REPORT
ON THE TRIAL HELD BEFORE THE PERMANENT MILITARY TRIBUNAL (RABAT, FEBRUARY 1-17, 2013) RELATED TO THE EVENTS AT THE GDEIM IZIK CAMP (WESTERN SAHARA)

March 18, 2013

AIODH

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AIODH was legally established in 2010 to further work in international human rights observation that has been ongoing since 2000.

Its main objective is to carry out legal observation missions of judicial proceedings brought against human rights activists, certifying whether in the course of these proceedings the international standards for what makes a fair and equitable trial are respected.

Consistent with that objective, AIODH seeks to encourage greater awareness of the defense of human rights in the regional, national and international spheres, promoting the culture and values of human rights; contributing to the training in humanitarian law and in development cooperation; promoting the freedom of expression and the right of every person not to suffer discrimination of any kind; promoting the release of prisoners of conscience; working to strengthen national and international justice and bolster the right to truth, justice, and reparation, especially for the victims of arbitrary detentions, trials conducted without sufficient guarantees, forced disappearances, extrajudicial executions, and gender violence.

The AIODH team, made up of academics, lawyers, and persons involved in the defense of human rights, has extensive experience not just in international observation, which it has done since 2000, but also in the promotion of human rights.

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I. BACKGROUND

1. THE EVENTS AT GDEIM IZIK: THE FACTS

Since 2010 the creation of encampments in the outskirts of the main cities in Western Sahara has become a new form of peaceful protest for its inhabitants to reclaim their economic and social rights. In that context, in September 2010 two small camps were established to the north and east of El Aaiún with this objective, although their organizers proceeded to dismantle them peacefully after receiving guarantees from the Moroccan authorities that their demands would be met.

Because these promises were not carried out, on October 10, 2010 Saharawi families began moving to the Gdeim Izik region, 12 km to the east of El Aaiún, until a camp of more than 7,000 *jaimas* (tents) was formed, home to an estimated population of over 20,000. In the first weeks the Moroccan authorities as well as the media celebrated the success of the organization of the camp, the legitimacy of the socioeconomic demands, and the work of the Dialogue Committee, made up of the representatives of the camp for conversations with the Moroccan authorities, who suggested it be established. The matter was the subject of debate in both chambers of the Moroccan legislature, and found considerable echo in the Moroccan media.

On October 18 the Moroccan authorities raised a sand wall around the camp, guarded by military and police forces to restrict movement in and out of the camp. From that moment the tension grew given that access to the camp was forcibly denied to hundreds of Saharawis, and it reached a critical point when 14-year-old NAJEM ELGARHI died from a gunshot when attempting to enter the encampment with five other youths on October 24. According to the Moroccan Association for Human Rights (hereinafter, AMDH), the death of this minor was caused by gunfire by security forces situated at the perimeter of the encampment directed at the vehicle in which the victim was traveling.[1]

On November 5, 2010, the Government of Morocco, represented by ABDELAZIZ BENNANI, Chief of Staff of the Army and Commander of the Southern Zone, TAIEB CHERKAOUI, Minister of the Interior, and those working with them, including the Saharawi representative in the Moroccan Parliament, GUEJMULA EBBI, reached an agreement with the Dialogue Committee to attend to the demands of employment and housing, and other individualized measures, and secured its implementation starting on November 8, 2010. For this purpose several large tents equipped with computer technology were set up on the outskirts of the camp with the objective of creating a registry of the Saharawi population at Gdeim Izik. After the content of the agreement was publicized, entry to the camp was opened to whoever wanted to do so.

Although the agreement presupposed the peaceful dismantling of the camp by the inhabitants, without knowing the reasons for this, on November 7 the prosecutor of the Court of Appeals of El Aaiún issued search and arrest warrants for the accused, under the main accusation of having kidnapped more than 20,000

[1] *Report of the Investigation Commission of the Moroccan Human Rights Association about the events in El Aaiún on November 8, 2010.*

people with the objective of destabilizing the zone and attacking Morocco's internal security. That same day access to the camp was completely closed.

At 6:00 a.m. on November 8, 2010, the date in theory for implementation of the agreement between the Moroccan authorities and the Dialogue Commission[2], there was a large operation by Moroccan forces to dismantle the camp, during the course of which violent measures were taken (using hoses with hot water and tear gas, among other means) to scatter the population, causing confrontations between the Moroccan forces and those responsible for the security of the camp. The violence moved to the streets of El Aaiún, where nearly 500 people were detained in the following days.

These incidents took place the day that unofficial discussions about the conflict were beginning between Morocco and the POLISARIO Front, under the auspices of the personal envoy of the UN Secretary General of the United Nations, dispatched sent from New York.

On February 1, 2013, the hearing began before the Permanent Military Tribunal of Rabat; it was postponed until February 8, and it then continued until 1:00 a.m. on February 17, which the President of the Tribunal made public the convictions and sentences. This report is the result of the observation work done by the members of AIODH who were present at the headquarters of the Permanent Military Tribunal in Rabat throughout the hearing.

2. THE REPORT BY THE JOINT COMMISSION OF MOROCCAN HUMAN RIGHTS ORGANIZATIONS REGARDING THE EVENTS OF NOVEMBER 8, 2010 AT EL AAIÚN

Although the Moroccan government has not allowed an independent and in depth investigation concerning the events that took place in Gdem Izik, a coalition of Moroccan NGOs issued an report that was part of a subsequent report that was presented before the United Nations Committee Against Torture in November of 2011[3], and that allowed some light to be shed on what happened.

This report highlights that the events that occurred in Gdem Izik are part of a context marked by two issues: first "the debate about the international status (Non-Self Governing Territory) of Western Sahara and the call by part of its population to be able to exercise the right to self-determination," and second, "the sequelae of grave human rights violations of the past and their persistence."

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[2] *Id.*

[3] *Rapport de la Commission conjointe des associations des défense des droits de l'Homme d'investigation à propos des événements du 8 novembre 2010 à Laayoune* (Commission made up of the following NGOs : l'Association des Barreaux du Maroc, la Ligue Marocaine de Défense des Droits de l'Homme, l'Association Marocaine des Droits de l'Homme, le Forum Marocain pour la Vérité et la Justice, le Forum Dignité des Droits de l'Homme, le Centre Marocain des Droits de l'Homme, l'Association Adala-Justice, la Ligue Marocaine Citoyenneté et Droits de l'Homme, l'Organisation Libertés d'Information et d'Expression, l'Organe Marocain des Droits de l'homme, and le Centre des Droits des Personnes).

In relation to the concrete facts of the dismantling and the days after it was dismantled, the Coalition reported the following:

- the short time the population was given from when the Moroccan authorities told them to abandon the camp to when the police began to intervene[4], without taking into account the presence of the elderly, women, minors, and disabled persons;
- the practice of violent detentions of the inhabitants of the camp;
- the existence of an authentic state of emergency, that was not declared and was therefore illegal;
- the arbitrary detentions that occurred in the days following the dismantling of the encampment in the city of El Aaiún, in which the following occurred:
    - illegal entries to the homes of Saharawi families by hooded members of the security forces, outside of the hours established by law, and without any judicial order;
    - attacks on the dignity of persons, such as insults, humiliations, and physical assaults in front of family members;
    - discriminatory acts against persons for being Saharawi;
    - arbitrary arrests and detentions, including of minors, carried out in illegal places (schools), and without informing their families; and
    - mistreatment, including torture, of detained persons.[5]

In its report to the Moroccan authorities, the Coalition of Moroccan NGOs recommended the adoption of the proper measures to guarantee an efficient, exhaustive, independent, and impartial investigation of the facts, whose conclusions should be made public, with the aim of identifying the individuals responsible, bringing them before an independent, competent, and impartial civilian court and apply to them the criminal, civil, and/or administrative sanctions provided by law, and make adequate compensation to the victims.

[4] "All of the information collected by the Commission leads one to believe that the offensive carried out against the camp took place at 6:30 in the morning and that the residents did not have enough time to understand what was happening or to prepare to vacate the area." (*Report of the Investigation Commission of the Moroccan Human Rights Association about the events in El Aaiún on November 8, 2010.*)

[5] In the report the AMDH highlights in detail the state in which some of the persons detained were found, e.g. M. KACHBAR AHMED: "in a wheelchair, with deep head wounds and multiple bruises on his back and eyes."

II. THE ISSUE OF THE TRIBUNAL'S JURISDICTION

1. LACK OF JURISDICTION OF THE MOROCCAN COURTS UNDER INTERNATIONAL LAW – THE LEGAL STATUS OF THE WESTERN SAHARA

As a starting point of this report, a key matter of this proceeding should be highlighted. If the human rights situation in Morocco is a constant concern of the main international human rights organizations, in the case of Western Sahara this concern is qualitatively greater since, in accordance with the UN Charter, it has to do with a *non-self-governing territory*, pending decolonization.[6] What aggravates this situation is the fact that it is not about violations of the human rights of the population by their own government, but by the government of a third state. In this respect it is befitting to remember the report by Hans Corell, Chief of the Office of Legal Counsel of the United Nations, issued at the urging of the President of the Security Council in 2002, stated that

> "The Madrid Accords did not transfer sovereignty over the Territory nor did it confer on any of the signatories the status of Administrative Power, a status that Spain could not transfer acting alone. The transfer of administrative authority over the Territory to Morocco and Mauritania in 1975 did not affect the international status of the Western Sahara as a non-autonomous territory."[7]

The conflict in Western Sahara continues to be analyzed annually by the Special Committee on Decolonization. For this reason, after almost 40 years of occupation, no state has recognized the annexation of Western Sahara by Morocco.[8] As has been confirmed on numerous occasions by the principal organs of the United Nations, *Morocco is the occupying power* of the territory.[9] This occupation and the denial of the right to self-determination of the Saharawi people,

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[6] On February 26, 1976, Spain reported to the Secretary General that as of that date it would end its presence in the territory and considered itself free and clear of all international relations responsibility having to do with the administration of the territory. Even so, the UN General Assembly reiterates annually that it is a conflict associated with decolonization that should be resolved by the peoples of Western Sahara. As this Assembly has indicated, "in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the Charter, the administering Power concerned should continue to transmit information under Article 73(e) of the Charter with respect to that Territory." According to this resolution, legally Spain continues to be the administering power of the territory, and Morocco is an illegal occupant of the territory (General Assembly Resolution 40/51, of December 2, 1985).

[7] Report of the Secretary General of February 12, 2002 (S/2002/161).

[8] Before the Green March, the Security Council called on Morocco not to carry it out, and once it was done it urged it to withdraw from the territory. Resolutions 379 (1975), of November 2, and 380 (1975), of November 6.

[9] Accordingly, when after Mauritania withdrew from the conflict, and Morocco occupied part of the territory that Mauritania left, UN General Assembly Resolution 34/37, of November 21, 1979, in addition to recognizing the legitimacy of the armed struggle of the POLISARIO Front, profoundly deplored "the aggravation of the situation resulting from the continued *occupation of Western Sahara by Morocco* and the extension of that occupation to the territory recently evaluated by Mauritania." Along the same lines see, for example, E/CN.4/L.1489, and Resolution 4 (XXVI), of February 15, 1980.

recognized by the General Assembly, the Security Council, and the International Court of Justice, is at the root of all the human rights violations in the territory.[10]

In keeping with what has been established by Resolution 2625 (XXV) of the United Nations General Assembly, Moroccan law is not applicable in Western Sahara, since "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles." Although this resolution refers to the duties of the administrative power (in the case of Western Sahara, Spain), it applies with even greater force to the power that illegally occupies the territory.

The acts for which the 24 Saharawi activists were prosecuted occurred in Gdeim Izik, 12 km from El Aaiún (Western Sahara), accordingly the Moroccan courts do not have jurisdiction to hear the matter. Although the main reason alleged by the Moroccan authorities for carrying out the intervention was that the accused had kidnapped more than 20,000 people with the objective of destabilizing the zone and threatening Morocco's internal security, the kidnapping is not even mentioned in the bill of indictment. Additionally, given the legal status of Western Sahara, there is no case where the actions of the activists can be considered a threat to the internal security of Morocco, as the territory is not part of Morocco. Based on the law of occupation, applicable to the Saharawi territory, and specially regulated by the 1907 Hague Regulation (Articles 42-56), the Fourth Geneva Convention (Articles 27-34 and 47-78)[11], Additional Protocol I, and customary international humanitarian law[12], the occupying state does not have sovereignty over the territory and it is obligated to respect the laws in force in the occupied territory.[13]

To this end, it should be recalled that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Méndez (hereinafter Special Rapporteur), clarifies in his report of February 28, 2013 that

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[10] Resolution 12 (XXXVII), of March 6, 1981, of the Commission on Human Rights on "Denial to the people of Western Sahara of its right to self-determination and other fundamental human rights, as a result of the *occupation of its territory by Morocco*," "deplores the *continuance of the occupation* of Western Sahara by Morocco."

[11] The Saharawi population benefits from the Fourth Convention, which protects "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a[n] … Occupying Power of which they are not nationals."

[12] As Article 42 of The Hague Regulation of 1907 points out "Territory is considered occupied when it is actually placed under the authority of the hostile army." The characterization of occupation does not depend, therefore, on the de facto submission of a territory and its population to the authority of an enemy army.

[13] As a result of the pressures of the Government of Morocco in the incident at the Lanzarote airport with Saharawi activist Aminetu Haidar, the Government of Spain issued a communiqué in which it noted that "while the dispute is resolved pursuant to the UN resolutions, Spain notes that Moroccan law is applied in the territory of the Western Sahara", which does not mean recognition of the annexation, as the Government of Morocco claims, for as noted the day after the communiqué by Leire Pajín, Secretary for Organization of the PSOE, "Spain does not recognize the sovereignty of Morocco over the Western Sahara" (*El País*, December 21, 2009).

he visited the territory as an independent mandate holder, and that his visit should not be interpreted as expressing any political view concerning the present or future status of the Non-Self-Governing Territory of Western Sahara, deliberately referring to the territory in the following terms: "The territory is subject to the right to self-determination in conformity with the principles contained in General Assembly resolutions 1514 (XV) and 1541 (XV)."[14]

Along these lines, the report by the Moroccan Human Rights Association's Committee to Investigate the events at El Aaiún of November 8, 2013[15] refers to the territory as "Western Sahara, former Spanish colony, invaded by Morocco in 1975" and affirms "the need to find a democratic solution to the conflict in the Sahara, a solution that can avoid new human rights violations in the region, allow the unity of the peoples of the Maghreb, the establishment of democracy, and the takeoff of economic and social development in the region. In effect, the social protests and human rights violations that in many cases accompany them, and the persistence of tense situations and confrontations between citizens and the powers that be are fueled by the conditions created by the conflict in the Sahara, which continue, have lasted too long."

In conclusion, the Moroccan courts do not have jurisdiction to hear the facts that are the subject matter of the proceeding, since they are facts that occurred in a non-self-governing territory.

2. LACK OF JURISDICTION OF THE MILITARY COURTS - THE EXCEPTIONAL NATURE OF THE MILITARY COURTS

2.1. Lack of jurisdiction of the military courts under International law

Morocco is a state party to most United Nations treaties related to human rights.[16] The defense recalled the need to apply the international conventions to which Morocco is a party to this trial, as they are of higher rank than the Constitution, and are referred to expressly in Article 10 of the Universal Declaration of Human Rights of 1948 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."), the International Covenant on Civil and Political Rights of 1966, and the international rules that regulate the conditions for a fair and equitable trial.

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[14] A/HRC/22/53/Add.2, p. 1.

[15] *Rapport de la Commission d'enquête de l'Association Marocaine des Droits Humains su les événements de Laâyoune du 8 novembre 2010* (Available at: http://saharadoc.files.wordpress.com/2011/01/association-marocaine-des-droits-humainsc2a0.pdf).

[16] In particular, of those related to the anti-torture effort, the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Convention on the Status of Refugees. The State is a signatory of the Rome Statute of the International Criminal Court, but has yet to ratify it, and it is a party to the Convention on the Prevention and Punishment of the Crime of Genocide.

Certainly no provision of the Constitution mentions the automatic application of international treaties in Moroccan law, but Morocco is a state party to the Vienna Convention on the Law of Treaties (1969), which states "Every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*)." (Article 26), and "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46." (Article 27)

The work of the UN Human Rights Council over the last 20 years has aimed to limit the jurisdiction of military courts to crimes strictly military in nature, committed by military personnel. Similarly, the case-law of the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights is unanimous in this regard.[17]

The document that best represents the position of the United Nations on these issues is the report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, titled "Issue of the administration of justice through military tribunals."[18] This report includes *Draft Principles Governing the Administration of Justice through Military Tribunals*, which include the following that were chosen as they apply to this case:

- Principle No. 1. Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.
- Principle No. 2. Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.
- Principle No. 5. Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.
- Principle No. 8. The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.
- Principle No. 12. In all circumstances, anyone who is deprived of his or her liberty shall be entitled to take proceedings, such as habeas corpus proceedings, before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The right to petition for a writ of habeas corpus or other remedy should be considered as a personal right, the guarantee of which should, in all circumstances, falls within the exclusive

[17] Among many others, the IACHR has affirmed "in a democratic state under the rule of law the military criminal jurisdiction has a restrictive and exceptional scope, and is aimed at protecting special legal interests related to the functions particular to the military forces." (Judgment in the case *Rosendo Radilla v. United Mexican States,* IACHR 2009, para. 272).

[18] Official UN Document E/CN.4/2006/58, January 13, 2006 (emphasis added).

jurisdiction of the ordinary courts. In all circumstances, the judge must be able to have access to any place where the detainee may be held.

- Principle No. 13. The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. In no circumstances should military courts be allowed to resort to procedures involving anonymous or "faceless" judges and prosecutors.
- Principle No. 15. Guarantee of the rights of the defense and the right to a just and fair trial
- Principle No. 17. In all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court.

As can be seen, the exceptional nature of the military courts is beyond any doubt. The international case-law[19] and international provisions on this subject clearly affirm that using this jurisdiction to prosecute civilians is at odds with the rules that guarantee a fair trial, and that this practice represents an open attack on the principle of separation of powers. These criticisms are applicable *mutatis mutandis* to the Permanent Military Tribunal of Rabat in relation to the prosecution of the 24 Saharawi activists.

2.2. Lack of jurisdiction of the military courts under Moroccan law

[19] Thus, for example, in the case of *Othman v. United Kingdom*, the complaint alleged the violation of the right to a fair trial given the military nature of the tribunal, based on the following arguments, which are consolidated in the case-law: "249. In respect of the military composition of the State Security Court, the applicant relied first, on the Human Rights Committee's condemnation of the practice of trying civilians before military courts (see paragraphs 157–159 above). Second, he relied on specific international criticism of Jordan's State Security Court. This criticism centered on: the possibility of extended periods of incommunicado detention without judicial review (at the instance of the Public Prosecutor, a military officer); the State Security Court's failure to investigate properly allegations of torture; and the court's lack of independence and impartiality. The applicant also relied on the unfairness of Jordanian rules of evidence relating to confessions. Even on the evidence of Mr Al-Khalila and Mr Najdawi, it appeared that the Court of Cassation had taken the approach that, once a confession was repeated before the Public Prosecutor, it was for the defendant to prove that the Prosecutor was complicit in obtaining it involuntarily. If the defendant did not so prove, the confession was admissible regardless of any prior misconduct by the GID. 250. In this context, he submitted that the State Security Court in Jordan was even more open to question than the Turkish State Security Court considered in *Ergin (no. 6)*, cited above. Both *Al-Moayad*, cited above and *Drozd and Janousek v. France and Spain*, 26 June 1992, Series A no. 240 suggested that trial by a military court would, in itself, amount to a flagrant breach of Article 6" (case of Othman (Abu Qatada) v. The United Kingdom (Application no. 8139/09), Judgment of January 17, 2012).

In the first session, held on February 1, the defense argued that the Military Tribunal lacks jurisdiction since the accused are not members of the military, and considering that the military jurisdiction is exceptional, expressly prohibited by the Moroccan Constitution of 2011, and for violating the constitutional principle of separation of powers. Yet that exceptional nature was not even questioned by the President of the Tribunal, who denied the objection to its jurisdiction based on his understanding that while the Constitution prohibits such jurisdiction, there is no provision that develops that constitutional precept; and that lacking such a provision the military jurisdiction continues to be the appropriate one. Strictly applying what is established by the Code of Military Justice[20] the Tribunal affirmed its own jurisdiction to take cognizance "in peacetime, of acts committed against the Armed Forces or against the State's external security."

Nonetheless, Article 127 of the Moroccan Constitution of 2011 affirms that "Regular or specialized jurisdictions are created by law" and that "Exceptional jurisdictions may not be created." From the perspective of a state that claims to respect the rule of law, the interpretation of the Permanent Military Tribunal is unacceptable: It is a basic principle that, from the entry into force of the new Constitution all the provisions that are at odds with it cease to be applicable. As Moroccan professor Mohammed-Jalal ESSAID has stated openly, "military jurisdictions are exceptional courts. Considering how they come into being and are regulated, they do not answer to the requirements of a fair trial…. One can verify that military justice offers very few guarantees to the parties brought before it." [21] In this regard, and in relation to the trial held February 1 to 17, the Special Rapporteur has denounced that the fact that the case is before a military and not a civilian court "contributes to the lack of transparency and refusal to investigate the allegations of mistreatment."[22]

Accordingly, the Military Tribunal should have declared that it lacks jurisdiction, and should have removed the proceeding to the civilian courts (Court of Appeals of El Aaiún). Once the judgment was handed down, the Special Rapporteur recommended to the Government of Morocco that it reconsider the jurisdiction of the Military Tribunal to judge the civilians in this case, to guarantee that civilians are not convicted by military courts, and to open a serious and impartial investigation to establish the facts and determine the responsibility of the members of the police or security forces, and to investigate all the allegations of torture and mistreatment.[23]

This last possibility would be right if one takes into account the statements by King Mohammed VI himself, made on March 4, 2013, in which, after receiving the report from the National Council on Human Rights on the reform of the Military Tribunal, which seeks to harmonize Moroccan law with the new Constitution, which provides that the powers of this tribunal "are going to be restricted so that civilians cannot be brought before this *exceptional* jurisdiction."[24]

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[20] Dahir No. 1-56-270 of November 10, 1956.
[21] Mohammed-Jalal ESSAID, *Le Procès équitable Dans le Code de Procédure Pénale de 2002*, Collection Reforme du Droit et Développement socio-économique, Vol. 1, March 2008, p. 134.
[22] A/HRC/22/53/Add.2, para. 66.
[23] A/HRC/22/53/Add.2, para. 97.
[24] See the Moroccan daily *Le Matin* of March 4, 2013 and http://www.atlasinfo.fr.

III. THE HEARING BEFORE THE PERMANENT MILITARY TRIBUNAL OF RABAT

1. THE PARTIES INTERVENING IN THE PROCEEDING AND THE RIGHT OF THE ACCUSED TO SAHARAWI IDENTITY

The Permanent Military Tribunal (comprised of the President and four military advisers) was presided over by Judge Mr. NOURE ADINE ZAHAFE. Mr. ADB ALKARIME HAKIMI represented the prosecution *(in French, Procureur du Roi, the King's Prosecutor*).

In order to better identify the persons accused and convicted in this proceeding, the official names that Morocco imposes on the citizens of Western Sahara will be used (father's last name, followed by first name) and not the names that correspond to their tradition (first name, followed by father's last name). It should be noted that since the Universal Declaration of Human rights was adopted in 1948, the *right to identity* is at the core of the fundamental rights of the person, and that Morocco, in its capacity as occupying power of the territory, has the obligation to respect and maintain the identity and the names of Saharawi citizens, in keeping with their traditions. Following the Moroccan usage, the accused were: ABDALAHI ABHAH, ISMAILI BRAHIM, SIDAHMED LEMJAYED, ABDALAHI LEJFAWNI, MOHAMED BANI, AHMED SBAI, ABDELJALIL LARUSI LEMGHAIMAD, MOHAMED ELBACHIR BUTENGUIZA, HASSANA AALIA (*in absentia*), NAAMA ASFARI, CHAIJ BANGA, MOHAMED BURIAL, DAH HASSAN, HOSSEIN ZAUI, MOHAMED EMBAREK LEFKIR, DAICH DAFI, MOHAMED LAMIN HADDI, ABDELAHI TOUBALI, MOHAMEDJUNA BABAIT, BACHIR JADDA, MOHAMED TAHLIL, MOHAMED SUELIM LAYUBI, SIDI ABDERRAHMAN ZEYU and TAKI ELMACHDOUFI.

The accused were represented by two groups of lawyers, a Saharawi group and a Moroccan group, who jointly represented them. The Saharawi group included the lawyers Mr. MOHAMED LAHBIB ERGUEBI, Mr. MOHAMED BOUKHALED, Mr. MOHAMED FADEL LEILI, Mr. LAHMAD BAZED, and Mr. ABDALA CHALOUKE. The Moroccan group included lawyers from the Moroccan human rights organizations, from the Casablanca Bar Association (NOUR EDDIN DALIL and MOHAMED EL MASAOUD – member of the Moroccan Association of Human Rights (AMDH), the Marrakesh Bar Association (MUSTAFA RACHDI, also a member of AMDH), and the Rabat Bar Association (AOUBIED EDDINE and MUSTAFA JAIAF, who represented the accused HOSSEIN ZAOUI).

2. ORGANIZATION OF THE SESSIONS

2.1. Access to and Organization of the Courtroom

The Tribunal carefully planned courtroom access to keep the public and observers far from the mistreatment to which both the accused and the observation missions were subjected in the latest trials held before the civilian courts in Casablanca. The treatment afforded was cordial at all times.

From the first session, the President of the Tribunal told both the defense and the considerable number of international observers (about 40), the representatives of two European embassies, and several legislatures from the European Parliament that the trial would be fair and equitable. During the hearing, which lasted nine days, the President of the Tribunal and the prosecutor repeated this statement even though in their final intervention, when assessing the trial, they concluded, in their own words, that "the trial has been fair… or almost fair." While arguing the fairness of the trial they mentioned that the only witness to testify for the prosecution had not been prepared by the prosecution, "for he answered spontaneously."

2.2. Private Hearing - The problems of translation

Despite the calm environment of the courtroom, the hearing was not public as the Tribunal's President had stated. In principle the Constitution[25] requires that it be public, as does Principle No. 14 of the *Draft Principles Governing the Administration of Justice through Military Tribunals* reiterates, ("As in matters of ordinary law, public hearings must be the rule, and the holding of sessions in camera should be altogether exceptional and be authorized by a specific, well-grounded decision the legality of which is subject to review.")[26], yet the families of the accused and the Saharawi victims who died on October 24 (NAYEM ELGARHI, 14 years old) and November 12 (IBRAHIM DAUDI, 40 years old) were not allowed in the sessions.

Similarly, entrance was denied to the Saharawi interpreters who were going to interpret for the international observers. This was partially resolved when some of the Saharawis identified themselves to the authorities as members of human rights organizations legally recognized in Morocco and were allowed to enter the courtroom.

The President tried to present himself as impartial before the international observation missions, and to cover the absence of the Saharawi interpreters, whose presence was essential given that the language of the accused is Hassaniya (on several occasions the President asked that the accused express themselves in classic Arabic because he could not understand them) when he decided to make a small personal summary that was interpreted into French, English, and Spanish. At one point the President "stated to the hearing" that the only "valid" interpretation was one done in this manner, given that the interpretation of the interpreters for the observers was not reliable. Yet the President's approximately two-minute

[25] Article 123: "Hearings are public unless the law provides otherwise."
[26] A/HRC/22/53/Add.2, para. 49.

"summary" of the events that had occurred over several hours in the hearing was a very personal, extremely abbreviated version which at times was at odds with what was actually said. Moreover, the translations of the different sworn interpreters did not match. For example, on several occasions when the French interpreter said "*la torture*" [torture] in Spanish the words "*malos tratos*" (mistreatment, or abusive treatment, instead of *la tortura*) were used. The interpretation mistakes continued for all nine days. On the second day of the hearing (February 9) NAAMA ASFARI had alleged that the interpreter did not interpret what he had said, and that his "kidnapping" by the police was interpreted as a "detention"; and he blamed the President for this.

2.3. The Presence of Military and Police Officials Inside and Outside the Courtroom

The outside of the courtroom as well as the benches in the courtroom were at all times surrounded by a very large group of police and military personnel dressed both in plain clothes and uniform. A similar number of police and military were present among the public during the trial. Even though they acted appropriately throughout the trial, their mere and overwhelming presence denoted the military character of the proceedings and put pressure on the accused and international observers that conditioned how the oral hearing unfolded, jeopardizing the procedures that should be in place in a fair and equitable trial.

2.4. Video and Photo Cameras as a Form of Intimidation

In the moments immediately prior to all the sessions, video and photo cameras, which were officially prohibited from entering the courtroom (as of the session of February 8 all photo cameras, computers, and telephones were taken from those who entered the courthouse), filmed those who entered, similar to how they have been used in previous trials, as an intimidation tactic. Despite being brought up by the defense counsel to the Tribunal, the President maintained that while he was in the courtroom this had not occurred, and that if it had occurred while he was absent from the courtroom it was not his responsibility.

On this issue, the Special Rapporteur reported that in meetings he had with civil society in the process of writing his report he was followed by the authorities and the media; the cameras were present everywhere he went, creating a climate of intimidation that negatively affected many of the people he met with during his visit.[27]

Similarly, the photo and video cameras intimidated the families of the accused who, after being denied entry to the courtroom, stayed outside and protested for the nine days of the oral hearing. As was proved later, this was not just an intimidation tactic; some of the family members were detained for several hours the night the convictions became public and the following days. These persons, who have alleged that they were mistreated while detained, were

[27] A/HRC/22/53/Add.2, para. 85.

released without charges. The fear that such actions could be carried out, unfortunately confirmed by the facts, were reported by the Special Rapporteur.[28]

This is an intimidation tactic well known by the international observation missions that constitutes one more element tending to impair an equitable trial.

2.5. Freedom of expression during the trial

In contrast to what happened in the last sessions before the Tribunal of Casablanca (in the so-called "*Trial of the seven*") it should be noted that every time the accused entered the courtroom they could say, without threat of police violence, in Hassaniya and in Spanish, slogans like, "Two peoples, two states," "self-determination is the only solution," "we ask that the UN expand the authority of MINURSO to monitor the human rights situation in Western Sahara," "Long live the struggle of the Saharawi people," "Long live the RASD" (República Árabe Saharaui Democrática, Saharawi Arab Democratic Republic), and "Long live the POLISARIO Front," and they would sing the Saharawi anthem while holding up "V" for victory. Yet when they tried to repeat these phrases after being told of the convictions and the sentences the morning of February, 17 2013, they were forcibly removed from the courtroom.

In the course of the trial, and as a result of the position of the defense counsel in response to the attitude of the President, who did not allow the accused to refer to the events prior to their detention or those that occurred during their lengthy pre-trial detention (allegations of torture), or to explain the reasons why, in their view, they were being prosecuted (for their political beliefs), the Tribunal ended up allowing the accused to make reference to these issues. Even so, the President sat stoically while the statements were made, refusing to engage them or to take into account what was said in those statements, and instructed the Clerk not to make a record of them.

2.6. The record of the trial - The Role of the Clerk

The Clerk of the Tribunal would make a record of the sessions by hand. On several occasions the defense asked him to read the statements noted in the record. These did not correspond to the statements actually made, and the Clerk had to modify what was already written.

Regarding the allegations by the accused that they had suffered torture, they had to approach the President and the prosecutor to show them the signs of torture (from burns on the skin and scars on the body to fingernails and toenails that had grown in irregularly due to having been forcibly extracted with pincers, as some of the accused alleged). The President and the prosecutor were the ones who decided based on their own criterion whether it was a matter of torture and the President indicated to the Clerk what should appear in the record. Despite the repeated requests of the defense, the President always rejected the possibility of

[28] "The Special Rapporteur urges the Government to effectively prevent reprisals, including intimidation, disciplinary measures and ill-treatment, against inmates, victims of torture and their families, activists and others who spoke to the Special Rapporteur during his visit, and to promptly investigate and punish the perpetrators of acts of reprisal." (A/HRC/22/53/Add.2, para. 96).

medical exams. Throughout the nine days of the oral hearing, even though the reasons for doing so were more than evident, not forensic physician came forward, with that role apparently played by the President of the Tribunal who, as indicated, told the Clerk what should appear in the record.

2.7. The physical condition of the accused during the oral hearing

The physical condition of the accused at the beginning of the hearing was not good, but it worsened visibly over the course of 10 days and more than 100 hours of trial. After two consecutive days of marathon 12-to-14 hour sessions the accused requested that the session be adjourned until the next day (it was 7:00 p.m. and the session had begun at 9:00 a.m.). Following the refusal of the President, the accused refused to continue testifying due to pure physical exhaustion, for they were being taken to the prison at 12:00 a.m. and being awakened at 5:00 a.m. to return to court. Previously, on February 9, ENAAMA ASFARI told the President that they could not rest because they were awakened at 5:00 a.m. and they had to defend themselves from charges that could lead to imposition of the death penalty. The prosecutor explained that the reason they were awakened at that hour was to avoid traffic problems (the courthouse is less than 30 minutes from the Salé I prison). Finally, the President felt obliged to suspend him, and the following day, smiling, he asked the first of the accused "have you slept well?" .

On February 10, one of the accused, ABDELJALIL LARUSI LEMGHAIMAD, experienced high blood pressure and vertigo; as a result the trial was suspended. After he was taken to the hospital, and after a medical report prescribed that he remain in the hospital for 48 hours, the defense asked for a stay in the hearing, since it was a joint proceeding against all the accused. The President denied that motion, and clarified that he would take note of what might be said in the hearing with respect to the accused, and would communicate it to him upon his return.

Similarly, two other accused, AHMED SBAI (pulmonary problems) and DAICH DAFI (diabetic), suffered fainting spells. AHMED SBAI had to be hospitalized. MOHAMED SUELIM LAYUBI, in addition to the effects of torture[29], also suffers from diabetes.

Generally speaking, the physical condition of the accused was very weak.

[29] See note 53 of this report.

3. CONDITIONS FOR A FAIR AND EQUITABLE TRIAL

3.1. Introduction

The law of occupation, especially as regulated by the Fourth Geneva Convention, and, as noted above, applicable to the territory of Western Sahara, establishes that persons accused of criminal infractions are to be tried with procedures that respect the judicial guarantees recognized internationally. But this is also a reference set forth in practically all international human rights instruments, especially as of the Universal Declaration of Human Rights (Articles 10 and 11). Moroccan law, albeit without referencing the international canons, also embraces this principle.

The minimum standards established in the international sphere of guarantees that should be respected in order for a trial to be fair are, in summary, the following:

- Before the trial: the right to a lawyer and to communicate with family, the right to be tried in a reasonable time or else be released, and the right to be treated humanely during detention and not to be tortured.
- During the trial: the right to be tried by an independent and impartial court, the right to call witnesses and question them, and the right to exclude any evidence obtained through torture or in the absence of investigations by the authorities *sua sponte*.
- After the trial: the right to appeal.

3.2. Pre-trial guarantees

3.2.1. The right to the assistance of counsel and to communicate with family

The Moroccan Constitution established at Article 23 that "any detained person should be informed immediately, in a manner that is comprehensible to him, of the reasons for his or her detention and of his or her rights, including the right to remain silent. He or she should benefit, at the earliest possible moment, of legal assistance and the possibility of community with his or her family, in keeping with the law." The Code of Criminal Procedure allows for a half-hour meeting with a lawyer authorized by the prosecution during the first 24 hours of detention, in the presence of an officer of the judicial police. Once the first 24 hours of detention under police have passed, and at the request of the police, the prosecution can postpone contact with the lawyer for an additional 12 hours.

During the hearing, the accused alleged that they were not allowed to communicate with their families until many days after they were detained, and since then their location has not been communicated to their families. As the accused and their defense counsel also reported, the first contact between them was not prior to their appearing before the investigative judge. According to the defense during the oral hearing – and this was not refuted by the prosecution – the assistance of counsel only came about after the second appearance before the

investigative judge. The report by the Special Rapporteur indicates likewise, based on his interviews with some of the witnesses.[30]

3.2.2. Right to be tried in a reasonable time or otherwise to be released

The accused have been in pre-trial detention for more than 27 months, after two stays whose motives were not explained or made known to the defense[31], violating Article 120 of the new Constitution, which says "Every person has the right to fair process and to a trial in a reasonable time." After two years and three months, and two stays of the trial with no reasons given, the Tribunal decided to suspend the first session, held February 1, so the defense could prepare its case; the Tribunal reconvened on February 8, even though the defense specifically requested 15 days so as to have more time for preparation.

As indicated on several occasions by the European Court of Human Rights, whose case-law the prosecution expressly referred to in its final statement in the oral hearing, "on demanding respect for *reasonable time*, the Convention highlights the importance attributed to justice not being administered with delays that could compromise its effectiveness and credibility."[32] More than two years in pre-trial detention is a clear violation of this constitutional principle.

3.2.3. Right to humane treatment in detention and right not to be subject to torture

(a) Obligations of Morocco under international law

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has been in force for Morocco since July 21, 1993[33]. Its Article 1 defines torture as

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

In relation to this Convention[34], on December 4, 2000, the UN General Assembly adopted the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* which, among other things, affirms:

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[30] A/HRC/22/53/Add.2, para. 26.
[31] The Special Rapporteur made a statement along the same lines, A/HRC/22/53/Add.2, para. 66.
[32] Among others, see ECHR, *Matter of Serrano Contreras v. Spain,* (Application No. 49183/08). Judgment of March 20, 2012.
[33] When it ratified it Morocco issued a reservation regarding Article 20 of the Convention, rejecting the Committee's jurisdiction over torture.
[34] In addition, and in its capacity as occupying power, Morocco is obligated by the Fourth Geneva Convention, which at Article 32 establishes the prohibition on torture, and at Article 37 affirms: "Protected persons who are confined pending proceedings or serving a sentence involving loss of liberty, shall during their confinement be humanely treated."

> "States shall ensure that complaints and reports of torture or ill-treatment are *promptly and effectively* investigated. *Even in the absence of an express complaint*, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public."[35]

In addition, as the European Court of Human Rights has noted, the prohibition on torture is absolute, allowing for no exceptions:

> "Article 3 (art. 3) enshrines one of the most fundamental values of democratic society …. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and [the] Protocols…, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation."[36]

These principles constitute the essence of what a state party to the Convention should do to fight torture. Nonetheless, as indicated above, the successive mechanisms to which the accused appealed refused to perform any such examinations for more than two years: neither the investigative judge, nor the Court of Appeals of El Aaiún, nor the Military Tribunal itself (the accused alleged they had suffered torture in the very chamber of the Military Tribunal where the hearing was held, to which the prosecution merely raised the doubt as to whether it was that or another chamber) agreed at any time to have such examinations performed.

In addition, the authorities not only failed to conduct any medical exams whatsoever, they also failed to conduct any investigation into the conditions of detention or the time spent by the accused in the prisons. In that regard, the European Court of Human Rights has held states responsible for failure to perform their duty to investigate possible cases of torture or mistreatment, although precisely for that reason it has not been possible to prove such practices:

> "The Court recalls that when an individual asserts defensibly having suffered, at the hands of the police or other services of the State, gross ill treatment contrary to Article 3, that provision, combined with the general duty imposed on the State by Article 1 of the Convention … to 'secure to everyone within their jurisdiction the rights and freedoms defined in … this Convention,' *requires, by implication, conducting an effective official investigation.* That investigation, as an example of the one resulting from Article 2, should be able to identify and punish the persons responsible…."[37]

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[35] Principles adopted by the General Assembly in its Resolution 55/89 Annex, of December 4, 2000.

[36] ECHR, *Matter of Chahal v. United Kingdom,* Judgment of November 15, 1996, no. 79, Digest of judgments and decisions 1996 –V.

[37] ECHR, *Matter of Martínez Sala et al. v. Spain,* Judgment of November 2, 2004, para. 156. Along the same lines, see the judgments of the ECHR in the *matter of Mahmut Kaya v. Turkey*, No. 22535/93, No. 115 ; ECHR 2000-III, Z et al. v. United Kingdom, No. 29392/95, No. 73, ECHR 2001-V ; or the most recent in the *Matter of El-Masri v. Former Yugoslav Republic of Macedonia* (Judgment of December 13, 2012), para. 198.

(b) Morocco's obligations under its domestic law

Moroccan domestic law requires that the authorities guarantee that detentions occur in humane conditions, and that detainees not be tortured. In this regard, Article 22 of the 2011 Constitution establishes:

> "The physical or moral integrity of anyone may not be infringed, in whatever circumstance that may be and by any person that may be, public or private. No one may inflict on others, under whatever pretext there may be, cruel, inhuman, or degrading treatments or infringements of their dignity. The practice of torture, under any of its forms and by anyone, is a crime punishable by the law."[38]

Article 231(1) of the Criminal Code defines torture as:

> "any act that causes pain or physical or mental suffering that is intentionally committed by a public servant or at his or her instigation, or with his or her express or tacit consent, inflicted on a person for the purpose of intimidating or pressuring him or her or a third person to obtain information or confessions, to punish him or her for some act that he or she or a third person has committed or is suspected of having committed, or when such pain or suffering is inflicted for any reason based on any type of discrimination,"

and it prohibits

> "the use of statements made under torture as evidence"

The Code of Criminal Procedure provides at Article 134 that the investigative judge, at the request of the accused or his or her attorney, *must submit the accused to a medical expert examination*. The Judge

> "*should* make the decision spontaneously whether there are any indicia in the defendant that justify such a measure, such as signs of torture."

In addition, Article 324(5) provides that

> "if a court decides to declare certain evidence in the record null (for having been obtained under torture, for example), *it should order as a result that it be removed from the record*. In that case, the court may decide to conduct a supplemental investigation."

The report submitted in November 2011 to the United Nations Committee against Torture by the above-noted coalition of Moroccan NGOs[39] criticizes the fact that despite those provisions Moroccan law does not expressly prohibit the use of documents that contain information or signatures obtained under torture, and that the lack of judicial guarantees makes it possible for police officers to obtain information and even the signature of those documents by the use of violence. In this report, the Moroccan NGOs describe numerous cases in which judges, making use of their discretional power, have accepted and used documents that contain confessions obtained under coercion or torture.

The fact is that as the Special Rapporteur has reported: "In cases involving State security, such as terrorism, membership in Islamist movements or

[38] Kingdom of Morocco. *Bulletin Officiel* No. 5952 bis, 14 rejeb 1432 (17 June 2011).

[39] *Rapport alternatif. Evaluation de la mise en oeuvre de la Convention contre la torture et autre peine ou traitement cruel, inhumain ou dégradant par le Maroc, soumis au Comité contre la torture des Nations Unies à l'occasion de l'examen du 4e rapport périodique du Maroc (47e session, novembre 2011)*, p. 11. This coalition was made up of the Moroccan Committee against Torture (MT), the Moroccan Human Rights Association (AMDH), and the Moroccan Human Rights Organization (OMDH).

supporters of independence for Western Sahara, there is a pattern of torture and ill-treatment by police officers during the arrest process and while in detention, in particular, by agents of the National Surveillance Directorate (DST). Many individuals have been coerced to confess and sentenced to prison on the basis of such a confession. The violations often continue while these individuals are serving their sentences."[40]

Accordingly, the Special Rapporteur makes the following general recommendations to the Moroccan government:

- that it amend the Code of Criminal Procedure to establish that in the face of an allegation of torture or mistreatment, the burden of proof is on the accusation, which should show beyond a reasonable doubt that the confession presented to the court was not obtained illegally;
- that it conduct impartial and exhaustive investigations into allegations of torture and cruel, inhuman or degrading treatment, without requiring a written complaint, in keeping with Article 13 of the Convention against Torture;
- that it establish procedures to investigate *sua sponte* cases of torture and mistreatment, independent of the way in which they are alleged, including the cases in which the victims do not use the procedures prescribed by law to report them.

Referring specifically to the events at Gdeim Izik, the Special Rapporteur recommends that a prompt investigation be conducted of all allegations of torture and mistreatment during and after the demonstrations and at the prison at El Aaiún, that a determination be made as to who is responsible for these acts, and that compensation be made to the victims.

(c) The allegations of torture in the oral hearing

Practically all of the accused reported that their statements were obtained under torture, denied all the charges against them, and state that when questioned they were not asked questions about the organization of the camp at Gdeim Izik, but about their personal ties with the POLISARIO Front and their work as human rights activists. If as everything appears to indicate these allegations are true, the torture would not have the purpose of obtaining information, but of punishing the accused for their status as human rights activists.

The defense asked, the second time the accused appeared before the investigative judge – which was the first time they appeared with their attorneys – that they undergo medical examinations (according to the defense and the testimony of the accused, they were bloodied as a result of the torture to which they were subjected). The judge told them they should submit the request in writing. This writing was filed immediately, and two days later the investigative judge denied the request for those medical exams to be conducted, on the basis that there was no visible reason for doing so. The defense appealed this resolution

[40] A/HRC/22/53/Add.2, para. 72.

to the Court of Appeals at El Aaiún, which confirmed the decision of the investigative judge, once again rejecting the production of such medical evidence.

During the oral hearing before the Military Tribunal the accused alleged they had suffered torture not only at the time of their detention, but also throughout the two years and three months of pre-trial detention. The defense requested on several occasions throughout the trial that given the allegations and evidence (both the President of the Tribunal and the prosecutor could visually observe sequelae that are clear signs of torture), the accused should undergo medical exams, yet the President rejected these motions without any explanation.

3.3. Guarantees during the process

3.3.1. Right to be judged by an independent and impartial court - The principle of separation of powers

The *Draft principles governing the administration of justice through military tribunals*, referenced above, affirms that the principle of the separation of powers runs alongside the demand for legal guarantees established at the highest level of the normative hierarchy, by the Constitution or by statute, avoiding any meddling by the executive branch or the military authorities in the operation of justice.[41] According to this report, in each case military tribunals must respect the principles of international law in respect of impartial trial, as these are minimum guarantees, even in crisis situations, for "Without such basic guarantees, we would be faced with a denial of justice, pure and simple."[42]

The principle of the separation of powers, affirmed in Article 1 of the 2011 Constitution, ("The constitutional regime of the Kingdom is founded on the separation, the balance, and the collaboration of the powers, as well as on participatory citizen democracy, and the principles of good governance and of the correlation between responsibility and accountability.") was violated in this procedure because the accused were civilians, while both the victims and the persons who carried out the detentions, and the tribunal itself who judged the facts are members of the military.

The presence of a civilian judge performing the functions of President of the Tribunal does not guarantee respect for that principle, especially when, as the Code of Military Justice indicates, the four persons who accompany the President have the status of "military advisers" as appears literally from Article 11(2) of that Code. As Professor ESSAID has noted in this regard, "one should put an end to the system of advisers without legal training…. Independence cannot be assured other than by an institution comparable to the Superior Council of the Judiciary." In the opinion of this renowned Moroccan jurist, the only possible way to guarantee the rights of the parties is "the suppression pure and simple of the permanent military

[41] E/CN.4/2006/58, January 13, 2006, para. 13.
[42] *Id.,* para. 15.

tribunal in peacetime."[43] The European Court of Human Rights has said on this point that the mere presence of a military judge on a tribunal calls into question its independence with respect to the Executive Branch[44], and in the case of the Rabat trial, four of the members of the tribunal were members of the military.

3.3.2. Right to call and question witnesses

At the first session of the trial, held February 1, 2013, the defense asked that several dozen persons appear as witnesses, including many who had been eyewitnesses of the events at the time the camp was dismantled, and others had participated in the negotiations with the Dialogue Committee alongside the Moroccan government.

The prosecution requested the testimony of nine persons, without naming them. Without giving any explanation in this regard, the Tribunal accepted only five of the witnesses proposed by the defense; it decided to reserve the decision on the admission of the nine proposed at the same time by the prosecution. The identity of the five defense witnesses was public from the moment the defense asked for them to testify, whereas the identity of only one of the witnesses proposed by the prosecution was made known at the time of his statement; the rest did not testify, and therefore their names were never known. It is true that Articles 80 and 91 of the Code of Military Justice gave the President absolute power in this regard[45], yet even so it seriously limits the ability of the accused to mount their defense. This is one of the reasons why a trial before the military jurisdiction cannot be fair or equitable, for independent of who the judge it, the procedure suffers from serious democratic deficits and is not sufficiently supportive of civil rights.

In addition, and although during the oral hearing the defense insisted on it, the Tribunal rejected the possibility of taking a witness statement from GUEJMULA EBBI, who had first-hand knowledge of everything surrounding the negotiations between the Government of Morocco and the Dialogue Commission. After the

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[43] Mohammed-Jalal ESSAID, *Le Procès équitable Dans le Code de Procédure Pénale de 2002*, Collection Reforme du Droit et Développement socio-économique, Vol. 1, March 2008, p. 136.

[44] "When a military judge has participated in one or more interlocutory decisions that continue to remain in effect in the criminal proceedings concerned, the accused has reasonable cause for concern about the validity of the entire proceedings, unless it is established that the procedure subsequently followed in the national security court sufficiently dispelled that concern. More specifically, where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court" (ECHR, *Case of ÖCALAN v. TURKEY*, (Application no. 46221/99), Judgment of May 12, 2005, para. 115).

[45] Article 80 of the CJM notes as follows: "The accused must notify the Government … of the list of witnesses he proposes to hear. Lacking such notification, no witness may be called either by the prosecution or the accused, without the assent of the president." Article 91 states that "The president is invested with a discretionary power for conducting the debates and the discovery of the truth. He may, in the course of the debates, produce any evidence that he considers useful for showing the truth and call, by orders to appear or to produce evidence, any person who it appears necessary to hear. If the prosecutor or defense counsel, in the course of the debates, requests that new witnesses be called, the president decides whether such witnesses shall be heard." (*Le 6 rebia II 1376, 10 November 1956)*.

camp was dismantled, this legislator had denounced the way in which it was done, and that people were not even notified that it was going to happen. She was a fundamental witness for hearing the reasons that led the Government to violently intervene, if there was one.

3.3.3. Right to suppress evidence obtained by torture or in the absence of investigations by the prosecutorial authorities sua sponte

(a) The evidence produced by the prosecution

During the first nine days of oral hearings, the evidence allegedly seized by the police at the time the camp was dismantled (12 cell phones, 3 walkie-talkies, 6 kitchen knives, 2 hatchets, 1 machete, 2 flares, 1 identity card, and 1 computer) were shown to the public without them being discussed at all before the Tribunal. None of them had marks of any kind (blood, fingerprints, etc.) nor were they isolated in plastic bags to keep them from becoming contaminated. Only once during the hearing did the President make reference to them to ask one of the accused whether he recognized his cell phone. There was no separate evidence file, nor were any of these items identified with any accused in particular. They were "just there."

The only eyewitness produced by the prosecution who was involved during the dismantling of the camp as a member of a team of persons that took persons injured in an ambulance said that he did not witness any violent act as between accused and victims, that he did not recognize any of the accused, and that at no time did he see any weapons other than stones.

It does not appear that any autopsy has been performed since the events. There hasn't even been identification of the victims. It is not known how, when, and in what way their deaths occurred: not even is the number of dead among the police forces known. According to the indictment, they numbered nine; the prosecutor referred to 11 on several occasions; in the video that was shown one could read that 10 police officers were killed. If one counts the number of persons who, according to the bill of indictment, each of the accused assassinated, we would be talking about more than 20. The failure to determine this figure is especially serious, for convicting a person for the generic assassination "of persons" is contrary to the most basic principles of justice. Moreover, one should bear in mind the right of the victims' families to learn how they died, and to know the specific identify of the perpetrators of these crimes.

Even though, according to the indictment, the most commonly used method of the accused to attack the official forces was running into them with two-track vehicles, there is no listing of vehicles, registration numbers, or possible dents on the bodywork that could indicate that they had been used to run down the victims.

On the screen one could see one of the items of evidence presented by the Prosecutor: cards on which one could read "CAMP SECURITY OFFICE" or "I PROTEST." The accused did deny the certainty of this evidence, but argued that it only proved that the camp was well-organized through committees known as the

Security Committee, the Cleaning Committee, the Health Committee, etc. Indeed this good organization had been highlighted by the Government of Morocco. As they noted when they spoke, without organization it would have been impossible for more than 20,000 persons to live together for a month.

During the oral hearing, none of the evidence requested by the defense in relation to the facts that preceded the intervention of November 8, 2010 in Gdeim Izik was collected. When the accused referred to those facts, the President repeatedly insisted that they would not be taken into account, and impeded key issues in this proceeding from being discussed, such as the conditions of detention in the police locales, the conditions of detention in the transfer to the Military Tribunal, and the conditions of the hearings and the confessions.

Curiously it was the representative of the prosecution who presented not one but two items of evidence that had nothing to do with the events of November 8 at Gdeim Izik, without the President of the Tribunal responding at all.

First, he presented a series of photographs of the accused in the company of the leaders of the POLISARIO Front, taken at the refugee camps at Tinduf (Algeria) at an international conference held in Algiers, which included the participation of the Saharawi activists. These photos were taken long before the dismantling of the camp. The prosecution asked that these photographs be distributed not only to the attorneys for the defense, but to the public as well, which was stopped thanks to the categorical protest by the defense. His presentation led the defense and some of the accused to thank the prosecutor, for in their opinion it was one more item of clear and convincing evidence that they were being prosecuted for their ideas, and for defending the right to self-determination of their people.

The prosecutor also showed a very poor quality video, entitled “Diary of an extremist in the camp,” which merged images from two different videos. In the images from the first such video, taken from an altitude from approximately 150 meters from a helicopter, one could see, in the camp of Gdeim Izik, a group of demonstrators who were throwing stones, some of whom were displaying knives (one of them was wearing white pants). In the images from the second video, disseminated via Internet long ago, and which had been recorded using a cell phone, one could see how a person, also wearing white pants, beheaded another person. In these latter images, the place where they had been filmed is not identified, nor could one see the faces of the persons who appeared in the video, who were only filmed from the waist down. In the prosecutor’s view the irrefutable evidence that it was the same person was the color of his pants. These events are said by the prosecutor to have taken place in the city of El Aaiún, on November 9 (although they could have taken place anywhere else in the world, and on any other date, for the video does not even include the information on the date it was made). As indicated above, the President did not even rule on the suitability of an item of evidence that did not make reference to what happened in Gdeim Izik, but to the events that supposedly occurred the day after the camp was dismantled.

In a second video one sees a person urinating on an apparently lifeless corpse. Although in the indictment two of the defendants are accused of participating in these events, the video shows just one person, who, moreover,

cannot be identified as being any of the accused. There is not even any evidence that those events occurred on that date and in that place. Even so, the Tribunal convicted two of them as the perpetrators of such profaning acts, which constitutes a violation of one of the fundamental principles for a fair and equitable trial, which is the principle of the personality of offenses and of penalties, in addition to considering the accused guilty of an unacceptable notion of "collective liability."

(*b) The bill of indictment as the only evidence of the charge*[46]

As indicated by Article 287 of the Code of Criminal Procedure, courts "can only base their decisions on evidence presented during the hearing and discussed orally and with adversarial rights before them". Article 189 of the Code of Criminal Procedure indicates that "the indictments or reports made by the officers and agents of the judicial police, public servants, or agents entrusted with certain judicial police functions do not have the force of evidence unless they are regular in form and if their author, in the performance of his or her functions, reports on what he or she has seen or heard personally about a matter under their jurisdiction." In this regard one should recall that that prosecutor himself recognized in the oral hearing (February 9) that the indictments were drawn up by police officers who did not witness any crime in flagrante. Moreover, Article 293 of the Code of Criminal Procedure provides that confessions are subject to examination by the judge, and that any evidence obtained by torture is inadmissible.

The Special Rapporteur notes in his report that he has learned that the Moroccan courts and prosecutors on a regular basis fail to carry out their obligation to open an investigation *sua sponte*, even when there are reasonable grounds to believe that the confessions were obtained through torture and mistreatment, or to immediately order an independent medical exam: "It appears that judges are willing to admit confessions without attempting to corroborate the confession with other evidence, even if the person recants before the judge and claims to have been tortured." The Rapporteur recalls that in the absence of other evidence, in many cases the tribunals rely exclusively on the confession of the accused, creating conditions that foster the torture and mistreatment of suspects.[47]

The CCDH, in its annual report on the human rights situation in Morocco for 2003 stated that "the evidentiary value accorded by the legislator to bills of indictment in criminal matters is not in keeping with the presumption of innocence and limits the power of the judge to appreciate the facts and evidence before him," and, accordingly, it argued that such documents should have no more value than that of "mere information."

Along the same lines, the report of the Special Rapporteur calls into question the independence and justice of this proceeding, and makes the following recommendations to the Government of Morocco:

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[46] For the purposes of this report, the expression "*Acta de acusación*" in the Spanish ("bill of indictment" in English) is used to refer to the French expression "*Procés-Verbaux."*

[47] A/HRC/22/53/Add.2, para. 27.

- Revise article 290 of the Code of Criminal Procedure to extend to infractions and misdemeanors the evidentiary standard already in effect governing crimes, so that in all penal trials statements prepared by the police shall be treated as one piece of evidence among others;
- Establish an effective and independent criminal investigation and prosecution mechanism with no connection to the body investigating or prosecuting the case against the alleged victim; and implement the right to complain and ensure that defendants who first appear before the mechanism have a fair opportunity to raise allegations of torture or ill-treatment they may have experienced;
- Ensure that statements or confessions made by a person deprived of liberty other than those made in the presence of a judge and with the assistance of a lawyer have no probative value in proceedings against that person;
- Ensure that reports prepared by the judicial police during the investigative phase remain inadmissible in trial court until the prosecution meets the burden of proving their veracity and legal validity according to the Code of Criminal Procedure;
- Introduce independent, effective and accessible complaint mechanisms in all places of detention.

According to the indictment, NAAMA ASFARI, allegedly at the "top of the pyramid of the organization" of the camp, "on 6:30 a.m. on November 8 gave strict instructions to the rest of the accused to confront and resist the government forces to the death, for the purpose of producing the largest possible number of victims, either by knives or the like, or running over the agents using vehicles." According to the indictment, he was detained in his *jaima* in the camp, where 5,000 euros, 500 dirhams, 10,000 U.S. dollars, and 300,000 Algerian dinars were seized from him, in addition to two machetes and one sword. The statement by two of the witnesses proposed by the defense showed that the accused was detained at El Aaiún on November 7, at the home of a neighbor. In response to this evidence the prosecution argued that even so, "he could have easily directed the order to attack from outside the camp," and that "only" in this case is the document false. The prosecutor thus recognized that the document was falsified in relation to the accusation against NAAMA ASFARI. In other words, that not even was the indictment, its only evidence, valid evidence. Most of the statements by the accused that are in the indictment, in which they incriminate themselves for "having attacked many persons causing their deaths" or "having stabbed many members of the security forces" (MOHAMED EMBAREK LEFKIR, MOHAMED BANI, MOHAMED SUELIM LAYUBI, ABDELJALIL LARUSI LEMGHAIMAD, ABDELAHI LEKHFAWNI) coincide in noting that on the morning of November 8, they received direct orders from NAAMA ASFARI to confront the armed forces with violence. All these statements are clearly vitiated to the extent that NAAMA ASFARI was detained at that time. The indictment is, therefore, null and void as a matter of law.

Furthermore, when the defense required the prosecutor to explain the reasons why at the foot of many of the statements by the accused their fingerprints

appear instead of their signatures, when these were persons who knew how to write, he said he did not know.

Along the same lines, it should be noted that the decision on whether the signatures of the statements made before the investigative judge were authentic or counterfeit was left in the hands of the President of the Tribunal and the prosecutor, without even any expert handwriting evidence. Indeed, when the President himself noted that some of the signatures were not even similar to themselves, he asked some of the accused (e.g. ABDELJALIL LARUSI LEMGHAIMAD) to sign their name several times on a piece of paper before the Tribunal to be able to compare these signatures with those on the statements to the investigative judge. Despite recognizing that they were not similar, the representative of the prosecution concluded without further explanation that it was merely a "change" in the accused's signature.

One should also note in the case of other persons accused (e.g. MOHAMED LAMIN HADDI) the President of the Tribunal recognized that part of the statement came after the accused's signature.

As the Special Rapporteur states, the Moroccan judicial system is largely based on confessions as the leading source of evidence, and since, even though Article 293 of the Criminal Code establishes that no confession or statement obtained under coercion is admissible, several reports indicate that torture is used by officials of the State to obtain evidence or confessions during the initial interrogation, especially in cases of terrorism or that affect national security.[48] The trial over the events at Gdeim Izik is solid evidence of this.

(c) The absence of medical exams

The right to request a medical exam for those who allege they have suffered torture or mistreatment is widely recognized in Moroccan law. Articles 73 and 74 of the Code of Criminal Procedure recognize the right of the accused to request such exams from the prosecution. In addition, as soon as he or she learns of an act or abuse, or is asked to investigate the act, the prosecutor must order it (Article 74(8)). In the same vein, Article 234(5) requires the judge to order an immediate medical exam for any person who shows signs of torture.

Even so, the Special Rapporteur has argued that forensic exams are not performed systematically or randomly at the moment of detention and release, and he states: "There is an urgent need to establish mechanisms that can guarantee qualified, impartial and independent forensic examination of detainees that does not depend only on the request of the police or legal authority.[49]

During the oral hearing no type of medical exam was allowed – which has been denounced by the Special Rapporteur[50], beyond transferring the accused to the military university hospital when, during that oral hearing, they fainted, had tachycardia and high pressure brought on by the poor physical conditions after more than two years in prison, in the course of which, according to the accused,

[48] A/HRC/22/53/Add.2, para. 76.
[49] A/HRC/22/53/Add.2, para. 34.
[50] A/HRC/22/53/Add.2, para. 66.

they were subject to continuous mistreatment and torture.

The President agreed in the last days of the trial to allow one of the accused, DAICH DAFI, beset by problems of eyesight, to receive care from an ophthalmologist; since he entered the prison, more than two years ago, he had requested this, and it had always been denied. He also agreed to allow ABDELJALIL LARUSI LEMGHAIMAD, who fainted at the trial, to be sent to the hospital, where a physician wrote a report in which he explained the cause of fainting (constant high blood pressure) and took the opportunity to indicate that the sequelae on one leg, which the accused had alleged to be sequelae of torture, were due to spots, saying the lesion originally occurred five years earlier. This medical certificate was read by the President in the courtroom, as if it were a forensic medical report.

As regards conducting medical exams in this context of torture and mistreatment in Morocco, after examining a broad sample of medical certificates the Special Rapporteur noted with concern that most of them had not been issued by forensic experts, but by regular physicians who were on the courts' lists of "experts." As indicated in his report, these persons do not have specific training or experience in forensic medicine; the medical reports after allegations of torture and mistreatment are of very poor quality; they do not comply with the minimum international standards that apply to the forensic exams to which the victims have a right, and they are not acceptable as forensic evidence. "Neither prison health-care staff nor the clinicians who act as court 'experts' have specific training in assessing, interpreting and documenting torture and ill-treatment."[51] In his opinion that may be the cause for not applying the rule on exclusion of evidence obtained under torture, since its poor quality makes it unusable, such that the confession is upheld, without conducting any serious investigation to prosecute torture and punish the persons responsible.[52]

As noted above, during the oral hearing the accused asked to undergo medical exams for the purpose of determining the causes of the lesions and sequelae affecting them. All of them explained the torture to which they were subjected: after being violently detained they were handcuffed, blindfolded, beaten, they were subjected to the torture called "the airplane," involving being beaten on the soles of the feet; some had their fingernails and toenails forcibly extracted with pincers, many of them were raped, they were urinated on, they were stood upon while prostrate on the floor of the plane that took them from El Aaiún to Rabat, where they were tied by the neck, in the first months they were not allowed to see the sun or to sleep for days. The President always denied these requests indicating that given the time that had elapsed from the time of the facts alleged, a physician could not determine their origin, an argument the defense characterized as unacceptable, given the technological advances in forensic medicine which, in cases for example of rape, could make it possible to determine with a minimal margin of error whether and when the rape occurred. Given the denial of medical exams, the accused showed in the courtroom the marks and signs of torture visible on their bodies. The President and the prosecutor decided that such torture did not exist without performing any type of forensic exam, even

[51] A/HRC/22/53/Add.2, para. 35.
[52] A/HRC/22/53/Add.2, para. 36.

joking about such a serious matter with some of the accused. For example, when one of the accused told the Tribunal that he had marks on his scalp from beatings by the police, the President responded, smiling, "if you wanted us to see them you would have shaved your head."

In some cases the accused provided dates, places, and names of those who tortured them; indeed one (MOHAMED LAMIN HADDI) said that one of the torturers was the clerk of the Investigative Court, and despite the requests of the defense, which reminded the prosecutor of his obligation once he had the data that the accused were providing to set an investigation in motion, he did nothing.

Although as of the writing of this report it has not been possible to verify more than visually the veracity of the torture allegations, in the case of one of the accused, MOHAMED SUELIM LAYUBI, who was released in December 2011, there are medical exams that allow one to confirm that in effect he was tortured and that he has had grave sequelae as a result.[53]

As the Special Rapporteur has noted, "Allegations of torture and ill-treatment should be admitted at any stage of the trial and courts are obliged to launch ex officio investigations whenever there are reasonable grounds to suspect torture or ill-treatment."[54] Yet neither at the time of the detention nor during in the time that has elapsed since has any investigation whatsoever been undertaken *sua sponte*, nor have the accused been allowed to undergo any medical exam. Even more surprising in a trial that has been held to be fair and equitable, at no time has any forensic physician been involved. As the Rapporteur has indicated, in the case

[53] MOHAMED SUELIM LAYUBI was detained on November 8, 2010, taken to the prison known as Cárcel Negra in El Aaiún, and then to Rabat to the prison known as Sale II. He stayed there until December 13, 2011, when he was released due to his deteriorating health. "During his administrative detention at the police station of El Aaiún he spent one day and one day, where he reports having been beaten. Subsequently, in one of the beatings in the jail, he suffered harm to his right shoulder when kicked there. They did not send him to any hospital. He was beaten repeatedly in the feet ("*falanga*") and since then he has walked with great difficulty. He was injected with an analgesic by a health worker at the jail. A few days later the shoulder had swollen and hurt a lot, and when they were going to give him an injection pus came out. He was operated for an infection in that joint. The exam shows a scar in the posterior-external face of the right shoulder, with significant atrophy of the deltoids, and a major limitation on its mobility; many scares from injuries throughout the body: wrists, feet, torso, etc.; disability in terms of autonomous walking, needing to use a cane; pain and post-phlebitic signs in the lower limbs, with sluggish venous return and pain in the calves. The testimony given by the subject, the physical exploration, and the radiological image are consistent with the account of the facts given by the victim, who presents a lesion on each foot, most certainly resulting from the sessions of *falanga*, in which the precarious circulation in the feet (he has a major case of diabetes) with changes in the distal microcirculation, may condition an irreparable lesion in the plantar fat pad, and that are at the origin of the inability to walk without assistance. The scar of the left shoulder and the radiological study that we have assessed suggest an infection in the shoulder joint, probably caused by the injections received in an environment with little in the way of aseptic conditions) (the prison) and in a diabetic with whom one must be especially careful, given the great ease with which a diabetic can develop infections, sometimes serious. The radiography shows that there was some fracture in the neck of the scapula, the source of the terrible pains that he reports in the shoulder and the reason for which he was injecting analgesics." (MARTÍNEZ, A. and HIDALGO, Mª A. (20I2), *Informe de Evaluación de Casos de Tortura en el Sáhara Occidental*, Sevilla, 2012, cited in MARTÍN BERISTAIN. C., and GONZÁLEZ HIDALGO, E., *El oasis de la memoria. Memoria histórica y violaciones de Derechos Humanos en el Sahara Occidental*, p. 391,

[54] A/HRC/22/53/Add.2, para. 79.

of torture allegations, medical exams are rare, and deliberately late. The European Court of Human Rights has indicated that a late investigation in cases of torture may be futile, and result in impunity for the alleged perpetrators.[55]

> "The Court considers that the elements before it do not allow it to establish beyond a reasonable doubt that the complainant has been subjected to the treatment that has reached a minimum of gravity, contrary to Article 3 of the Convention. In this respect, it wishes to underscore that this impossibility emanates largely from the absence of an in-depth and effective investigation by the national authorities in response to the complaint filed by the complainant for mistreatment."[56]

The above-mentioned document *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[57] established how medical evidence should be taken, and the professional qualifications required for those who take such evidence.[58] Nonetheless, as the report of the Special Rapporteur indicates, the current forensic system of Morocco, in which the prisoners are subjected to exams by physicians with no specialization in forensic medicine, is not in keeping with international standards[59]; the current reporting mechanisms are neither effective nor independent. Accordingly, he makes the following recommendations to the Government of Morocco:

- Invest in the fields of psychiatry and forensic medicine, as well as in specific training for forensic experts on the assessment of ill-treatment and torture,

[55] The ECHR has affirmed that "the lack of promptness and diligence in the investigation (of possible torture) resulted in the quasi-impunity of the members of the Guard Corps of the Prime Minister, the alleged perpetrators of acts of violence against the applicant, and rendered the criminal remedy ineffective" (*matter of Okkalı v. Turkey*, No. 52067/99, § 78, ECHR 2006-XII, para. 62).

[56] *Matter of Beristain Ukar v. Spain,* No. 40351/05, Judgment of March 8, 2011, para. 42.

[57] Principles adopted by the General Assembly in its Resolution 55/89 Annex, of December 4, 2000.

[58] "6. (a) Medical experts involved in the investigation of torture or ill-treatment shall behave at all times in conformity with the highest ethical standards and, in particular, shall obtain informed consent before any examination is undertaken. The examination must conform to established standards of medical practice. In particular, examinations shall be conducted in private under the control of the medical expert and outside the presence of security agents and other government officials. (b) The medical expert shall promptly prepare an accurate written report, which shall include at least the following: (i) Circumstances of the interview: name of the subject and name and affiliation of those present at the examination; exact time and date; location, nature and address of the institution (including, where appropriate, the room) where the examination is being conducted (e.g., detention centre, clinic or house); circumstances of the subject at the time of the examination (e.g., nature of any restraints on arrival or during the examination, presence of security forces during the examination, demeanour of those accompanying the prisoner or threatening statements to the examiner); and any other relevant factors; (ii) History: detailed record of the subject's story as given during the interview, including alleged methods of torture or ill-treatment, times when torture or ill-treatment is alleged to have occurred and all complaints of physical and psychological symptoms; (iii) Physical and psychological examination: record of all physical and psychological findings on clinical examination, including appropriate diagnostic tests and, where possible, colour photographs of all injuries; (iv) Opinion: interpretation as to the probable relationship of the physical and psychological findings to possible torture or ill-treatment. A recommendation for any necessary medical and psychological treatment and/or further examination shall be given; (v) Authorship: the report shall clearly identify those carrying out the examination and shall be signed." (Principles adopted by the General Assembly in its Resolution 55/89 Annex, of December 4, 2000).

[59] A/HRC/22/53/Add.2, para. 78.

in line with international standards, including the Istanbul Protocol;

- Ensure that medical staff in places of detention are truly independent from law enforcement and trained in the Istanbul Protocol;
- allow access to independent medical examinations without interference by or the presence of law enforcement agents or prosecutors; and ensure timely access to independent medical check-ups at the time of arrest, upon transfer to another place of detention or upon request.

(d) The burden of proof and the presumption of innocence

As ESSAID has noted, "the burden of proof is on the prosecution."[60] This is a rule accepted by all positive criminal legislation and international treaties. It is the prosecutorial authority who must prove the criminal acts of the accused, thus respecting the principle of the presumption of innocence.

The European Court of Human Rights has noted in this regard,

> "Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, *the burden of proof may be regarded as resting on the authorities* to provide a satisfactory and convincing explanation.[61]

In the trial before the Permanent Military Tribunal the burden of evidence as to the existence of torture has been made to fall on the accused, in violation of the fundamental principle that holds for any fair and equitable judicial procedure that is the presumption of innocence.[62]

3.4. Post-trial guarantees – The lack of a right to appeal criminal convictions

Principle No. 17 of the Draft Principles, mentioned above, affirms the need, in those cases in which there are military judicial bodies, for their jurisdiction to limited to the first instance. Accordingly, "*recourse procedures, particularly appeals, should be brought before the civil courts.* In all situations, disputes concerning legality should be settled by the highest civil court." The principle of the right to appeal presupposes the right of the accused to bring an appeal to a court of higher rank than the one that handed down the judgment, one that is able to review the judgment of the lower court and cure its possible defects. Yet in this case not only is it questioned that the right of appeal should be before a civilian court, but that it should even exist.

Obviously, the motion for cassation, the only one possible after the judgment of the Permanent Military Tribunal, which is limited to verifying respect for the rules of law and the formal aspects, does not perform this function. As ESSAID has pointed out, "the appeal procedure should extend equally to the

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[60] Mohammed-Jalal ESSAID, *Le Procès équitable Dans le Code de Procédure Pénale de 2002*, Collection Reforme du Droit et Développement socio-économique, Vol. 1, March 2008, p. 147.

[61] *Matter of Salman v. Turkey,* No. 21986/93, n. 100, ECHR 2000-VII.

[62] "Regarding Laâyoune, Western Sahara, the Special Rapporteur found that torture and ill-treatment were inflicted during arrest, at police stations and at the prison in Laâyoune" (A/HRC/22/53/Add.2, para. 84).

exceptional jurisdictions, one of which is the military jurisdiction."[63] The right to appeal is one of the principles intrinsic to a democratic judicial system, and is set forth in the immense majority of international treaties in force.[64] The non-existence of an appeal presupposes a serious breakdown of the guarantees that should preside over a fair and equitable trial.

[63] Mohammed-Jalal ESSAID, *Le Procès équitable Dans le Code de Procédure Pénale de 2002*, Collection Reforme du Droit et Développement socio-économique, Vol. 1, March 2008, p. 162.

[64] For example, see Article 2 of the European Convention on Human Rights ("Right to appeal in criminal matters"), or Article 3 of the International Covenant on Civil and Political Rights of 1966 ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.")

IV. THE JUDGMENT

1. THE CONVICTIONS AND SENTENCES

In their last statement before the Military Tribunal all of the accused highlighted the peaceful nature of what they were calling for; they expressed their condolences for both the Moroccan and the Saharawi victims; they rejected the use of violence; they affirmed their belief that they had not been tried for the acts of which they were accused, but for their status as human rights activists; they proclaimed that they would continue struggling peacefully for the self-determination of the Saharawi people; and they asked that an independent international investigation be carried out to clarify the facts and to convict and sentence the perpetrators.[65]

The Permanent Military Tribunal communicated *in voce* the convictions and sentences at 12:45 a.m. on February 17, 2013; as of the writing of this report the judgment has not been made public, therefore it is not possible to assess it.

The sentences are as follows:

Life in prison:

- ABDALAHI ABHAH, accused of *being part of a criminal band* for the purpose of using violence against members of the government forces who were on active duty, resulting in death and the *profaning of a corpse*.
- ISMAILI BRAHIM, accused of *participating* in acts of violence against the members of the government forces who were on active duty, resulting in death.
- SIDAHMED LEMJAYED, accused of *participating* in acts of violence against the members of the government forces who were on activity duty, resulting in death.
- ABDALAHI LEJFAWNI, accused of *forming part of a criminal band* for the purpose of using violence against members of the government forces who were on activity duty, resulting in death.
- MOHAMED BANI, accused of *forming part of a criminal band* for the purpose of using violence against members of the government forces who were on activity duty, resulting in death.
- AHMED SBAI, accused of *forming part of a criminal band* for the purpose of using violence against members of the government forces who were on active, resulting in death.
- ABDELJALIL LEMGHAIMAD, accused of *forming part of a criminal band* for

[65] In that regard, it should be recalled that the European Parliament has indicated that "it takes note of the formation by the Moroccan parliament of a investigative committee tasked with investigation the course of events that led to the intervention of the Moroccan authorities, but it *considers that the United Nations would be the more appropriate body to conduct an independent investigation internationally to clarify the facts, the deaths, and the disappearances.*" (Resolution of the European Parliament, December 13, 2012, on the Annual Report on Human Rights and Democracy in the World, for 2011, and the European Union policy in this respect.)

the purpose of using violence against members of the government forces who were on activity duty, resulting in death.

- MOHAMED ELBACHIR BUTENGUIZA, accused of *forming part of a criminal band* for the purpose of using violence against members of the government forces who were on active duty resulting in death, and *profaning a corpse.*
- HASSANA AALIA (*in absentia*), accused of *forming part of a criminal band* for the purpose of using violence against members of the government forces who were on activity duty, resulting in death.

30 years in prison:

- NAAMA ASFARI, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- CHAIJ BANGA, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- MOHAMED BURIAL, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- DAH HASSAN, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.

25 years in prison:

- HOSSEIN ZAUI, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- MOHAMED EMBAREK LEFKIR, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- DAICH DAFI, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- MOHAMED LAMIN HADDI, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- ABDELAHI TOUBALI, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- MOHAMEDJUNA BABAIT, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.

20 years of prison:

- BACHIR JADDA, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in

death.

- MOHAMED TAHLIL, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- MOHAMED SUELIM LAYUBI, accused of *forming part of a criminal band* for the purpose of using violence against members of the government forces who were on active duty, resulting in death.

2 years and 3 months imprisonment, corresponding to the period held in pre-trial detention:

- SIDI ABDERRAHMAN ZEYU, accused of *participating* in acts of violence against members of the government forces who were on active duty, resulting in death.
- TAKI ELMACHDOUFI, accused of *forming part of a criminal band* for the purpose of using violence against members of the government forces who were on active duty, resulting in death.

2. THE CONVICTION AND SENTENCING *IN ABSENTIA* OF ONE OF THE ACCUSED

2.1. The principle of res judicata

The principle of *res judicata*, a procedural principle based on the higher principle of legal certainty, is admitted without question not only in international law but also in Moroccan law. Accordingly, it is recognized both by Article 9 of the Statute of the International Criminal Tribunal for Rwanda, Article 10 of the Statute of the Tribunal for the former Yugoslavia[66], Article 20 of the Statute of the International Criminal Court[67], and Article 1 of the Code of Criminal Procedure and Article 119 of the new Moroccan Constitution of 2011.

[66] Both articles read the same: "*Non bis in idem*. 1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda. 2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a) The act for which he or she was tried was characterised as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served."

[67] "*Ne bis in idem*. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. 3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Where

Pursuant to this principle, the judgments that put an end to the criminal proceeding take on the force of *res judicata* once they are firm. The main consequence is that there can be no new trial against the same defendant for the same act.

In the proceeding that is the subject matter of this report, on November 14, 2010 the search and arrest warrant was issued for HASSANA AALIA for his participation in the events at Gdeim Izik. After staying in hiding several weeks, on January 5, 2001, he was detained in the streets of El Aaiún. The next day the Court of First Instance released him provisionally, with the warning that he must appear before the Court again on January 31, 2011, for the trial. On February 14, 2011 the Court of First Instance of El Aaiún handed down a conviction sentencing him to four months imprisonment, suspended, since he had no criminal record, in the understanding that there was no evidence he had participated in attacks directed against the security forces (the Judgment is included as an attachment to this report).

Despite this, once the sentence had been carried out, on November 15, 2011, while the accused was in Spain, he learned that had been accused once again for the same facts and that he was decreed to be a fugitive to be searched for and arrested. On February 17, 2013, the Permanent Military Tribunal sentenced him to life in prison for the same charges for which the Court of First Instance had sentenced him to four months in prison two years earlier.

The prosecution, for the second time and on the same facts, of HASSANA AALIA constitutes a very grave violation of the principle of *res judicata*, and, accordingly, in every aspect related to this accused, the trial is null and void as a matter of law, because it never should have gone forward without cause; the Tribunal has committed an incurable defect.

2.2. Conviction and sentencing in absentia

Having established that the Military Tribunal violated one of the most basic principles of law since the time of the Roman Law, namely the principle of *res judicata*, one must determine whether, even if there was no *res judicata,* the Military Tribunal could convict the accused *in absentia*). Taking into consideration the international practice of the last decade, in which international criminal law has established itself as a specialized sector in the international legal order, reflected among others in the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and especially the Statute of the International Criminal Court, it can be said that the presence of the accused in a criminal proceeding is a basic right that should be respected in any trial that claims to be fair and equitable. All of them prohibit the prosecution and conviction of an accused *in absentia*. Thus, for example, Article 63(1) of the Statute

for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise where not conducted independently or impartially in accordance with the norms of due process recognized by international law and where conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

of the International Criminal Court expressly indicated "The accused shall be present during the trial." The practice of these courts is very clear in this regard, and no judgment has been handed down where the accused is *in absentia*.

The report by the UN Secretary General prior to the adoption of Resolution 827 (1993) already noted that

> "*a trial should not commence until the accused is physically present before the International Tribunal*. There is a widespread perception that trials *in absentia* should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence."[68]

This opinion was implicitly reflected in Articles 21(4)(b) and 20(4)(b) of the Statutes of the Tribunals for the former Yugoslavia and Rwanda, respectively, which recognize the right of the accused to be present at trial, which has been understood by most of the doctrine and by the very judges of the *ad hoc* tribunals as a prohibition on holding trials *in absentia*. The practice of these tribunals is summarized perfectly in the words of Richard GOLDSTONE, who at that time was Chief Prosecutor of the Tribunal:

> "such trials tend not to satisfy calls for justice and create an impression of being 'show trials'. The evidence is untested and any conviction and sentence that may follow are empty shells and would be so perceived. If the person 'convicted' is later arrested and brought for trial the earlier proceedings would have to be disregarded and a trial would begin de novo."[69]

In addition to each and every irregularity noted in relation to the rest of the accused being applicable to this case, the Permanent Military Tribunal of Rabat grievously breached another of the principles that should be observed in a fair and equitable trial, on convicting the accused *in absentia*, and, moreover, imposing a life sentence.

[68] Report by the Secretary General S/25704, para. 101 (emphasis added).
[69] *Opening Statement by Justice Goldstone*, *Case of Nikolic* (IT-94-2-R-61), October 9, 1995.

V. CONCLUSIONS

Whether a trial is a fair trial is determined not by the sum of individual guarantees analyzed in this report, but the appreciation of all of them together. Similarly, its equity is gauged based on how the trial unfolds. Mindful of all these criteria for assessment, and the analysis of the proceeding and the oral hearing, we draw the following conclusions:

1. THE PERMANENT MILITARY TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE MATTER

- Under *international law* the Moroccan justice system does not have jurisdiction to take cognizance of the events in the Western Sahara, given its status as a non-autonomous territory pending decolonization that has been occupied by Morocco since 1975.
- Under *Moroccan law*, and specifically its 2011 Constitution, which prohibits exceptional jurisdictions, the military jurisdiction has that exceptional character, and so does not have jurisdiction to take cognizance of the events at Gdeim Izik, given that the accused are civilians.

2. THE CONDITIONS IN WHICH THE ORAL HEARING WAS HELD DID NOT GUARANTEE A FAIR AND EQUITABLE TRIAL

- Even though access to and the organization of the courtroom in which the hearing was held was orderly and represented a substantial improvement for the international observer missions in relation to earlier trials, the oral hearing *was not actually conducted in a public hearing*. The Saharawi interpreters who were going to translate for the international observers were not allowed to enter the courtroom, for which the Tribunal sought to compensate by means of an "official" translation to French, English, and Spanish. This *translation* was partial and in many parts did not correspond to what had actually been said in the hearing.
- The overwhelming presence inside and outside the courtroom of *strong military and police contingents* highlighted the military characteristics of the proceeding and seriously conditioned the procedures that should prevail in a fair and equitable trial.
- The now customary presence of *video and photo cameras* in the courtroom was reproduced, as a form of intimidation.
- After a harsh verbal confrontation with the President of the Tribunal the first days of the hearing, *the accused were able to explain how they were arrested, denounce the torture* they suffered since and during their captivity, and explain what, in their view, was the cause of their prosecution: their *status as human rights activists* and their peaceful struggle for the self-determination of the Saharawi people. Despite this, the President gave express instructions to the Clerk not to make a record of their statements.

- The *record of the trial* was drafted manually by the Clerk of the Tribunal, who freely interpreted what should be included. On several occasions one could see that the content did not correspond to what was said during the hearing.
- The *physical conditions of the defendants* during the oral hearing were very poor. Several of them had to be moved to the military university hospital. After sessions of 10 to 12 hours they were only allowed to rest for five hours.

3. DURING THE PROCEEDING THE CONDITIONS OF A FAIR AND EQUITABLE TRIAL WERE NEVER GUARANTEED

- The defendants were not allowed to have *the assistance of counsel* until their second appearance before the investigative judge, nor were they allowed to *communicate with their families* until after several days had gone by.
- The right of the defendants to be judged in a *reasonable time* was not respected, as more than two years went by from their detention (November 2010) and the opening of the oral hearing (February 2013).
- The right of the defendants to be tried by an *independent and impartial court* was not respected, nor was the constitutional principle of the *separation of powers*. Since those who carried out the detentions and four members of the Permanent Military Tribunal are members of the military, as were the victims, they are both judge and party.
- The right of the accused to call key *witnesses* in the trial and to question them was not respected, even though such persons were eyewitnesses to both the negotiations and the events during the violent dismantling of the camp, very seriously impairing the right to defense.
- The authorities repeatedly rejected both the allegations of *torture and mistreatment* and the requests for *medical examinations* filed by the accused, not only at the moment of detention or during the period in prison, but also in the oral hearing. The lack of an investigation of those complaints by the Moroccan authorities constitutes a violation of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, to which Morocco is a party, and the Moroccan legal order.
- Throughout the procedure the principle of *presumption of innocence* was violated; one of the pillars of justice in a democratic state, it was violated when the burden of proof was placed on the accused when they asserted that their statements had been obtained under torture.
- Even though the main cause of the trial of all the accused was having kidnapped the more than 20,000 persons who were at Gdeim Izik, *at no time were they formally accused of the crime of kidnapping*.

- *Lack of evidence*. The Tribunal convicted the accused based on the just one item of evidence, their statements, which were given when they were arrested.
    - The prosecution based its entire case on the statements made by the accused *without the assistance of counsel, and, according to their allegations, under torture.* International canons establish that the statements by the accused can only be used as "information" but never as proof of guilt.
    - *The video that was shown by the prosecution has no probative value*. There is no certification of the images that correspond to the events at Gdeim Izik; some of them, according to the prosecution itself, occurred at El Aaiún, and none of the accused appears in them.
    - Although the alleged *items of evidence* were presented to the public in the courtroom throughout the oral hearing, practically never was reference made to them. One could see the lack of blood that could relate them to the events, and they were not isolated from possible environmental contamination; accordingly, they are of no value.
    - The testimony of the defense also showed the *false nature of the documents* of the accusation. It was shown, and the prosecutor tacitly admitted, that the main person accused of organizing and giving instruments to violently resist the government forces on November 8 at Gdeim Izik had been arrested one day earlier at El Aaiún. The remaining statements by the accused that were in the bill of indictment were also based on this assertion, and, therefore, are equally false.
    - At the hearing emphasis was placed on the existence of serious *irregularities in the bill indictments.* For example, it was clear that some signatures were falsified, and the prosecution could not explain why some of the statements were accompanied by fingerprints instead of a signature, when these were persons with university studies.
    - From the moment of the arrests *no medical examination whatsoever has been performed*, even though this was requested on numerous occasions by the accused. In the only medical exam that was performed on one of the accused, since he has been conditionally released as of December 2011, it has been confirmed that he suffered torture and mistreatment and that he has had serious physical and psychological sequelae as a result.
    - *No autopsy whatsoever has been performed* so as to make it possible to learn at least the causes of the deaths, for it is not even known whether the victims died as a result of being run down, stabbings, or blows by stones, or all of these causes together.
    - There is no *account of the facts* that explains specifically how any of the accused killed any of the victims. The convictions are based on

the bill of indictment, which relates to the accused to the generic deaths of "several" of the victims. There is no evidence of any of the accused being involved in any way with the victims' deaths. The victims' next-of-kin have the right to know who the direct perpetrator of the killing was and how it occurred.

- The only thing that the prosecution was able to prove on showing photographs of the accused in the company of the leaders of the POLISARIO Front is the identification of the accused with the objective of this national liberation movement, recognized by the United Nations as the sole and legitimate representative of the Saharawi people: their common and peaceful vindication of the right to self-determination, which is recognized by the United Nations.

- The procedure violates the *right to appeal,* which is one of the essential principles for guaranteeing a fair and equitable trial.
- The procedure violates, in the case of the accused HASSANA AALIA, *the principle of res judicata,* unequivocally recognized in both international law and Moroccan law.

4. FOR ALL THESE REASONS, ONE MUST STATE CLEARLY THAT BOTH IN THE PROCEEDING HELD FROM THE ARREST OF THE ACCUSED AND IN THAT ORAL HEARING PRACTICALLY EACH AND EVERY GUARANTEE OF A FAIR AND EQUITABLE TRIAL HAS BEEN VIOLATED. THE SENTENCES, EXTREMELY HARSH, HAVE BEEN IMPOSED WITHOUT ANY EVIDENCE, THEREFORE ONE DOESN'T EVEN REACH THE QUESTION OF THE PROPORTIONALITY OF THEIR DURATION, FOR THE VERY PROSECUTION OF THIS CASE IS A GENUINE LEGAL ABERRATION.