Al-Madfai beat Luara with his nightstick and shoved her back inside the house; as a result of this brutality, she developed a concussion.⁴³

When Sultana arrived at 8:15 pm, there were 21 police vehicles and numerous agents surrounding the house. Once Sultana made her way to the door, she was pushed inside the house and not allowed to leave. Sultana was eventually allowed to accompany her mother to the hospital, but she was immediately pushed back inside the house after returning.⁴⁴

⁴¹ Footage showing the police swarming Sultana in 2018 at a peaceful protest can be found online: <https://www.facebook.com/watch/?v=309471343119771>. Sultana is the woman wearing bright green clothing.

⁴² Information comes from interviews with Sultana and her family members.

⁴³ Password-protected Evidence Folder for the Working Group on Arbitrary Detention, Attachments 2–3 [hereinafter Evidence Folder]. There is an attachment list included in this folder detailing the contents of each video and photograph.

⁴⁴ *Morocco Cracks Down on Activists*, *supra* note 34.

b. The Detention of the Khaya Sisters since November 19, 2020

Sultana and Luara have remained under *de facto* house arrest since November. During this time, they have been subjected to rape, beatings, denial of access to family, and are doused each day with toxins. In May 2021, Moroccan agents raped Sultana and Luara. On both May 10 and 12, 2021, after Sultana and Luara waved a Western Sahara flag on the roof during the day, Moroccan agents raided the Khaya home at night. During both raids, the agents totally ransacked the house, stealing valuables, documents, and electronics and destroying all furniture. Other family members inside the home were violently assaulted. Agents covered Sultana and Luara's faces with rags to near suffocation. During the May 12 raid, Sultana was kicked and penetrated with a shoe for several minutes, and she was left bleeding. Luara was penetrated with a stick that the sisters normally use to wave the Western Sahara flag. The assailants also trampled the sisters and kicked their breasts.⁴⁵ Moreover, during the May 10 raid, approximately 40 Moroccan agents entered the Khaya home and forcibly removed three Sahrawi activists – Salek Baber, Khaled Boufraya, and Babuizid Mohammed Saaed Labhi – who had managed to break the police barricade and join Sultana and Luara inside the house. These three activists were abducted, tortured for two hours, and dumped in the desert.⁴⁶

In addition to severe and unpredictable attacks by the Moroccan authorities, daily conditions for Sultana and Luara under *de facto* house arrest are abhorrent. First, they are not allowed to leave the house. Whenever they step outside, they are forced back inside. Second, each time Sultana and Luara peacefully demonstrate with the Western Sahara flag on the rooftop, they face police brutality and suppression. For instance, on both December 1 and 18, 2020, the police covered the windows of the Khaya home with black plastic to prevent passersby from viewing other Western Sahara flags that the family keeps inside the house through the window.⁴⁷ Police threats to abduct Luara have made it dangerous for her to step outside at all. Third, the Moroccan authorities severed the house's electricity in mid-April, and the Khaya sisters have been without electricity ever since. Fourth, their family members and friends are routinely attacked and denied entry into the house. Luara's family has been subjected to economic coercion, such as the revocation of her son's scholarship to pursue university study, since Luara began demonstrating alongside Sultana while under *de facto* house arrest. Fifth, Sultana's communications have been surveilled and leaked by the police as part of an online defamation campaign against her, including sensitive details about the May 12 rape, which she shared in confidence with her therapist.⁴⁸ Sixth, Sultana and Luara receive regular death threats from Moroccan agents, especially after May 12. And seventh, each day since early May and throughout their house arrest, the police have thrown a toxic, foul-smelling liquid, "skunk water," into the house and do not allow Sultana and Luara any reprieve for fresh air.

To this day, Sultana and Luara have *never been formally arrested*.⁴⁹ On February 17, 2021, after the Khaya sisters had already been under *de facto* house arrest for three months, the police twice threatened to arrest them. First, Sultana and Luara stepped outside the house and into the

⁴⁵ Evidence Folder, *supra* note 43, Attachment 23; *Woman Human Rights Defender Sultana Khaya Was Sexually Assaulted*, FRONT LINE DEFENDERS, May 14, 2021, *available at* <https://www.frontlinedefenders.org/en/case/woman-human-rights-defender-sultana-khaya-was-sexually-assaulted> (discussing both Sultana and Luara's assaults) [hereinafter FRONT LINE DEFENDERS].

⁴⁶ Appendix I, *supra* note 24.

⁴⁷ Evidence Folder, *supra* note 43, Attachments 16, 22.

⁴⁸ The recording was leaked on Facebook.

⁴⁹ *Morocco/Western Sahara: Sahrawi Activist Abused Under House Arrest: Sultana Khaya*, AMNESTY INT'L, Mar. 18, 2021, *available at* <https://www.amnesty.org/en/documents/mde29/3815/2021/en/>.

street to join a peaceful protest. The police brutally beat both sisters and then dragged them by their hands and feet back inside the house.⁵⁰ When the police dumped Sultana and Luara in the doorway, a metal bolt from the door fell to the ground.⁵¹ The Police Commissioner, Hakim Amer, possibly thinking the bolt was a weapon, then stated, “I now have the proof I need to arrest you.” Second, in the evening on February 17, Amer opened the door of the Khaya home without warning, and, fearing assault, the Khaya family members began to throw their slippers at him.⁵² Amer then said, “This is what I need to arrest you.” During both events, Amer explicitly admitted to the sisters that he did not actually have the proof or authority to keep the Khaya sisters under house arrest. The Khaya sisters have not attempted to obtain local counsel and are represented only by their international legal team.⁵³

II. LEGAL ANALYSIS

For the reasons set forth below, Sultana and Luara’s detention constitutes an arbitrary deprivation of their liberty under Categories I, II, III, and V of the WGAD’s Revised Methods of Work. The Government of Morocco signed the International Covenant on Civil and Political Rights (ICCPR) on January 19, 1977 and ratified it on May 3, 1979. The WGAD may look to other instruments in determining whether a deprivation of liberty is arbitrary, including the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (“Body of Principles”) and the UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.⁵⁴

Both Article 9 of the ICCPR and the Universal Declaration of Human Rights (UDHR) state that “no one shall be subjected to arbitrary arrest, detention, or exile.”⁵⁵ The WGAD has held that the prohibition of arbitrary arrest and detention is a peremptory norm of international law.⁵⁶ In light of the COVID-19 pandemic and that Morocco declared a state of emergency in March 2020, it is critical to note that the WGAD has held that the prohibition on arbitrary arrest and detention cannot be derogated from *even during states of emergency*.⁵⁷

⁵⁰ Evidence Folder, *supra* note 43, Attachments 16, 18–21.

⁵¹ *Id.*, Attachments 17, 21.

⁵² *Id.*, Attachment 20.

⁵³ The Khaya sisters have not sought local counsel due to both the lack of local judicial proceedings and fear of reprisals.

⁵⁴ METHODS OF WORK OF THE WORKING GROUP ON ARBITRARY DETENTION, U.N. HUMAN RIGHTS COUNCIL, 36th Sess., U.N. Doc. A/HRC/36/38, July 13, 2017, at ¶ 7(e)–(f), (i) [hereinafter REVISED METHODS OF WORK].

⁵⁵ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at Art. 9(1) [hereinafter ICCPR] and Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, *adopted* 1948, at Art. 9.

⁵⁶ *Liu Xia v. China*, Opinion No. 16/2011, U.N. Doc. A/HRC/WGAD/2011/16, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* May 5, 2011, at ¶ 12.

⁵⁷ *Id.* (holding that the WGAD views the prohibition on arbitrary arrest and detention as *jus cogens* and that the WGAD follows the Human Rights Committee’s General Comment 29 on states of emergency in its opinions with respect to *jus cogens*); *General Comment No. 29 on Article 4: Derogations During a State of Emergency*, U.N. HUMAN RIGHTS COMM., U.N. Doc. CCPR/C/21/Rev.1/Add.11, Aug. 31, 2001, at ¶ 11, *available at* <https://www.refworld.org/docid/453883fd1f.html>; and *Morocco: Government Decides to Ease Restrictions Aimed at Curbing COVID-19*, LIBRARY OF CONGRESS, June 24, 2020, *available at* <https://www.loc.gov/law/foreign-news/article/morocco-government-decides-to-ease-restrictions-aimed-at-curbing-spread-of-covid-19/>. *See also* *Gunasekaram Jayasundaram v. Sri Lanka*, Opinion No. 38/2012, U.N. Doc. A/HRC/WGAD/2012/38, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Aug. 31, 2012 and *Santhathavan Ganesharatnam v. Sri Lanka*, Opinion No. 9/2013, U.N. Doc. A/HRC/WGAD/2013/9, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* May 2, 2013 (finding that detention was arbitrary despite the state’s proclamation of emergency and the legality of detention under the state’s domestic laws).

Additionally, the WGAD has emphasized that it “subjects interventions against individuals who may qualify as human rights defenders to particularly intense review.”⁵⁸ Both Sultana and Luara qualify as human rights defenders. Thus, the WGAD should review their case, and the numerous violations contained within it, using this heightened level of scrutiny.

A. As an initial matter, both Sultana and Luara Khaya have been deprived of their liberty since November 19, 2020 under *de facto* house arrest.

An individual is under *de facto* house arrest when they are placed under house arrest without legal basis.⁵⁹ The WGAD has explained that house arrest constitutes a deprivation of liberty where it is “it is carried out in closed premises which the person is not allowed to leave”⁶⁰ or “accompanied by serious restrictions on freedom of movement.”⁶¹ In specific cases, the WGAD has found that individuals under house arrest were deprived of their liberty where they were held in closed premises and told they could not leave the premises;⁶² were denied visitors or access to family without guard authorization;⁶³ were denied contact with the external world;⁶⁴ were prevented from leaving the premises by force;⁶⁵ had their telephone or Internet access curtailed or severed completely;⁶⁶ could leave the premises only with a guard escort;⁶⁷ or faced surveillance or guards on the premises.⁶⁸

⁵⁸ See, e.g., *Dilmurod Saidov v. Uzbekistan*, Opinion No. 67/2012, U.N. Doc. A/HRC/WGAD/2012/67, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 23, 2012, at ¶ 57 and *Nega v. Ethiopia*, Opinion No. 62/2012, U.N. Doc. A/HRC/WGAD/2012/62, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 21, 2012, at ¶ 39.

⁵⁹ *Chen Guancheng v. People’s Republic of China*, Opinion No. 47/2006, U.N. Doc. A/HRC/7/4/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 24, 2006, at ¶¶ 6, 10.

⁶⁰ REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION, COMMISSION ON HUMAN RIGHTS, U.N. Doc. E/CN.4/1993/24, Jan. 12, 1993 [hereinafter *Deliberation No. 1*].

⁶¹ REVISED FACT SHEET NO. 26, U.N. WORKING GROUP ON ARBITRARY DETENTION, Feb. 8, 2019, at 5, *available at* <https://www.ohchr.org/Documents/Issues/Detention/FactSheet26.pdf>.

⁶² *Abassi Madani and Ali Benhadj v. Algeria*, Opinion No. 28/2001, U.N. Doc. E/CN.4/2003/8/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Dec. 3, 2001, at ¶¶ 25 (describing how the complainants were ordered to stay inside the apartment), 28 (finding that their house arrest was a “detention” in conformity with WGAD *Deliberation No. 1*).

⁶³ *Aung San Suu Kyi v. Myanmar*, Opinion No. 2/2007, U.N. Doc. A/HRC/7/4/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* May 8, 2007, at ¶ 4; *see also Abdesalam Yassin v. Morocco*, Opinion No. 4/1993, U.N. Doc. E/CN.4/1994/27, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Sept. 29, 1993, at ¶ 9 (finding that the complainant’s house arrest amounted to deprivation of liberty since he was deprived of access to most of his family and his wife was the only person allowed to visit).

⁶⁴ *Aung San Suu Kyi v. Myanmar*, *supra* note 63, at ¶ 4.

⁶⁵ *Chen Guancheng v. People’s Republic of China*, *supra* note 59, at ¶ 11 (noting that whenever Chen Guancheng tried to exit his house to visit with lawyers he was forced back inside and beaten when he tried to resist).

⁶⁶ *Id.*, at ¶ 10 (noting that the authorities cut the complainant’s landline and seized his computer); *see also Benoit Faustin Munene v. Republic of the Congo*, Opinion No. 62/2020, U.N. Doc. A/HRC/WGAD/2020/62, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 23, 2020, at ¶¶ 52–53 (finding that the complainant could not leave because his contact with the outside world was restricted, his communications were monitored and he was only permitted the “bare minimum” of communication, and he was under constant surveillance by security guards); *Thich Quang Do v. Viet Nam*, Opinion No. 18/2005, U.N. Doc. E/CN.4/2006/7/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* May 26, 2005, at ¶ 14 (finding that house arrest amounted to deprivation of liberty and noting that the police cut Thich Huyen Quang’s telephone line and confiscated his mobile phone).

⁶⁷ *Liu Xia v. China*, *supra* note 56, at ¶ 17 (finding Liu Xia’s house arrest amounted to deprivation of liberty because of the limitations on her physical movements, including police escort on excursions).

⁶⁸ *Benoit Faustin Munene v. Republic of the Congo*, *supra* note 66, at ¶ 10 (finding that the complainant was under constant surveillance and could not move freely outside his residence); *Liu Xia v. China*, Opinion No. 16/2011, *supra* note 56, at ¶ 7 (describing the presence of “plain clothes” security agents in front of the apartment building gate to keep

Applying this standard, Sultana and Luara have clearly been deprived of their liberty. They are held within closed premises and are not allowed to leave. Both sisters have been prevented from leaving the Khaya home by force, including when they attempt to leave the house and Moroccan forces drag them back inside.⁶⁹ Furthermore, when Luara opened the door after being shoved inside the house on November 19, 2020, Colonel Al-Madfai forced her back inside.⁷⁰ Even when Sultana and Luara manage to get outside, they face limitations on their physical movement. On February 23, 2021, Sultana and Luara rushed out of the house to join a peaceful protest, but as they left the Khaya property, their mother overheard an agent say into his walkie-talkie, “Tell them to intervene, they have left the perimeter.” Their mother screamed for Sultana and Luara to return to the house, and when they did, they overheard the same agent say, “Tell them not to intervene, they have come back.” The Khaya home is always guarded by an estimated 30 police, military, and plainclothes agents.⁷¹

Sultana and Luara cannot leave the house. Sultana was instructed not to leave the house; Police Commissioner Hakim Amer told her that if she left her house, he would arrest and torture her. Initially, Luara, not Sultana, could go to the market near the Khaya home with a police escort. However, Luara now cannot leave the house at all for fear of abduction and torture. On May 13, 2021, the Boujdour office of the Moroccan Ministry of the Interior summoned Luara’s immediate family members and said, “it is time to clear the nest. Either you remove Luara, or we will do it our way.” Later that day, Luara’s brother communicated to Luara through a broken window that the police told him they would abduct Luara if she left the house. On July 6, 2021, Luara was beaten when she stood immediately outside the doorway. Thus, neither sister can leave the Khaya home without forfeiting her fundamental right to physical integrity.

Sultana and Luara have also been denied visitors and access to family. Guards prevent their relatives from entering the house without authorization.⁷² On February 25, 2021, Sultana and Luara’s other sister was blocked from entering the Khaya home, even though her son was asleep inside. When Sultana stepped into the street to help her sister, she heard Colonel Al-Madfai say, “take her, she is exiting the perimeter.” Sultana stepped back inside, and the police then allowed Sultana’s sister to enter the house to get her son. On May 24, 2021, the Moroccan police refused entry to all people who were bringing food to Sultana and Luara, and on May 25, stated that family members could not come in because Sultana and Luara are in “obligatory prison.”

In addition, Sultana and Luara have been heavily surveilled. Additionally, according to the Khaya family members, the Moroccan police are surveilling the house. A post outside the home contains a camera, and the family recognizes Moroccan intelligence vehicles parked outside the house that conduct electronic surveillance. The family recognizes these vehicles because they frequently operate in activists’ neighborhoods. Sultana’s Internet and telecommunications are regularly disrupted; and on June 11, the Moroccan police raided the home and Sultana believes they installed a frequency inhibitor on the second floor.

Sultana and Luara have been denied access to the outside world. On December 1 and 18, 2020, the police covered their windows with black plastic to prevent their neighbors from seeing

visitors and journalists away); *Thich Huyen Quong v. Viet Nam*, Opinion No. 4/2001, U.N. Doc. E/CN.4/2002/77/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* May 17, 2001, at ¶¶ 8–9 (finding that the complainant was under house arrest amounting to deprivation of liberty when he could not communicate freely, was under surveillance, and guards prevented him from leaving the closed premises where his house arrest took place).

⁶⁹ Evidence Folder, *supra* note 43, Attachments 12–14, 19–20.

⁷⁰ *Id.*, Attachments 1–3, 6.

⁷¹ *Id.*, Attachments 4–5, 10, 15.

⁷² *Id.*, Attachments 7–9.

another Western Sahara flag that the Khaya sisters had hung at the window.⁷³ However, this plastic has also prevented Sultana and Luara from seeing family members. When Sultana exited the house on December 1 to ask why her windows were covered, the police failed to explain, saying only “long live the King” before shoving Sultana back inside the house. On December 18, the police broke through Sultana’s window to snatch her Western Sahara flag and then re-covered the window.

Sultana and Luara now at risk of being completely cut off from the outside world. Throughout their *de facto* house arrest, the police have repeatedly tried to steal Sultana’s cell phone and succeeded on two occasions. On June 8, 2021, the Moroccan police denied entry to a family member who had been bringing Sultana and Luara batteries for their portable power source. Since losing their electricity, this power source is the only way that the sisters can charge their cell phones. Without functioning phones, they will be unable to contact international counsel, speak to family members, or document the abuses against them. Thus, as an initial matter, Sultana and Luara’s *de facto* house arrest constitutes a deprivation of liberty.

B. Category I: No Legal Basis for Detention

Each sister’s arbitrary arrest and detention constitutes a Category I violation. A detention is arbitrary under Category I when “it is clearly impossible to invoke any legal basis justifying the deprivation of liberty.”⁷⁴ The WGAD has found a Category I violation where a detainee was arrested without a warrant, was not informed of any charges against him, and was not brought promptly before a judge.⁷⁵

Sultana and Luara have been arbitrarily detained under Category I because there is no legal basis for their detention. Neither sister was informed of any charges against her at the time of her placement under house arrest, as is required under both Moroccan and international law.⁷⁶ First, when Sultana was initially searched at the police station on November 19, 2020, Police Commissioner Hakim Amer told her that he lacked a legal basis to search her when she asked. After arriving in Boujdour, Colonel Al-Madfai shoved Sultana inside the Khaya home without explanation.

Second, the only legal document Sultana has ever received from the Moroccan government came on February 23, 2021, after Sultana had already been detained under *de facto* house arrest for around three months. A representative of the King’s Prosecutor appeared at the Khaya home with a “summons” for Sultana. Sultana refused to accept this summons because she does not recognize the jurisdiction of Moroccan courts. Hypothetically, if the document was intended as a summons to appear in court, under Moroccan law, a valid summons to appear in court must contain notice to individuals of the charges against them as they are stated *in the arrest warrant*.⁷⁷ Since Sultana has never been provided with an arrest warrant, a summons to appear would be invalid. Even if the document were a valid summons to appear in court, which this one is not, a criminal suspect may be

⁷³ *Id.*, Attachment 22.

⁷⁴ *Liu Xia v. China*, *supra* note 56, at ¶¶ 11–12.

⁷⁵ *Hung Linh Nguyen v. Viet Nam*, Opinion No. 46/2015, U.N. Doc. A/HRC/WGAD/2015/46, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Dec. 3, 2015, at ¶¶ 27, 31, 35.

⁷⁶ Moroccan Criminal Procedure Code, Feb. 10, 1959, at Arts. 147–48, *available at* <https://www.refworld.org/docid/3ae6b5104.html> [in French] and ICCPR, *supra* note 55, at Art. 19(2) (“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.”); *see also* MOROCCO: HUMAN RIGHTS AT A CROSSROADS, HUMAN RIGHTS WATCH, Oct. 2004, at § IV, *available at* <https://www.hrw.org/reports/2004/morocco1004/morocco1004.pdf> (describing illegal detention under the Counter-Terrorism laws).

⁷⁷ Moroccan Criminal Procedure Code, *supra* note 76, at Art. 137.

brought into custody only for 24 hours pending examination by a magistrate judge.⁷⁸ It is also worth noting that Moroccan law only allows for detention of a suspect pending an investigation for a maximum of 48 hours,⁷⁹ which has clearly been exceeded in this case. Sultana’s seven-month *de facto* house arrest is a Category I violation that is also contrary to Moroccan law.

Like Sultana, Luara was first shoved inside the Khaya home on November 19, 2020 without legal basis. Since then, she has been under *de facto* house arrest amounting to deprivation of liberty, as discussed in Section II(A). Luara likewise was not informed of any charges against her at the time she was placed under house arrest, and she has never been presented with an arrest warrant. Thus, the Khaya sisters have both been detained without a legal basis, a Category I violation.

C. Category II: Detention Based on the Exercise of Fundamental Rights and Freedoms

A detention is arbitrary under Category II when it results from the exercise of fundamental rights or freedoms protected under the UDHR and the ICCPR.⁸⁰ Sultana and Luara’s detention is arbitrary because it is a direct result of their exercise of their rights to freedom of expression, peaceful assembly, and freedom of association, which are protected under both domestic law⁸¹ and international law.⁸² In assessing whether the exercise of a fundamental human right was the cause for arrest or detention, the WGAD will examine documentation of an individual’s extensive work as an HRD,⁸³ among other factors.

1. Sultana was deprived of her liberty as punishment for exercising her rights to freedom of expression and peaceful assembly.

In prior cases involving Sahrawis, the WGAD has considered the “general situation in Western Sahara,” including the repression of freedom of expression for pro-independence Sahrawis.⁸⁴ Under Article 19(2) of the ICCPR, “everyone shall have the right to freedom of expression,” and under Article 21, “the right of peaceful assembly shall be recognized.”⁸⁵ Although the right of peaceful assembly may be limited to protect public health, the WGAD has found that Morocco could not justify restricting the rights set out in Articles 19 and 21 of the ICCPR in an opinion rendered during the COVID-19 pandemic and while Morocco was under a state of emergency.⁸⁶

Sultana was deprived of her liberty as punishment for exercising her fundamental rights to freedom of expression and peaceful assembly. Apprehending Sultana on November 19, 2020 was clearly retaliation for her outspoken advocacy for self-determination in Western Sahara – not only is

⁷⁸ *Id.*, at Arts. 139–40.

⁷⁹ *Id.*, at Arts. 68 (establishing maximum time), 82 (establishing that the time of detention pending investigation can be extended by the Prosecutor for only another 24-hour period).

⁸⁰ REVISED METHODS OF WORK, *supra* note 54, at ¶ 8.

⁸¹ Constitution of Morocco, amended in 2011, at Arts. 12, 29.

⁸² Universal Declaration of Human Rights, *supra* note 55, at Arts. 19, 20(1) and ICCPR, *supra* note 55, at Arts. 19(2), 21, 22(1).

⁸³ *Nasrin Sotoudeh v. Iran*, Opinion No. 21/2011, U.N. Doc. A/HRC/WGAD/2011/21, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* May 6, 2011, at ¶¶ 5, 31–32.

⁸⁴ *Ali Salem Bujmaa v. Morocco*, *supra* note 23, at ¶¶ 60–61 (citing to the Human Rights Committee’s concluding observations on Morocco, U.N. Doc. CCPR/C/MAR/CO/6).

⁸⁵ ICCPR, *supra* note 55, at Arts. 19(2) and 21.

⁸⁶ *Walid El Batal v. Morocco*, *supra* note 23, at ¶¶ 73 (noting that there is no context for restricting rights under Article 19), 93 (finding that the COVID-19 pandemic provides a heightened impetus for Mr. El Batal’s immediate release from prison).

her detention part of a larger campaign of abuse intended to silence Sahrawi activists, but Moroccan authorities have repeatedly attacked and harassed Sultana, over many years, for speaking out in favor of self-determination. The fact that Police Commissioner Hakim Amer told Sultana that she must stay home and “not discuss politics with anybody” or he would torture her indicates that she was targeted because of her political speech and to prevent her from further exercising her right to freedom of expression. Moreover, as discussed in section I(A)(4) above, the police beat Sultana for joining Sahrawi peaceful protests in 2007, 2011, 2013, 2016, and 2018 before placing her under *de facto* house in 2020, indicating that her current detention is also a result of her participation in peaceful assemblies.

2. Both sisters were deprived of their liberty as a result of the exercise of their right to freedom of association.

Both sisters were deprived of liberty as a direct result of the exercise of their right to freedom of association. Under Article 22 of the ICCPR, “everyone shall have the right of freedom of association with others.”⁸⁷ The WGAD considers association with human rights organizations as clearly covered by the right to freedom of association.⁸⁸ In addition, the Declaration on Human Rights Defenders recognizes “the right, individually and in association with others,” to promote human rights, and the right “[t]o form, join and participate in non-governmental organizations, associations or groups” for the purpose of promoting and protecting human rights.⁸⁹

Sultana was deprived of her liberty due to her association with and membership in ISACOM and the League for the Defense of Human Rights and Natural Resources, Sahrawi human rights organizations which peacefully advocate for human rights and self-determination in Western Sahara. This is clear from the fact that, in May 2021, five other members of ISACOM were targeted for assault, harassment, or house arrest.⁹⁰ Moreover, as discussed in the preceding sections, there is extensive documentation of Sultana’s career as a nonviolent HRD, and she has been detained on numerous previous occasions while peacefully demonstrating with civilian human rights groups and protesters.

Luara was deprived of her liberty as a result of her association with both Sultana and the League for the Defense of Human Rights and Natural Resources. On May 13, 2021, the authorities summoned members of Luara’s immediate family and threatened to “take Luara out” and to “clear the nest” if her family could not convince her to stop protesting for Western Sahara’s self-determination. Luara’s family members have suffered economic coercion due to Luara’s associations with the Sahrawi pro-independence movement, including the revocation of a scholarship for her son’s university degree.

D. Category III: Violation of Due Process Rights

A detention is considered arbitrary under Category III “[w]hen 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

⁸⁷ ICCPR, *supra* note 55, at Art. 22(1).

⁸⁸ *Afif Jamil Mazhar, et al. v. Syria*, Opinion No. 10/1993, U.N. Doc. E/CN.4/1994/27, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Apr. 29, 1993, at ¶ 5(h).

⁸⁹ Declaration on Human Rights Defenders, G.A. Res. 53/144, U.N. Doc. A/RES/53/144, *adopted* Dec. 9, 1998, at Arts. 1, 5.

⁹⁰ Appendix I, *supra* note 24.

concerned, is of such gravity as to give the deprivation of liberty an arbitrary character.”⁹¹ To make decisions concerning Category III violations, the WGAD draws upon the ICCPR and the Body of Principles, among other sources. In this case, Sultana and Luara have been subjected to numerous violations of Articles 9 and 14 of the ICCPR and the Body of Principles, and their ongoing detention is therefore arbitrary under Category III.

1. Both sisters were arrested without a warrant and were not informed of the reasons for their arrest at the time of arrest.

Article 9(2) of the ICCPR provides that “[a]nyone 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.”⁹² The Body of Principles echoes this language in Principle 10.⁹³ The WGAD has found that arrest without a warrant is a clear violation of Article 9 of the ICCPR, and that accompanying due process deprivations simply further the existing violation.⁹⁴ Possession of the warrant is required at the time of arrest.⁹⁵ The WGAD has also repeatedly stated that arrest without a warrant is only permissible when either the arrest is *in flagrante delicto* or carried out under emergency powers that satisfy all other procedural safeguards,⁹⁶ neither of which is true in Sultana and Luara’s case.

As discussed above in Section II(B), both Sultana and Luara have been arrested and detained under house arrest without a warrant and without being informed of the reasons for their arrest at the time of arrest. When Sultana asked Hakim Amer whether he had a legal basis to search her, he replied that he did not. Neither sister was provided with an explanation when she was forced inside the Khaya home and not allowed to leave. Neither sister was in the process of committing any crimes when she was placed under *de facto* house arrest – Sultana was returning to her family’s home and Luara had simply opened the door of the house when she was brutally beaten and shoved inside. Even if the Government of Morocco provided an arrest warrant today, the WGAD has previously found that a delay of only a few hours between arrest and providing a warrant is a Category III violation.⁹⁷

2. Both sisters were denied the right to challenge their detention in court.

Under Article 9(4) of the ICCPR, “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful.”⁹⁸ The Body of Principles reiterates the importance of being promptly brought before a judge.⁹⁹ The Khaya sisters have been neither presented to a judge nor allowed to access one during their seven months under house arrest.

⁹¹ REVISED METHODS OF WORK, *supra* note 54, at ¶ 8.

⁹² ICCPR, *supra* note 55, at Art. 9(2).

⁹³ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/172, U.N. Doc. A/RES/43/173, *adopted* Dec. 9, 1988, at Principles 2, 10.

⁹⁴ *Di Dafeng, et al. v. China*, Opinion No. 44/1993, U.N. Doc. E/CN.4/1995/31/Add.1, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Sept. 30, 1993, at ¶ 7; *Reynaldo Bernardo v. Philippines*, Opinion No. 30/1993, U.N. Doc. E/CN.4/1994/27, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Apr. 30, 1993, at ¶¶ 11, 17(a).

⁹⁵ *Id.*

⁹⁶ *Reynaldo Bernardo v. Philippines*, *supra* note 94, at ¶¶ 11, 17(a).

⁹⁷ *Luu Van Vinh v. Viet Nam*, Opinion No. 35/2018, U.N. Doc. A/HRC/WGAD/2018/35, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Apr. 26, 2018, at ¶ 26.

⁹⁸ ICCPR, *supra* note 55, at Art. 9(4) (emphasis added).

⁹⁹ Body of Principles, *supra* note 93, at Principle 11(1).

3. Both sisters have been denied the presumption of innocence.

Under Article 14(2) of the ICCPR, “everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”¹⁰⁰ The Body of Principles affirms the right to the presumption of innocence.¹⁰¹ The WGAD has explained that excessive recourse to pre-trial detention can violate the presumption of innocence.¹⁰² As discussed in Section II(B)(1) above, Moroccan law allows a criminal suspect to be brought into custody only for 24 hours pending examination by a magistrate judge.¹⁰³ Both Sultana and Luara have been summarily arrested and detained under house arrest for seven months, extra-legally and without any charge. They have been under *de facto* house arrest for so long that their treatment is the equivalent of the Moroccan government presuming them guilty of unknown charges and sentencing them to indefinite detention.

4. Both sisters have been denied a fair and public hearing by an impartial tribunal established by law.

Article 14(1) of the ICCPR provides that individuals are entitled to “a fair and public hearing by a competent, independent and impartial tribunal established by law” in the determination of criminal charges against them, and Article 14(3) provides that they must be tried without undue delay.¹⁰⁴ The Body of Principles affirms these critical due process rights.¹⁰⁵ Neither of the Khaya sisters has been allowed to access a court to challenge the arbitrariness of her detention. Thus, their detention constitutes a Category III violation.

E. Category V: Discrimination Based on a Protected Class

A detention is arbitrary under Category V when it “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.”¹⁰⁶ The WGAD has further explained that protected classes for the purposes of Category V include discrimination based on “a person’s status as a human rights defender,” and in particular, “discrimination in the exercise of rights elaborated under declaratory instruments such as the Declaration on Human Rights Defenders.”¹⁰⁷

In its previous decisions relating to Sahrawis who advocate for the right to self-determination in Western Sahara, the WGAD has held that these individuals suffered discrimination based upon their status as Sahrawis and their political opinions.¹⁰⁸ In particular, the WGAD has noted “there is a widespread practice of abuse against persons who . . . campaign for the right to self-determination

¹⁰⁰ ICCPR, *supra* note 55, at Art. 14(2).

¹⁰¹ Body of Principles, *supra* note 93, at Principle 36(1).

¹⁰² *Report of the Working Group on Arbitrary Detention: Mission to Brazil*, U.N. WORKING GROUP ON ARBITRARY DETENTION, U.N. Doc. A/HRC/27/48/Add.3, June 30, 2014, at ¶ 100.

¹⁰³ Moroccan Criminal Procedure Code, *supra* note 76, at Arts. 139–40.

¹⁰⁴ ICCPR, *supra* note 55, at Art. 14(1)–(3).

¹⁰⁵ Body of Principles, *supra* note 93, at Principles 32, 37.

¹⁰⁶ REVISED METHODS OF WORK, *supra* note 54, at ¶ 8(e).

¹⁰⁷ *Ny Sokha v. Cambodia*, Opinion No. 45/2016, U.N. Doc. A/HRC/WGAD/2016/45, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Nov. 21, 2016, at ¶¶ 44–45.

¹⁰⁸ *Walid El Batal v. Morocco*, *supra* note 23, at ¶¶ 88–89.

of the Saharan people.”¹⁰⁹ On discrimination based on gender, the WGAD has held that being targeted in detention for being a woman, including being threatened with rape, indicates a Category V violation.¹¹⁰

Sultana and Luara have been discriminated against on the bases of their national, ethnic or social origin, political opinions, and gender. First, as Sahrawis from Western Sahara who support Western Sahara’s independence, their right to freedom of expression is extremely limited.¹¹¹ In contrast with the violent suppression of Sahrawi pro-independence demonstrations, the Moroccan authorities allowed large demonstrations in December 2020 supporting the US’s recognition of Morocco’s sovereignty over Western Sahara.¹¹² Although the Government of Morocco has argued that its actions preventing Sahrawi protests are justified by COVID-19 regulations, it first enacted these regulations in March 2020, and failed to justify allowing the December 2020 demonstrations to take place. The suppression of public gatherings targets pro-independence Sahrawis.

Second, Sultana and Luara have been discriminated against as Sahrawi women. Most Sahrawi human rights defenders are women.¹¹³ Additionally, the WGAD considers evidence showing that a woman has been targeted in detention with discriminatory treatment based on gender as supporting a Category V violation.¹¹⁴ Sultana and Luara were raped on May 12, 2021 by Moroccan agents who conducted a nighttime terror raid on the Khaya home. Furthermore, on June 2, 2021, Moroccan police intercepted voice recordings about the rape that Sultana had sent, in confidence, to her therapist. The police then published this recording online to defame Sultana, as is a common practice toward women Sahrawi human rights defenders and journalists.¹¹⁵

Finally, Sultana and Luara have been discriminated against as human rights defenders (HRDs). They have been targeted for speaking in favor of self-determination in Western Sahara and their advocacy for peaceful protest and political change. Sultana has also been targeted for her membership in ISACOM, like many other Sahrawi HRDs. Both sisters have been targeted for their membership in the League for the Defense of Human Rights and the Protection of Natural Resources. All of their activities are protected rights under declaratory instruments such as the UN Declaration on Human Rights Defenders.¹¹⁶ Thus, Sultana and Luara’s detention is arbitrary under Category V.

F. The Moroccan Government’s Mistreatment of the Khaya Sisters Also Violates the Geneva Conventions

We also highlight, for the Working Group’s awareness and at its discretion, that the Khaya sisters are being held under *de facto* house arrest in Boujdour, a city under occupation by the Moroccan government. There is an armed conflict between Morocco and the Polisario Front. As an Occupying Power, the Government of Morocco holds distinct responsibilities under International Humanitarian Law. To willfully cause great suffering or serious injury to the body or health of protected persons, to commit acts of torture or inhumane treatment, and to deprive a person protected by the Fourth Geneva Convention of the right to a fair and regular trial are all grave

¹⁰⁹ *Id.*, at ¶ 87.

¹¹⁰ *Zeinab Jalalian v. Iran*, Opinion No. 1/2016, U.N. Doc. A/HRC/WGAD/2016/1, U.N. WORKING GROUP ON ARBITRARY DETENTION, *adopted* Apr. 18, 2016, at ¶ 37.

¹¹¹ *State Department Human Rights Report*, *supra* note 28.

¹¹² *Id.*

¹¹³ Nazha El Khalidi, *Sahrawi Women Are a Pillar of Resistance Against Moroccan Occupation*, NATIONALIA, July 21, 2020, *available at* <https://www.nationalia.info/dossier/11321/sahrawi-women-are-a-pillar-of-resistance-against-moroccan-occupation>.

¹¹⁴ *Zeinab Jalalian v. Iran*, *supra* note 110, at ¶ 37.

¹¹⁵ RWB, *supra* note 29, at 18.

¹¹⁶ Declaration on Human Rights Defenders, *supra* note 89, at Arts. 5–6, 7, 12–13.

breaches of the Convention pursuant to Article 147. The Government of Morocco ratified the Fourth Geneva Convention in 1956, and its Additional Protocol I in 2011.¹¹⁷

III. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN

Not applicable. Neither Sultana nor Luara have been provided an opportunity for judicial review of their detention. On June 6, 2021, the Moroccan judicial police visited the Khaya home and asked to speak with Sultana. Sultana declined this meeting, because there is a pattern or practice of the judicial police asking to speak with Sahrawi human rights defenders, interrogating them in the absence of counsel, and forcing them to confess under duress to offenses they did not commit. In a previous case before the WGAD, Morocco even used coerced statements obtained through interrogation of a Sahrawi human rights defender in its response to his petition.¹¹⁸ Sultana has declined meetings with the National Council for Human Rights (CNDH) for similar reasons.

¹¹⁷ The Polisario Front made a unilateral declaration that it would adhere to Additional Protocol I in 2015, and this declaration was accepted by the Swiss Federal Council.

¹¹⁸ *Ali Salem Bujmaa v. Morocco*, *supra* note 23, at ¶ 66.