

Trial Observation Report

From the proceedings against the “Group Gdeim Izik” in Salé, Morocco, 23rd to 25th of January 2017.



The “Group Gdeim Izik” inside of the “glass-cage” on the 26th of December 2016

Executive summary

My name is Tone Sørffonn Moe. I am a Norwegian law student at the University of Bergen.

I travelled to Morocco, Rabat, on the 25th of December 2016 and the 23rd of January 2017 to attend the trial of the “Group Gdeim Izik” on behalf of the Norwegian Support Committee for Western Sahara and the Rafto Foundation for Human Rights. The overall objective of my attendance was to evaluate whether the trial against the group was a fair trial, according to Moroccan and international standards.

On the 17th of February 2013, the Military Court in Rabat sentenced a group of 25 Saharawi activists to harsh penalties. The *Court de Cassation* found the decision from the Military Court of Rabat null and void, and referred the case to Court of Appeal in Rabat. The *Tribunal de Première Instance* was on the 26th of December 2016 to address the appeal of the case of these 24 men. One of the original 25 are sentenced to life *in absentia*. The trial on the 25th of December was postponed to 23th of January 2017. After two days of proceedings, the case was on the 25th of January 2017 postponed to March 13th. As such; this report is an intermediate report.

On the 25th of January, the court ruled that the Tribunal de Première Instance in Salé was competent and had necessary jurisdiction; that the prisoners were to be given medical

examinations, both physical and mental examination; that the defence could present all of the witnesses, excluding the Moroccan authorities that had been in negotiations with the Gdeim Izik dialogue committee. Thus, the police and gendarmerie officers who drafted the “minutes” (documents relating to the arrest and custody), were convened. Furthermore, the court ruled to postpone the discussion upon partial status for civil party (the representatives of the victims). None of the prisoners were granted provisional release.

When assessing this trial observation, I have evaluated the proceedings on the basis of a political trial; assessed when proceedings are brought up for reasons of political persecution (political trials) rather than to impart justice. The only evidence against the “Group Gdeim Izik” are testimonies extracted through the use of torture. Therefore; there is an absence of proof against the defendants, and a great risk that the proceedings as a whole may be unfair.

It is of fundamental importance that the *Fourth Geneva Convention* is applied; according to which the “Group Gdeim Izik” has the right to be judged by their natural judges, without being subjected to the misunderstanding or bias of persons representing a foreign mentality, traditions or doctrines.

During the trial the presiding judge *de facto* undermined both the Torture Convention and the CAT decision (CAT/C/59/D/606/2014) on the case of Eênaama Asfari. There seems to be a lack of willingness within the Moroccan legal institutions to respect its international commitments. It is thus up to the international community to make sure that Morocco fulfils its obligations.

The burden of proof will be a crucial factor during the commencement of the proceedings on March 13th. The presiding judge is obliged to uphold this principle, as the burden of proof lays with the prosecution. As such, an accused can only be found guilty, and thus sentenced, if the question of guilt is proven beyond any reasonable doubt.

I strongly recommend that Norwegian NGOs or government officials should be present on the scheduled appeal on the 13th of March 2017.

My trip to Rabat was financed by the Rafto Foundation for Human Rights and the Norwegian Support Committee for Western Sahara, and I was accredited by Fundación Sahara Occidental.

List of Content

Executive summary	1
1. Introduction	5
2. The prisoners and the charges against them	6
3. The previous legal proceedings	13
<i>3.1. The Military Court</i>	13
<i>3.2. Decision from Court of Cassation</i>	13
<i>3.3. The trial on the 26th of December at the Tribunal de Première Instance, Salé.</i>	14
4. The proceedings for the “Group Gdeim Izik”, 23rd to 25th of January 2017, Salé, Morocco	14
<i>4.1. Tribunal de Première Instance de Salé</i>	14
<i>4.2. The proceedings</i>	15
<i>4.2.1 Day 1: January 23th</i>	15
<i>4.2.2 Day 2: January 24th</i>	16
<i>4.2.3 Day 3: January 25th</i>	17
<i>4.3 The verdict</i>	18
5. Principles for trial observation	19
<i>5.1. The Trial Observation Manual</i>	19
<i>5.2. The Gdeim Izik trial is to be regarded as a political trial.</i>	19
6. The legal framework	20
<i>6.1. The legal framework when conducting a trial observation</i>	20
<i>6.2. The Constitution of Morocco, the Criminal Code and Code of Criminal Procedure of Morocco, and the Human rights treaties to which Morocco is a party</i>	20
<i>6.3.1 Ratification is rarely followed by harmonization.</i>	21
<i>6.4. Human Rights treaties to which Morocco is a party, and international standards on human rights and administration of justice that are declarative in nature, and norms of customary international law.</i>	22
<i>6.4.1 The right to a fair trial</i>	22
<i>6.4.1.1 The Right to a Fair Trial after the UDHR</i>	22
<i>6.4.1.2. The Right to a Fair Trial after the ICCPR</i>	22
<i>6.4.2 The Convention against Torture</i>	22
<i>6.3.2.1. The Committee against Torture</i>	23
7. The question of jurisdiction and humanitarian law	24
<i>7.1. Western Sahara and its legal status</i>	24
<i>7.2 Occupation and the fourth Geneva Convention</i>	25

8. The fairness of the trial	27
8.1 <i>The right to equality before the law and courts</i>	27
8.2 <i>Independence and impartiality</i>	28
8.3 <i>Right to defense and right to be informed promptly of the charge</i>	28
8.4 <i>The right to be tried without unfair delay</i>	29
8.5 <i>The right to a public hearing</i>	29
8.6 <i>Right to interpretation</i>	29
8.7 <i>The principle of equality of arms</i>	30
8.8 <i>Right to call and examine witnesses</i>	30
8.9 <i>The presumption of innocence</i>	31
8.10 <i>The right not be compelled to confess guilty or to testify against oneself and exclusion of evidence elicited by illegal means, including torture or ill-treatment.</i>	31
8.11. <i>Circumstances surrounding the trial</i>	31
9. Conclusion and last remarks	32



The Gdeim Izik Camp on November 8th 2010.

1. Introduction

In 1963, Western Sahara was listed as a non-self-governing territory by the United Nations. In 1966 the United Nations General Assembly adopted its first resolution (UN General Assembly, 1966, Resolution 2229 (XXI)) on the territory, urging Spain to organize, as soon as possible, a referendum on self-determination under UN supervision.

In 1975, the International Court of Justice (ICJ) rendered an advisory opinion on the Western Sahara question, concluding by 14 to 2 votes that while there had been certain pre-colonial ties between the territory of Western Sahara and Morocco, these ties did not imply sovereignty. Shortly thereafter, on the 6th of November, Morocco occupied and later annexed Western Sahara, through the famous “Green march”. This constituted an act of aggression in violation of the UN Charter. The same day, the UN Security Council, in Resolution 380, called upon Morocco “immediately to withdraw all the participants in the march.”

Morocco did not withdraw the participants. Thus, Western Sahara has been under occupation by Morocco since 1975. Morocco and Western Sahara, lead by the Saharawi liberation movement Front Polisario, were in an armed conflict until 1991, when a peace agreement was set into place. Today, Western Sahara is divided in half by a 2200-kilometre wall, built by the Moroccan army. The occupied areas are controlled by Moroccan authorities, where the other half is controlled by Polisario. The most important aspect of the peace agreement, a referendum on self-determination for the Sahrawi people, has never been implemented.

The Gdeim Izik was a provisional protest camp in 2010 situated outside of El Aaiún, the capital of Western Sahara. The camp demanded respect for their most basic human, social and economic rights. The “Group Gdeim Izik” relates to the imprisonment of 25 Saharawis arrested prior, during and after the dismantling of the silent protest camp Gdeim Izik on November 8th of 2010.

Moroccan authorities held the areas surrounding the camp under surveillance from the beginning. Since October 12th 2010, armed trucks, helicopters and army vehicles circulated the camp areas, and authorities constructed roadblocks and checkpoints around the camp. On the 24th of October, the Moroccan authorities opened fire on a vehicle trying to enter the camp site with food supplies. A 14-year-old boy (Nayem Elgarhi) died. He was buried in secret by the Moroccan authorities. His family still demands that the officers who shot Nayem shall be tried.

The Dialogue Committee remained, despite the violent clashes, in dialogue with the Moroccan authorities. On October 26th, both parties agreed to hold a census of the protesters as a starting point. Tents were put up near the camp to commence the census the following Monday, November 8th.

On November 8th, around 6:30am, the Moroccan military broke their promise and attacked the Gdeim Izik camp. Camp residents reported the use of rubber bullets, real bullets, hot-water cannons, tear-gas, truncheons and stones. As panic took over, clashes between the army

and the protesters ensued, leading to casualties and injuries on both sides. Street riots broke out in several cities of Western Sahara.

In the weeks leading up to the November 8th break-down, Morocco refused foreign politicians, NGOs and media access to the camp, creating a full information black-out. Therefore, an exact figure on the number of victims does not exist, as independent observers were not allowed to access the area. It is likely that around 11 Moroccan police officers were killed.

During and after the violence on November 8th 2010 Moroccan security officials proceeded to arrest hundreds of Saharawis. Many prisoners remained in custody longer than 48 hours, and were held without being charged over months before released on provisional release.

The Group of “Gdeim Izik” remained in jail, and were transferred to Rabat for investigation by the Military Court of Rabat in 2013.

2. The prisoners and the charges against them

The accusations are related to (1) being part of a criminal organization, (2) violence towards police officers, (3) intentional/unintentional murder. The accusations are based on article 129, 130, 267, 271, 293 and 294 of the Moroccan penal code. The victims, that the “Group Gdeim Izik” are accused of murdering, are 11 policemen who died during the dismantlement of the camp site and during the riots that broke out in El Aaiún. The 11 victims remain unidentified.

All defendants maintain their innocence, professing that the real reason behind their detention is their activism for human rights, anti-discrimination and/or respect for the Saharawi people’s right to self-determination.

The accusations and charges are listed below, with parts of the prisoners’ testimonies from the Military Court in Rabat in 2013 (see point 3.1), including information about their arrest.

1. **Sidi Abdallah Abbahah (B’hah), born 1975. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death; with intent to kill and desecration of the corpses.

Sidi Abdallah was one of the main organizers of the camp Gdeim Izik and played a vital role in the camps survival. Sidi was arrested in the Linaach neighborhood in El Aaiún on the 19th of November, 2010. Sidi claims to have been kept blindfolded, handcuffed and naked throughout interrogations in the police station, had urine poured on him and was forced to stand up against a wall without moving. He claims to have signed the declarations and confessions under torture.

2. **Mohamed El Bachir Boutinguiza, born 1974. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal

organization; violence against public forces with the cause of death; with intent to kill and desecration of the corpses.

Boutinguiza took part of the protest camp Gdeim Izik where he acted as one of the security volunteers at the camp site. Boutinguiza was arrested on the 19th of November, 2010, in El Aaiún. Detained on November 19th of 2010, he reported at the Military Court in Rabat in 2013 that at moment of his arrest "the police forced my house entrance (...) and beat me with shoes, and later on I was tortured in many different ways". He claims to have signed the declarations and confessions under torture.

3. **Mohamed El Ayubi, born 1956. Sentenced to 20 years under provisional release due to his debilitated health condition by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Mohamed El Ayoubi suffers from a mental disorder which originated in early childhood, and was therefore provisionally released on December 13th, 2011, but still sentenced by the Military Court in Rabat in 2013. Mohamed was arrested on 8th of November 2010 at the camp site. Mohamed stated at the Military Court of Rabat in 2013 that at the day of his detention he saw his tent being invaded by a great number of military, claiming to have been raped, and violently beaten. Mohamed has difficulty speaking as a result of the torture inflicted upon him. He claims to have signed the declarations and confessions under torture.

4. **Ettaki Elmachdoufi (Machdoufi Ettaki), born 1985. Sentenced to time served by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Machdoufi Ettaki was arrested on 8th of November 2010 on the campsite. Ettaki stated at the Military Court of Rabat in 2013 to have been detained by eight authority agents while he was helping an old lady. Machdoufi states to have been brutally tortured and kept blindfolded, handcuffed and stripped of his clothes. Ettaki had to be transported to the hospital twice due to the brutal beatings. He claims to have signed the declarations and confessions under torture.

5. **Mohamed Bani, born 1969. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Bani was not a part of the protest camp Gdeim Izik, but had a lot of relatives at the camp site. He visited his family on Sunday November 7th, and was stopped when trying to leave. On November 8th, when trying to leave, the police arrested him, accusing him of running over an officer.

Bani worked at the Ministry of Infrastructure. Bani presented a document at the Military Court of Rabat in 2013 signed by his department director and fifteen fellow

employees stating that he was present at his workplace on Friday November 5th of 2010. The document was classified by the King's General prosecutor as irrelevant.

Bani was subjected to brutal torture. The wounds haven't healed and Mohamed continues to have problems resulting from a head injury. He claims to have signed the declarations and confessions under torture.

6. **Abdeljalil Laaroussi, born 1978. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Laaroussi was a part of the protest camp Gdeim Izik and a member of the Dialogue Committee which negotiated with the Moroccan authorities.

Laaroussi was arrested on the 13th of November in 2010, and taken to the police station in El Aaiún where he was brutally tortured, electro-shocked and threatened with rape. Laaroussi has still difficulty walking due to loss of balance. Laaroussi stated at the Military Court of Rabat in 2013 to have been at the hospital under the dismantlement of the camp. He claims to have signed the declarations and confessions under torture.

7. **Abdulahi Lakfawni, born 1974. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; and for violence against public forces with the cause of death, with intent to kill.

Lakfawni was at the Gdeim Izik camp and was part of the organization, where he worked in the security forces. On November 5th 2010, the governor of El Aaiún wanted to enter the camp, but was turned back by Lakfawni. It is claimed that this incident is the reason for his arrest and conviction. Lakfawni was arrested on 12th of November 2010. Abdulahi stated at the Military Court of Rabat to have been subjected to different types of brutal torture. He was kept blindfolded and handcuffed during the torture, deprived of sleep and food. He claims to have signed the declarations and confessions under torture.

8. **Ahmed Sbaai, born 1978. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Ahmed Sbaai is the founder of the Saharawi League for the Protection of Political Prisoners inside Moroccan jails. Sbaai was in prison in 2002 and in 2006 for his activism. Sbai stated at the Military Court in Rabat in 2013 to have been arrested on November 8th of 2010, during a family party in the Lirak neighborhood. He was beaten and intimidated during his interrogation. Sbai claims that he was kept blindfolded and handcuffed until he was referred to the military court of Rabat. He claims to have signed the declarations and confessions under torture.

9. **Sid´Ahmed Lemjeyid, born 1959. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal organization;

violence against public forces with the cause of death, with intent to kill.

Sid' Ahmed Lemjeyid is the president of CSPRON, the Committee for the Protection of Natural Resources in Western Sahara. Lemjeyid was arrested in 1999 for attending a protest in El Aaiún, and again in 2005. Lemjeyid was arrested on the 25th of December 2010. Lemjeyid stated at the Military Court of Rabat that when he was detained, he was taken to a place unknown, and spanked during an interrogation which only focused on political issues, without ever mentioning the Gdeim Izik camp. Lemjeyid states that he was tortured and arrested for being a Saharawi activist. He claims to have signed the declarations and confessions under torture.

- 10. Brahim Ismaili, born 1970. Sentenced to life imprisonment by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Brahim is the president of the Centre for Preservation of the Collective Saharawi memory. Brahim Ismaili claims that he is imprisoned due to the fact that he is a Sahrawi activist, and to have been already abducted and arrested in 1987, having passed 8 months at a secret prison at El Aiün. Brahim was arrested on November 9th of 2010 in his house in El Aaiún. After 7 months in the "Black prison" in El Aaiún he was released, but arrested again once outside the prison, and driven to Salé prison. He claims to have signed the declarations and confessions under torture.

- 11. Mohamed Embareh Lefkir, born 1978. Sentenced to 25 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Lefkir was part of a delegation of Sahrawi human rights defenders who had been invited to Algiers by the Front Polisario, where he told about the great protest that would take place. It is believed that this interview is the reason for his arrest and imprisonment. Lefkir claimed at the Military Court of Rabat in 2013 to have been kidnaped on the 11th of November 2010, by a group of civilian police officers using masks to cover their faces, at his uncle house, being beaten in front of his family. He was taken to the "Black prison" in El Aaiún, where he was kept until the 17th of June 2011. He was temporarily released but detained again once outside the prison walls. He claims to have signed the declarations and confessions under torture.

- 12. Larabi El Bakay, born 1982. Sentenced to 25 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, with intent to kill.

Bakay was a part of the protest camp Gdeim Izik and a member of the Dialogue Committee who negotiated with the Moroccan authorities. Bakay was one of the many responsables maintaining the order in Gdeim Izik. Bakay was arrested on September 9th of 2012, almost two years after the dismantlement of the Gdeim Izik camp. He claims to have signed the declarations and confessions under torture.

- 13. Enaâma Asfari, born 1970. Sentenced to 30 years by the Military Court in 2013.**

Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Asfari is the vice-president of CORELSO (Committee for Liberties and Respect for Human Rights in Western Sahara). Asfari has already been detained at Tan-Tan, in 2009, due to his peaceful activities in defence of human rights. Asfari claimed at the Military Court of Rabat in 2013 that he was already in prison at the date of Gdeim Izik dismantle. He was detained on November 7th in 2010, and maintained five days in an unknown location, where he was held blindfolded and handcuffed. He claims to have signed the declarations and confessions under torture.

14. Cheikh Banga, born 1989. Sentenced to 30 years by the Military Court in 2013.

Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Cheikh is a member of CODESA and President of the Saharawi Committee for Human Rights in Assa and AMDH. He was arrested and imprisoned two times in 2006 for his activism. Cheikh Banga was arrested November 8th in 2010 on the Gdeim Izik camp site. Banga was arrested upon arrival when he was bringing medicine to his aunt. Cheikh reported at the Military Court of Rabat in 2013 to have been tortured and ill-treated before being incarcerated in Salé II prison. He claims to have signed the declarations and confessions under torture.

15. Mohamed Bourial, born 1976. Sentenced to 30 years by the Military Court in 2013. Accused of participation in and aiding a criminal organization; and for violence against public forces with the cause of death, without intent to kill.

Bourial participated in the Gdeim Izik camp and was a part of the Dialogue Committee which negotiated with the Moroccan government. Bourial was arrested by the Moroccan army on November 8th in 2010 at the campsite. Bourial stated at the Military Court of Rabat in 2013 that a Moroccan official told him on November 7th that "we arrested Asfari". He claimed to have spent five days blindfolded, naked and undergoing brutal beatings with a steel cable. He claims to have signed the declarations and confessions under torture.

16. Mohamed Lamin Haddi, born 1980. Sentenced to 25 years by the Military Court in 2013. Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

It is believed that his arrest was linked to the assistance he had offered to two Belgian doctors, Marie-Jeanne Wuidat and Ann Collier, who were on a humanitarian mission in the occupied territories to provide medical assistance to Sahrawi victims of Morocco's repression in the Gdeim Izik camp. The Belgian doctors were expelled from El Aaiún. Mohamed Lamin Haddi was arrested by Moroccan secret service on November 20th, 2010, in El Aaiún. Haddi stated at the Military Court of Rabat in 2013 that he was being tortured within the court facilities. He reported to have been detained at El Aaiún, where he was psychically and psychologically tortured. He claims to have signed the declarations and confessions under torture.

- 17. Sidi Abderahmane Zayou, born 1974. Sentenced to time served by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Sidi did not participate in the Gdeim Izik camp but visited once. Sidi Abderahmane Zayou is the president of “Comité des Cadres Sahraouis”, which provided food and medicine to the camp. Sidi was arrested on November 21st 2010 at the airport of El Aaiún. Sidi claimed in the Military Court of Rabat in 2013 to have been arrested for his declarations to the international TV network Al-Jazeera. Sidi was tortured, and kept blindfolded and handcuffed during his detention. He claims to have signed the declarations and confessions under torture.

- 18. El Houssin Ezzaoui, born 1975. Sentenced to 25 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

El Houssin was a part of the protest camp Gdeim Izik where he was a member of the Dialogue Committee which negotiated with the Moroccan government. El Houssin was arrested around midnight on December 2nd, 2010, at the house of his wife's brother. El Houssin stated at the Military Court of Rabat in 2013 that he was not at Gdeim Izik during the dismantlement, but at the hospital where he was under internment. He furthermore testified that he had suffered under torture ever since his arrest. He declared to have been under every form of torture, stating that his health condition drastically worsened since his arrest, where he has been moved to the military hospital. He claims to have signed the declarations and confessions under torture.

- 19. Abdullahi Toubali, born 1980. Sentenced to 25 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Toubali was a member of the Dialogue Committee, which attempted to negotiate with the Moroccan authorities. Toubali was run over November 7th, 2010, on the eve of the camps dismantlement, and was taken to the hospital of El Aaiún. Abdullahi went home at 2:00am, November 8th, 2010. Abdullahi was arrested on December 2nd, 2010, accused of murdering a policeman on the 8th of November. Abdullahi stated at the Military Court of Rabat in 2010 that there are witnesses that can confirm that he was in fact at home at the time of the alleged crime. He stated to have been kidnapped, undressed, spanked, threatened to be raped with a lamp, and denied food. He claims to have signed the declarations and confessions under torture and whilst blindfolded.

- 20. Deich Eddaf, born 1978. Sentenced to 25 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Deich Eddaf was a member of the Dialogue Committee which negotiated with the Moroccan Government. Deich was arrested by the police on December 3rd of 2010.

Deich was brutally tortured, and spent his time in detention naked, blindfolded, handcuffed and deprived of sleep, food and water. He claims to have signed the declarations and confessions under torture.

21. **El Bachir Khadda, born 1986. Sentenced to 20 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Bachir is a member of the Saharawi Observatory for Human Rights in Western Sahara, and was imprisoned at an age of 21. Khadda reported at the Military Court of Rabat in 2013 to have been abducted at El Aaiún together with Mohamed Tahlil and Hassan Dah on December 5th, 2010. He was tortured for an unknown period, since he lost consciousness "due to the tortures". He was blindfolded and handcuffed throughout his detention. He claims to have signed the declarations and confessions under torture.

22. **Hassan Dah, born 1978. Sentenced to 30 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Hassan Dah is a human rights defender and connected to the Saharawi Observatory for Human Rights in Western Sahara. He spent 10 months in prison in 2010 for his political views. Hassan Dah took part in the Gdeim Izik camp, where he acted as a correspondent for the Frente Polisario's TV and radio service. Hassan Dah was arrested on December 5th 2010 with Mohamed Tahlil and Bachir El Khadda. Hassan stated at the Military Court in Rabat in 2013 to have been brutally tortured when detained in El Aaiún, at the gendarmerie as well as in the court facilities in Rabat. He also claims that all of his signatures were obtained under torture.

23. **Mohamed Tahlil, born 1981. Sentenced to 20 years by the Military Court in 2013.** Accused of participation in and aiding criminal organization; violence against public forces with the cause of death, without intent to kill.

Tahlil is the president of the Boujdour section of ASVDH (the Saharawi Association of Victims of Grave Human Rights Violations Committed by the Moroccan State). He's been imprisoned for his activism in 2005 and 2007. Tahlil was detained together with Bachir El Khadda and Hassan Dah on December 5th in 2010. Tahlil stated at the Military Court of Rabat in 2013 that he was never at Gdeim Izik neither was he part of the initiators of the camping. He stated to have been submitted to torture, also inside the court facilities, as well as to have signed all the confessions blindfolded and under torture.

24. **Mohamed Khouna Babait, born 1981. Sentenced to 25 years by the Military Court in 2013.** Accused of participation in and aiding a criminal organization; violence against public forces with the cause of death, without intent to kill.

Babait worked at the local administration in El Aaiún. After the violent dismantlement of the Gdeim Izik camp, Babait joined the demonstrations demanding the release of

the prisoners. Babait continued to participate in the protest marches, despite numerous threats from both his work place and from the authorities. Babait was arrested August 15th 2011. He reported at the Military Court of Rabat in 2013 to have been blindfolded and taken to a deserted place near Gdeim Izik, where he was undressed and violently tortured. He also denounced the tortures he went through on his way to Agadir, and then to the Salé II prison. He claims to have signed the declarations and confessions under torture.

The last of the original “Group Gdeim Izik”, is **Hassana Alia, born 1989. Sentenced to life *in absentia* by the Military Court in 2013.** Hassana was granted political asylum in Spain. Hassana Alia was not summoned to the proceedings at the Tribunal de Première Instance in Salé.

3. The previous legal proceedings

3.1. *The Military Court*

The Military Court of Rabat sentenced the 25 Saharawi’s on the 17th of February 2013. The trial held in the Military Court of Rabat was postponed twice prior to this. The reasons for these postponements remain unclear.

The 25 Saharawi’s were sentenced to harsh sentences (life, 20, 25 or 30 years). Machdoufi and Zeyou were released with time served. Observers (i.e. international observers which attended the proceedings) from the Military Court of Rabat report the use of torture both within the courtroom establishment and during the transportation back and forth from the prison.

The sole piece of evidence were statements given by the prisoners, which were extracted under torture. All the defendants testified to have been forced to sign, or put their fingerprints, on statements that they had not read in advance and often under violent torture, some whilst blindfolded. The defendants’ complaints regarding the evidence were ignored by the judge in court.

The only witness (i.e. there was only one) was unable to identify the defendants or to link them to the alleged acts of violence. None of the police officers were questioned about the circumstances of the violent acts. Similarly, none of the weapons connected to the criminal acts were linked to any of the defendants. The court rejected the defence’s demand for testing of traces of human DNA on the weapons.

Only days after the court’s ruling in February 2013, the group filed a request to appeal in front of the Court of Appeal.

3.2. *Decision from Court of Cassation*

The Moroccan Court of Cassation quashed the decision taken at the Military Court of Rabat in 2013, on September 21st 2016. The Court of Cassation referred the case to the Tribunal de Première Instance in Salé.

Tribunal de Première Instance in Salé is an appeal court, but since the decision from the Military Court of Rabat is null and void, the proceedings at the Tribunal de Première Instance in Salé is the *de facto* first instance.

3.3. The trial on the 26th of December at the Tribunal de Première Instance, Salé.

The trial for the “Gdeim Izik Group” was to be held at the Tribunal de Première Instance in Salé, and commenced at 10:00am on the 26th of December.

There were 24 on trial, while only 23 were present at court. The court decided that the trial had to be postponed until the 23rd of January 2017 as one of the accused (Mohammed Ayubi) was absent.

The first question that the court raised was related to partial status for the attorneys advocating on behalf of the victims (hereinafter “the civil party” or “attorneys advocating on behalf of the victims”), but the question was never ruled upon. After the court, had decided to postpone the trial, the defence raised questions regarding provisional release pending trial. The defence argued that the prior conviction was null and void, that the accused were innocent, and that further imprisonment constituted a violation of their right to freedom.

The court denied the defence to put forward arguments relating to the Convention against Torture and from the decisions made at the Committee against Torture on December 12th 2016 (CAT/C/59/D/606/2014). Their reasoning was that Moroccan law was in accordance with International law and that International law, and in special the CAT decision, was not relevant to the question put forward. The court ruled that none of the accused was to be granted provisional release pending trial.

The proceedings at the Tribunal de Première Instance in Salé held at December 26th 2016, constituted a breach of the right to a fair trial as put forward in article 14 of the ICCPR and by International law.

The prisoners are not yet proven guilty (i.e. The decision from the Court of Cassation). Their right to be regarded as innocent parties until proven otherwise has been severely violated. Secondly, the prisoners were not able to follow, or contribute in any way, in favour of their own defence, due to the fact that they were held in a “glass-cage” without being able to follow the proceedings.

4. The proceedings for the “Group Gdeim Izik”, 23rd to 25th of January 2017, Salé, Morocco

4.1. Tribunal de Première Instance de Salé

The proceedings against the “Group Gdeim Izik” was held in Tribunal de Première Instance de Salé in Rabat, Morocco on the 26th of December 2016, and commenced at January 23rd of 2017.

The Tribunal de Première Instance is organized by Law No 1-74-338 of July 15th, 1974. The court is competent to pronounce judgments in all matters, except in cases where law expressly

gives competence to another jurisdiction. The Court is regarded as formally independent.

4.2. The proceedings

The proceedings lasted for a total of three days. The court ruled on the third day that the proceedings will commence at March 13th of 2017.

4.2.1 Day 1: January 23th

At 10:45am the presiding judge, followed by five other judges, entered the courtroom and stated: “In the name of the king we open this court”.

The defendants were brought into to the courtroom in two groups. The first group entered the courtroom shouting “labadil labadil antakrir al massir” – the only solution is self-determination.

The judge called for respect for the court, and reminded everyone present that the court respects the rule of law. The second group did not arrive, and the president called for them. The second group shouted: “torture, torture, torture!” from the basement. It was made clear that the prisoners had been woken up at 4:00 am in the morning, and kept in an ice-cold basement until the court was opened.

The families of the accused were allowed to enter the courtroom (i.e. every Saharawi were prohibited from entering at the proceedings in December 2016). Protests emerged within the court facilities when the families arrived. The Saharawi’s called for the right to self-determination, whereas the Moroccans demanded conviction of the criminals and justice for the victims.

The defence demanded chairs for all of the accused, so they could be placed within the courtroom, and follow the proceedings. The defendants were ordered back into the glass-cage.

The presiding judge informed the court that the glass-cage had newly installed speakers inside of the “cage”, but the defendants were still prohibited from collaborating with their defence attorneys. Shortly after the prisoners were placed inside the glass-cage the defendants themselves made it clear that they could not adequately follow the proceedings, as the active parts did not sufficiently use the microphones. Despite of this, the prisoners remained inside the “glass-cage” for the whole three days. Regardless of the numerous complaints made by both the accused themselves and by the defence.

The defendants were furthermore deprived of their papers and pens, which they had brought from the prison to take notes from the proceedings. The defendants claimed that they needed their pens and papers to adequately follow the proceedings and to adequately answer the accusations put forward.

Mohamed El Ayubi was not present at the proceedings. The courtroom was informed that Ayubi was, due to his health condition, in hospital.

The prosecution reported that Mohamed El Ayubi had been informed of the proceedings through a distant relative. The prosecution insisted that this was adequate, meaning that Ayubi

had been sufficiently informed about the proceedings. The defence however, argued that this was not sufficient, and that Ayubi had the right to be informed of the trial in person. If the authorities were unable to get a hold of Ayubi, they had to forward the information to a close relative. However, it was pointed out by the defence that the public office clearly knew where he was.

The question that was raised was whether the group case was to be postponed due to the fact that one of the accused was missing. After a recess, the court ruled that the proceedings should commence without Ayubi, and that the case of Ayubi was to be separated from the rest of the group and held on March 13th of 2017.

After a break, the defendants refused to come back into the courtroom due to the fact that they were not given their pencils back. The court ruled that the 22 prisoners in the “glass-cage” were to be given, in total, three pens and three pieces of paper. Furthermore, the prisoners could only keep paper that were in compliance with the case put forward and that were relevant for the proceedings. The presiding judge would therefore go through all the documents. The judge pointed out that this was a “matter of security” since the prisoners could easily “kill someone” with a pen.

Since the presiding judge had ruled that the trial would commence, the defence argued that they needed more time to prepare their defence. They had not been given the chance to meet with their clients, despite numerous requests. Also, the defence had not been given access to all of the case documents. The defence therefore asked for 24 hours to prepare their defence alongside with their clients.

The defence was given “24 hours” until 10 am the next day. However, the time was then 5:40 pm, so in reality the defence was only given 16 hours and 20 minutes, including the night.

4.2.2 Day 2: January 24th

The court commenced at 10:45 am.

The defence started the proceedings. The defence claimed that they had not been given sufficient time to prepare their defence, where they had asked for and had been given 24 hours. The defence therefore argued that the proceedings should be postponed until 5:00 pm.

The president claimed that the defence should be satisfied with his ruling, as he had ruled in their favour, and had given them extra time.

Eênama Asfari then requested that he was to be given his pen and paper back, which were taken away from him the prior day. He shouted “the pen is my weapon”.

The president repeated his ruling, and declared that Eênama should be given his pen, and three pieces of paper. Eênama refused to receive the pen and paper, since his request concerned all the prisoners, and not just himself. He declared that all the prisoners are entitled to pen and papers so they could follow the proceedings adequately. Thus, none of the prisoners were given pens or papers.

The next question that was raised was whether the civil party was to be given a partial status in the proceedings. It was highlighted due to the fact that the civil party was given the case papers, without being a formal part of the proceedings.

The attorneys advocating on behalf of the victims argued for their case for approximately three hours, without interruption. They claimed that article 14 of the ICCPR also entails a fair trial for the victims, meaning that the victims are entitled to defend their rights in a criminal case. The victims were thus entitled to face the culprits. The civil party further argued that because the Kingdom of Morocco was superior and had the necessary jurisdiction, Morocco was entitled to judge their equals.

The defence argued that the victims were defended via the public office. Thus, the prosecution as a public office should protect the common interest, whereas the civil and the criminal case should be separated. The defence argued that the victims' right for compensation is first and foremost relevant after the accused are proved guilty.

The defence were interrupted numerous times, i.e. they were not able to speak as freely as both the prosecution and the civil party. It should be noted that the defence attorneys advocating on behalf of the accused consisted of several Saharawi lawyers and three French lawyers. The judge talked in a condescending manner to the Saharawi lawyers, and made jokes in the middle of the proceedings. The defence was throughout the trial prohibited from talking about the protest camp Gdeim Izik or the political background.

The court ended at 20:40.

4.2.3 Day 3: January 25th

The proceedings commenced at 10:30 am.

Defence Lawyer Lili started the proceedings by pointing out some main issues that should be dealt with by the judge: The fact that the accused still didn't have any writing material; the threats made against Abde Sbaai, the brother of the accused Ahmed Sbaai, inside the court building; the fact that Mrs. Claude Mangin, French citizen and wife of Mr. Naama Asfari was expelled from the country and had no authorization to attend her husband's trial and finally the fact that some members of ASVDH (a Saharawi organization legalized by the Moroccan government) were not allowed to enter the court building to attend the proceedings.

The defence of the accused continued the proceedings upon procedural matters. This raised questions about (1) the jurisdiction of the court, (2) documentation regarding the arrest and custody, (3) medical examination to prove the use of torture, and (4) witnesses.

One question raised in particular both discussions and protest within the courtroom. The French attorneys tried to bring forward the fourth Geneva Convention, but was prohibited when grand protests arose within the courtroom.

The civil party literally screamed out that the great Kingdom of Morocco has the supremacy over Western Sahara, and that the ID cards of the Saharawi prove that they are Moroccans (all Saharawi's are forced to have a Moroccan name and a Moroccan ID card, and were at the

start of the occupation deprived of their national identity). The civil party claimed that the French attorneys had no respect for the Kingdom of Morocco or this courtroom.

The presiding judge claimed that the international conventions was not legal instruments in his courtroom, and furthermore claimed that they could not be forwarded as legal sources in his courtroom. The presiding judge remained ignorant to the fact that the French attorneys were prohibited from presenting their case.

The defence argued that all of the documentations (i.e. documents relating to the arrest and length of custody) could not be used as evidence in the courtroom, as they were extracted through the use of torture.

The prosecution argued that torture had never taken place, and that claims about torture had never been forwarded from the prisoners. The prosecution further argued that the court had to trust public officials.

Regarding the CAT decision on the case of Eênama Asfari (see more in point 6.3.2.1), the prosecution argued that Eênama had never been tortured. Asfari had, after the CAT decision, been approached by two police officers who wanted Asfari to come with them to Casablanca. Eênama refused due to the fact that he wanted his defence attorneys to be present at the examination. The prosecutor claimed that the fact that Eênama would not go with two police officers for examination, proved that he was only making false accusations.

The civil party advocating on behalf of the victims supported the defence in their request for both witnesses and medical examinations, but claimed that all the documentations had to be put forward as evidence.

The Court ended at 11:20 pm.

4.3 The verdict

The court ruled that the Tribunal de Première Instance in Salé was competent and had necessary jurisdiction.

Also, the prisoners were to be given medical examinations, both physical and mental examination.

The court ruled that the defence could present all of the witnesses, excluding the Moroccan authorities and ex-ministers that had been in negotiations with the Gdeim Izik dialogue committee. Thus, the police and gendarmerie officers who drafted the “minutes” (documents relating to the arrest and custody), was convened. The documentation could furthermore be placed forward as evidence.

Furthermore, it was ruled to postpone the discussion upon partial status for the civil party, i.e. the attorneys advocating on behalf of the victims.

The court refused to grant provisional release.

The appeal for the “Group Gdeim Izik” will resume in Tribunal de Première Instance de Salé in Rabat, Morocco on the 13th of March 2017.

5. Principles for trial observation

5.1. *The Trial Observation Manual*

The right to observe trials stems from the general right to promote and secure the protection and realization of human rights.

According to the principles set out in the International Commission of Jurist’s *Trial Observation Manual* observations should focus on matters relating to judicial guarantees, as well as the right to a fair trial.

Generally, the observers have no role in evaluating the evidence and arguments put forward by the parties, or in weighing up the guilt or innocence of the accused. The observers should, however, examine two principles related to the submission of evidence that are especially important. The first is the principle of legal evidence, which aims at ensuring that evidence has been lawfully obtained in accordance with procedural norms. The second is the principle of legitimacy of evidence which aims to preclude evidence that has been obtained using methods prohibited under international law, such as torture or death threats.

The Manual also sets forth that observers may assess the substance and merits in a specific case, although under certain circumstances. The observer may evaluate the substance and merits, if a trial is brought against;

“human rights defenders, journalists and political or social opponents for the legitimate and peaceful exercise of their rights to promote and strive for the protection and realization of human rights their political rights and/or their freedom of conscience, expression and association. Such proceedings are generally brought up for reasons of political persecution (political trials) rather than to impart justice.”

As it follows from the “International Commission of Jurists, Trial Observation Manual for Criminal Proceedings” on page 21, the principle of observing the substance and merits, can furthermore be applied in cases of;

“Proceedings in which there is such a complete and blatant absence of proof against the defendant that the proceedings as a whole may be unfair. These kinds of proceedings are usually initiated for reasons other than the proper administration of justice. In such situations, trial observers will, as part of their assessment, need to evaluate whether sufficient evidence was presented by the prosecution”

5.2. *The Gdeim Izik trial is to be regarded as a political trial.*

As enlisted in point 1 and 2; The Gdeim Izik camp was a protest camp claiming the right to self-determination and socio-economic rights for the Saharawi people. The prisoners were all arrested in correlation with the dismantlement of the Gdeim Izik camp. The arrest of the “Group Gdeim Izik” should be regarded as proceedings brought up for reasons of political

persecution.

As it follows from point 2; the prisoners are all human rights defenders. Several of the prisoners served as leaders and spokespersons for the Gdeim Izik protest camp in 2010. Several of the prisoners are leaders of human rights and/or political organizations calling for the self-determination for Western Sahara. This political activism is to be regarded as the reason for the proceedings; rather than to impart justice.

Furthermore; the main evidence is, as it follows from the observation reports from the Military Court in Rabat, confessions extracted under torture. From the above mentioned; the proceedings as a whole may be unfair due to the complete and blatant absence of proof against the defendant. The observation will therefore evaluate whether sufficient evidence was presented by the prosecution.

As listed above; these proceedings are *“brought up for reasons of political persecution (political trials) rather than to impart justice”*, and I will therefore evaluate the proceedings on the grounds of assessing a political trial.

6. The legal framework

6.1. The legal framework when conducting a trial observation

In order to avoid possible challenges to the legal nature of the standard employed during the trial observation, observers should refer only to norms whose legal foundation is undisputed. When assessing the particular trial against the “Group Gdeim Izik”, the following norms constitutes the legal framework;

1. The Constitution of Morocco, the Criminal Code and Code of Criminal Procedure of Morocco;
2. The Human Rights treaties to which Morocco is a party;
3. International standards on human rights and administration of justice that are declarative in nature, and;
4. Norms of international customary law.

6.2. The Constitution of Morocco, the Criminal Code and Code of Criminal Procedure of Morocco, and the Human rights treaties to which Morocco is a party

Morocco is a monarchy with a bicameral parliament, and according to the Constitution an independent judiciary. In practice, the power of the King is seen to have few constraints.

As it follows from The Moroccan Constitution (adopted in 2011, hereinafter the "Constitution"), the judgments are delivered in the name of the King; and the judges are nominated by the King. Furthermore, the king has the power to confer pardon to a person at any stage of the proceedings.

The Constitution contains 21 articles on fundamental freedoms and rights. Articles 19 to 40 include all fundamental rights that are recognised universally. In this context, we can cite the

following examples: the right of equality between man and woman, the right to life, the right to physical integrity, freedom from torture, the right to be treated equally by the law, freedom from arbitrary arrest, the right to fair trial and presumption of innocence, the right to privacy at home and in correspondence, freedom of movement, the right to own property, freedom of opinion and expression, the right to access of information, freedom of association and assembly, the right to work, health, education and adequate living, the right to participate in cultural life, freedom of belief: The State shall guarantee the free exercise of religious practices (Article 3).

The Constitution thus entails and seeks to protect the basic human rights.

Morocco has furthermore ratified some of the most important international human rights conventions. Note that the Constitution does not entail any provisions confirming the supremacy of international treaties over domestic law.

Morocco has ratified the International Covenant on Civil and Political rights (ICCPR) of 1966 (ratified 1979), the International Covenant of Social, Economic and Cultural Rights of 1966 (ratified 1979), the Convention against Torture and Other Cruel, Inhumane, or Degrading treatment and Punishment of 1984 (1993), and the International Convention on the Elimination of all forms of Racial Discrimination.

6.3.1 Ratification is rarely followed by harmonization.

Ratification is rarely followed by harmonization of domestic law in accordance with the standards of the international conventions. As a consequence, local judges, who lack sufficient education in international human rights law, may not consider the enforcement of international standards to be a priority. Furthermore, the Constitution does not contain any provisions prescribing the supremacy of international treaties over domestic law.

The Human Rights Watch concluded in “World Report 2015: Morocco/Western Sahara” that:

“Morocco’s 2011 constitution incorporated strong human rights provisions, but these reforms have not led to improved practices, the passage of significant implementing legislation, or the revision of repressive laws.”

The United Nations Working Group on Arbitrary Detention (WGAD) concluded after visiting Morocco and Western Sahara in December 2013 that:

“The Moroccan criminal judicial system relies heavily on confessions as the main evidence to support conviction. Complaints received by the Working Group indicate the use of torture by State officials to obtain evidence or confessions during initial questioning Courts and prosecutors do not comply with their obligation to initiate an ex officio investigation whenever there are reasonable grounds to believe that a confession has been obtained through the use of torture and ill-treatment.”

6.4. Human Rights treaties to which Morocco is a party, and international standards on human rights and administration of justice that are declarative in nature, and norms of customary international law.

6.4.1 The right to a fair trial

The right to a fair trial is a fundamental safeguard to assure that individuals are not unjustly punished. The principle is indispensable for the protection of other human rights.

6.4.1.1 The Right to a Fair Trial after the UDHR

The right to a fair trial is one of the universally applicable principles recognized in the Universal Declaration of Human rights (UDHR).

According to Article 8 of UDHR everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 10 of UDHR states that 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.

Article 11 of UDHR prescribes that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence and that no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

6.4.1.2. The Right to a Fair Trial after the ICCPR

The main article concerning the right to a fair trial is enlisted in article 14 of the ICCPR. Article 14 of the ICCPR is regarded as the fundamental provision for the right to a fair trial, due to the fact that article 14 entails all the main principle or doctrines that together constitutes a fair trial.

A failure to uphold one principle will in the next instance affect the others. The principles are therefore linked together; if one collapses; the others will fall.

The principles outlined in article 14 of the ICCPR are put forward and analysed in point 8 of this report.

6.4.2 The Convention against Torture

The states that have ratified the Convention against Torture are, *inter alia*, obliged to exclude evidence obtained through torture as evidence in trials.

Article 1 of the Torture Convention gives the definition of torture:

“1. For the purposes of this Convention, the term "torture" means 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

Article 2 relates to a member state's responsibility to prevent the use of torture, where paragraph two and three notes that the prohibition of torture is absolute. It follows from *article 2* that:

“1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”

Furthermore, the torture convention, relates to the failure to investigate (art.12); violation of the right to complain (art.13); obligation to compensate and reparation (art.14); usage of confessions obtained through torture (art. 15); and inhumane treatment in detention (art. 16).

The prohibition against usage of confessions obtained through torture is set forth in *article 15* of the torture convention:

“Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

6.3.2.1. The Committee against Torture

The competence of the Committee against Torture is outlined in Part 2 of the Torture Convention, where it follows from art. 17 that

“there shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided.”

The Committee against Torture is a monitoring party and its legally role and its decisions must be linked to the member's state's commitment to prevent and investigate torture (art.2, art 12 and art. 13).

The Committee against Torture (CAT) may consider individual complaints alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States parties who have made the necessary declaration under article 22 of the Convention.

A key report that can be regarded as a legal binding source is the recent decision dated 12 December 2016 from the CAT regarding the case of Eênama Asfari (CAT/C/59/D/606/2014).

CAT clearly stated that Morocco was in violation of multiple articles listed in the Convention against torture. Such as; torture during arrest and interrogation (art.1); failure to investigate (art.12); violation of the right to complain (art.13); obligation to compensate and reparation (art.14); usage of confessions obtained through torture (art. 15); and inhumane treatment in detention (art. 16).

7. The question of jurisdiction and humanitarian law

7.1. *Western Sahara and its legal status*

Section 42 of the Regulations respecting the Laws and Customs of War on Land states that a territory:

"Is considered occupied when de facto placed under the authority of the enemy army. Occupation extends only to those territories where such authority is established and capable of exercising "

According to the ICRC in its commentary to article 43 of the Regulations on the Laws and Customs of War on Land:

"The occupation of war [...] is an essentially provisional state of affairs which does not deprive the occupied Power of its status or its sovereignty; It only impedes the exercise of its rights. "

The African Union published January 2017 a legal opinion at the request of the Kingdom of Morocco, in regard to the question of admission into the African Union. Morocco was admitted into the African Union on January 30th 2017, and is therefore *inter alia* bound to its legislation and legal opinions.

The office of the legal counsel of the African union commented on the legal situation of Western Sahara, where it is put forward in point 5 to 8:

"The presence of Morocco in Western Sahara territory is considered by the United Nations (UN) and the African Union as occupation (See UN General Assembly Resolution 34/37 of 1979 and various relevant OAU/AU decisions), which is against the founding principles and objectives of AU as articulated in Articles 3 and 4 of the Constitutive Act. Western Sahara remains on the UN list of Non-Self-Governing Territories after the abandonment of administrative responsibilities by Spain on 26 February 1976. As a non-self-governing territory, Western Sahara retains its separate and distinct status until such time that the people of that territory will have exercised their right to self-determination. (...)

It is also necessary to recall the European Court of Justice delivered its judgment on 21 December 2016, in the Appeal in Case C-104/16 P, (...) the Court also found that Western Sahara is a separate territory in North-West Africa, bordered by Morocco to the north, Algeria to the north-east, Mauritania to the east and south and the Atlantic to the west."

In light of the above mentioned factors the conclusion is that Western Sahara is a non-self-governing territory under occupation.

According to art. 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the people of Western Sahara (the Saharawi) have a right to self-determination, which can be fulfilled through the creation of a fully sovereign state, if they so choose. Under that principle, they also have the right to "freely dispose of their natural wealth and resources".

Furthermore; since Western Sahara is to be considered as occupied territory; international humanitarian law is applicable. The application of international humanitarian law entails procedural consequences for all of its members, including the competence of a Moroccan court house.

7.2 Occupation and the fourth Geneva Convention

Morocco ratified the Geneva Conventions on 26 July 1956 and Additional Protocols I and II on June 3rd 2011 to the occupied territories of Western Sahara. There is no doubt that Western Sahara was, at the beginning of the occupation by the Kingdom of Morocco, part of the Spanish territory, and hence part of a country party to the Fourth Geneva Convention.

The reasoning of the Fourth Geneva Convention that was applied in the Israel-Palestine matter, is likewise applicable when it comes to the occupation of Western Sahara. The International Court of Justice, in the famous judgment on the Israel-Palestine wall, showed that:

"101. In the light of the foregoing, the Court considers that the Fourth Geneva Convention is applicable in any territory occupied in the event of an armed conflict arising between two or more Contracting Parties. Israel and Jordan were parties to the convention when the armed conflict of 1967 broke out. The Convention was therefore applicable in the Palestinian territories prior to the conflict east of the Green Line and Israel, without there being any need to investigate the exact status of those territories. "

From this fact alone, it is indisputable that international humanitarian law in general and the Fourth Geneva Convention in particular are intended to apply. The Fourth Geneva Convention states that the convention is to be applied throughout the "duration of the occupation", as listed in article 6.

Consequently, despite the adoption of the ceasefire and the official end of military operations since 1991, the articles cited still applies to the occupied territories of Western Sahara.

Article 47 of the Fourth Geneva Convention, related to the Protection of Civilian Persons in

Time of War, provides:

"Protected persons who are in an occupied territory shall in no case be deprived of the benefit of this Convention in any way or by any change whatsoever resulting from occupation in the institutions or The Government of the territory in question, either by an agreement between the authorities of the occupied territory and the occupying Power, or again by annexation by the latter of all or part of the occupied territory. "

The question of the applicability of the law and jurisdiction of the occupier's courts to the nationals of the occupied territories is governed by article 64 and 66 of the Fourth Geneva Convention.

Article 64 of the Fourth Geneva Convention provides:

"The penal legislation of the Occupied Territory shall remain in force except to the extent that it may be repealed or suspended by the Occupying Power if such legislation constitutes a threat to the security of that Power or an obstacle to the application of this Convention. Subject to this last consideration and to the need to ensure the effective administration of justice, the courts of the Occupied Territory shall continue to function for all offenses under this legislation."

Article 66 of the Fourth Geneva Convention provides:

"The Occupying Power may, in case of infringement of the penal provisions promulgated by it under the second paragraph of Article 64, refer the accused to its military, non-political and regularly constituted courts, provided that they sit in the occupied country. Appeals tribunals shall preferably sit in the occupied country. "

Article 64 and article 66 enlists the principle of the application of the law in occupied territory, and by the jurisdictions situated in occupied territories. Thus, in ordinary the legislative competence rests with the authorities of the occupied territory. It follows from the Commentary by the International Committee of the Red Cross that the reasoning behind the principle is;

"Through the maintenance of national courts, protected persons will be judged by their natural judges, without being subjected to the misunderstanding or bias of persons representing a foreign mentality, traditions or doctrines. The maintenance of courts also means that judges must be able to rule independently. The occupier, therefore, can not, subject to the following, interfere in the administration of criminal justice or in any way act against judges who conscientiously apply the law of their country "

In this case, the Sahrawi law, as legislation of the occupied territory, must be applied. Moreover, in accordance with the aforementioned article, the courts located in Western Sahara will be competent to judge the present case. Sahrawi judges must be appointed to make up the court in order to guarantee their impartiality. This is in line with article 64 and the understanding enlisted by the International Committee of the Red Cross, which states that the occupier can not interfere in the administration of criminal justice in the occupied

territory.

The Court of Appeal of Rabat can only declare itself incompetent in favour of the jurisdictions sitting in El Aaiún, a court in the occupied territory, which applies the Saharawi law.

8. The fairness of the trial

Due process of law (or, the right to a fair trial) is grounded on two main elements: the right of all persons to equality before the law and the courts and the right of all persons to a public hearing with all due guarantees before a legally-constituted, competent, independent and impartial tribunal as well as the right to appeal.

It should be noted that failure to comply with international humanitarian in turn affects the observance of the other basic legal mechanisms that are meant to ensure the due process of law.

Thus; the principles that constitutes the right to a fair trial, are not sufficiently outlived without the application of international humanitarian law when it is meant to apply; hereafter that the case is referred to a court consisting of natural judges, where the accused can be trailed without being subjected to the misunderstanding or bias of persons representing a foreign mentality, traditions or doctrines. The fact that the proceedings is held in a Moroccan courtroom, with Moroccan judges, and controlled by Moroccan law, affects both the equality before the law, independence and the overall impartiality.

8.1 The right to equality before the law and courts

The right to equality before the courts as enshrined in Article 14 of the ICCPR has two basic aspects: equal access to the courts and equal treatment by the courts. This means that all persons are equal before courts and tribunals.

As highlighted earlier, the defence could not speak as freely as the opposing counsel. The defence were directly prohibited from mentioning the political issues, the Gdeim Izik camp, or the question upon jurisdiction. In comparison; the civil party were not prohibited, in any way, from speaking their mind. One of the Moroccan lawyers at one point, directed towards the Sahrawi lawyers, stated: “Don't stand too close to me! I am afraid of you! Thank God I wasn't at the Gdeim Izik camp - if I was - I would be dead too”. The judge remained ignorant to this direct discrimination.

The principle entails that national legislation should prohibit any type of discrimination and guarantee everyone equal and effective protection against discrimination on any ground such as race, colour, ethnic origin, language, sex, gender, sexual orientation, gender identity, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status.

As it follows, the opposing counsel openly harassed the defence attorneys. It was clear that the discrimination was based on race and national origin. A symbol of the discrimination is

the fact that civil party (which were all Moroccan lawyers) were allowed to bring water into the courtroom. Everyone else was deprived of their water upon entrance.

8.2 Independence and impartiality

By virtue of Article 14, subparagraph 1 of the ICCPR, the requirement of independence and impartiality serves to safeguard the integrity of the judiciary and to ensure that judges base their judgments solely on the merits of the case before it according to law.

When assessing the principle of independence and impartiality one factor to take into account is the separation of powers and the relationship between the judiciary and the prosecution.

The principle of independence and impartiality is a safeguard when ensuring that a trial and its ruling is based on evidence and legal provisions. At the case of the “Group Gdeim Izik” politics dominates the courtroom, and the court facilities are characterized by grand demonstrations both inside and outside.

As it follows from point 6.2, Morocco does not in general respect the rule of law. The Moroccan legal system relies heavily on confessions obtained through torture, and political prisoners are often released after being pardoned by the King. In whole, it may seem as if justice is taken out of the courtroom, and into to the hands of the king.

When communicating with the families of the prisoners it becomes clear that the prisoners have difficulties believing they will be given a fair trial. As such, when all hope is shattered, the prisoners bring the politics into to the courtroom. They shout for self-determination and wear their traditional costume, knowing that this statement most likely will give them harsher penalties than if they refrained.

8.3 Right to defense and right to be informed promptly of the charge

Under international standards, anyone arrested or detained has the right to be assisted by a lawyer without delay and to communicate and consult with his lawyer without interception or censorship and in full confidentiality. This right may be delayed only in exceptional circumstances and must comply with strict criteria determined by law. In any event, the person deprived of liberty should have access to a lawyer within 48 hours of their arrest or detention.

Several factors can be put under the loophole when it comes to the right to defence. Firstly, the prisoners were detained from communicating with their defence attorneys. The defence were prohibited, after numerous requests, from visiting their clients and to plan their defence strategy.

Secondly, the accused were deprived of their pens and papers. The accused could not take notes from their own proceedings. They were locked inside the “glass-cage”, and were *de facto* prohibited from following their own proceedings.

Thirdly, the accused remained in custody for longer than 48 hours without being presented in front of a judge. Several of the accused were abducted, tortured, and held in locations

unknown for a long period of time, clearly violating the time limit of 48 hours.

8.4 The right to be tried without unfair delay

Pursuant to article 14, subparagraph 3 (c), of the ICCPR, everyone has the right to be tried without undue delay. Undue delay has to be assessed on the merits of each specific case, considering the complexity and the special circumstances of each case.

As it follows from point 3, where the previous legal proceedings are highlighted, the prisoners have remained in prison for 6 years without being found guilty. As it follows; the prisoners have been deprived of their freedom for 6 years, without a fair trial and without being found guilty. This is at the best a breach of the right to be tried without unfair delay, but also a breach to the right to freedom.

This time span is to be regarded as undue delay, whereas neither the complexity or the special circumstances entails that the process of investigation should take 6 years.

8.5 The right to a public hearing

A decision not to hold a public hearing needs to be taken before the hearing and may only be granted under specific circumstances. If it is still, when the hearing is ongoing, unclear whether the hearing is public or not, and if some people are not let into the courtroom, the hearing does not raise to the standards of international law.

All Saharawis wanting to attend the trial had difficulties entering the courtroom. Many of the family members were prohibited from entering upon arrival. It was therefore only a small number of the family members who actually entered the courtroom. It is therefore from this fact alone clear that the hearing does not raise to the standard of international law.

Abde Sbai (the brother of Ahmed Sbai) was allowed to enter on the first day. Abde Sbai was approached and surrounded within the court facilities by a dozen police officers. He was told to go with them, outside of the courtroom. Once outside he was told to leave, or be placed inside of a body bag. Abde Sbai therefore left the courtroom, and did not try to enter on the following days.

Laila Fakhouri acted as my translator during my stay in Morocco. Laila had difficulties with entering the courtroom each day, and was told that she was on a “non-enter-list”. The police in control stated that the reason for the exclusion was the fact that Laila is “Sahrawi”. I therefore spent around one or two hours each day arguing with the police in control, demanding that Laila, as my translator, were to access the courtroom. Laila entered the courtroom each day. Laila has nevertheless been followed by the police ever since my departure, and has on several occasions been approached by the police without any apparent reason.

8.6 Right to interpretation

The right to interpretation as contained in international treaties, concerns the right of the accused to have the trial translated into his or her mother-tongue or another language that the defendant may understand.

The Sahrawis speak Hassaniya, a particular Arabic dialect. The proceedings should therefore be translated into Hassaniya, which is the defendant's mother-tongue.

The presiding judge claimed that the official language in Morocco is Arabic, and that every Moroccan speaks their own language. The proceedings were therefore never translated. Thus, the right to interpretation is violated.

8.7 The principle of equality of arms

The principle of equality of arms stems from the right to equality before courts as established in Article 14 § 3 (b) of the ICCPR. This implies that all parties to a trial should have the same procedural rights in order for a trial to be fair. The principle of equality of arms requires that the parties can contest the arguments and evidence presented against them.

As it follows from point 4, the proceedings contained three parties. The defence had to defend themselves from two sides; (1) the prosecution, and (2) the civil party. As it follows from the summary of the proceedings; the civil party is not a formal party of the proceedings since the presiding judge has refrained from ruling on the matter. Nevertheless, the civil party were given the right both to litigate in front of the court, and to receive the case documents, and is there *de facto* an active part of the proceedings.

We therefore have a case of “two against one”. In light of the fact that the accused are not yet proven guilty, the civil and the criminal case should be separated, and the victims should seek compensation only after the accused have been proven guilty.

That the proceedings should be separated is supported by the fact that the defence are not allowed to speak as freely, and are constantly interrupted during their proceedings. As it follows; the principle of equality of arms is severely breached, where the defence have difficulties with laying out a proper defence strategy due to the fact that they are constantly being stopped. The defence are therefore not able to contest the arguments and evidence presented against them.

Furthermore, it was made clear that the defence of the accused had not been given access to see the full contents of the case file. To not be able to see the content of the case file is a clear breach of the principle of equality of arms.

8.8 Right to call and examine witnesses

It is a crucial aspect of the right to defence to be able to question the evidence from the other side and to cross-examine witnesses presented from the other side.

The defence of the accused were given the right to present several witnesses. The court refused “the political witnesses”, thus the leaders that were in negotiations with the Gdeim Izik camp cannot be presented as witnesses.

On the other hand, the defence, were given permission to assemble the police officers that conducted the arrest. In that regard, they have been given the chance to question the documentation upon the arrest and custody.

8.9 The presumption of innocence

The principle of presumption of innocence, as codified in article 14 of the ICCPR, is a fundamental part of the right to a fair trial. The presumption of innocence is an absolute right which can never be derogated from.

The prisoners are not yet proven guilty, and they have the right to be presumed innocent. This right is breached at the outmost expense due to the fact that the prosecution actually litigates in the media. The media is overflowing of propaganda in the weeks following up to the trial; portraying the accused as terrorists and violent killers.

Numerous consequences flow from the guarantee of innocence, including the accused's right to remain silent and not to be compelled to make a confession and the principle that the burden of proof should lay with the prosecution. It is therefore of outmost importance that the principle of burden of proof is applied when the court commences the trial on the 13th of March 2017.

8.10 The right not be compelled to confess guilty or to testify against oneself and exclusion of evidence elicited by illegal means, including torture or ill-treatment.

Article 293 of the Criminal Code of Procedure prohibits the use of "confessions" obtained through torture and other ill-treatment, stating that a "confession" obtained through "violence or coercion shall not be considered as evidence by the court". In a report from the ICJ the ICJ states that this "article remains largely disregarded by Moroccan courts, in particular in cases related to 'terrorism'".

With regards to the "Group Gdeim Izik", several reports conclude that all of the prisoners have been subject to comprehensive torture both during detention and during the imprisonment. The reports also conclude that the confessions used as evidence in Rabat Military Court on the 17th February 2013 were obtained through torture.

From the Military Court of Rabat in 2013, all of the prisoners claimed to have signed the confessions and statements under torture. Furthermore, the CAT decision (CAT/C/59/D/606/2014) clearly states that Eênama Asfari has suffered under violent torture, and that the government has refrained from investigating. The Court on the other hand refused to regard the CAT decision as evidence, or in any way as a legal document.

As mentioned above, the main evidence used against the prisoners in the Military Court of Rabat in 2013 was evidence obtained through torture. This evidence is illegal, and the usage is a direct violation of Morocco's international commitments, and is alarming news for the following proceedings.

8.11. Circumstances surrounding the trial

The case of the "Group Gdeim Izik" is a case of great political importance. It is said that the Gdeim Izik camp started the Arab spring in 2010, when thousands of Sahrawi's demanded their right to self-determination in a peaceful protest in the middle of the desert. Thus; the case draws a lot of attention, both from the international community, the Moroccan population and from the Sahrawi's.

On the first day of the trial we were a total of 23 Norwegians observing the trial of the “Group Gdeim Izik”. Two of my colleagues were Hans Inge Alander and Diego A. Vaula Foss. Mr. Alander and Mr. Foss travelled on Wednesday January 26th to El Aaiún, which is the capital of Western Sahara. They were stopped at the El Aaiún airport, and transported back to the airport in Casablanca. They were detained at the airport for three days, where they were kept isolated without food and water on the first day. It is believed that the reason for their expulsion is their attendance at the trial for the “Group Gdeim Izik”.

The Court facilities are guarded by a huge number of military forces, closed down with fences. Upon entrance one has to go through three “checkpoints”, full body search and give away all technology (i.e. phones, computers, cameras) and water upon arrival. On the other hand, both Moroccan journalists and Moroccan lawyers are not deprived of either their technology devices or their water upon arrival.

Demonstrations are held just outside of the courtroom. The Saharawi’s were given a place (fenced in) in the middle of the parking lot, whereas the Moroccans were surrounding them on every side (also fenced in). The Moroccans had four speakers, where they played both music (the national anthem etc.) and held appeals. The Saharawi’s were placed in the centrum, without the same means, and were constantly approached by the police, and items were thrown at them (such as bottles etc). On the first day, the Sahrawi demonstrators had to leave the premises, due to the fact that they were attacked by the Moroccans.

9. Conclusion and last remarks

As highlighted in point 7, Western Sahara is to be regarded as a non-self-governing territory under occupation. The Commentary by the International Committee of the Red Cross highlights that the purpose of the Fourth Geneva Convention is to make sure that

“protected persons will be judged by their natural judges, without being subjected to the misunderstanding or bias of persons representing a foreign mentality, traditions or doctrines.”

One should be prosecuted and tried by its equals, without the fear of being prosecuted for political reasons or by a court that is biased. As it follows from my observations, the defence were not given the right to speak as freely as the opposing counsel, and the proceedings as a whole may be unfair, due to a blatant absence of proof. The case of the “Group Gdeim Izik” highlights the need for the usage of the Fourth Geneva Convention, and symbolises what happens when international humanitarian law is disregarded.

As it follows, the conducting of the trial constitutes a breach of the fourth Geneva Convention, whereas the Tribunal de Première Instance in Salé does not have the jurisdiction to rule upon the matter. When the Geneva Convention was raised, and occupation of Western Sahara was mentioned, demonstrations within the courtroom arose, whereas the judge remained ignorant to the fact that the defence of the accused was prohibited from making their case.

Furthermore, the main evidence against the accused are documents and confessions obtained through violent torture. This evidence is illegal, and the usage constitutes a clear breach of the Torture Convention. When commencing the proceedings on March 13th, it is crucial that the judge upholds the principle of burden of proof, that should lay with the prosecution, where the accused has to be found guilty beyond reasonable doubt.

In conclusions, it should be noted, that Morocco does not in general honour its international agreements and obligations. At one point the judge stated related to the report from the UN Committee against Torture dated 12 December 2016 regarding the case of Eênama Asfari:

“The international agreements are not a legal binding instrument in my court room, and I do not regard the decision from the Committee against Torture as any legal binding evidence”.

From this statement alone, it is clear that the Moroccan legal system does not respect its international commitments. It is thus up to the international community to make sure that they do.

Written by:

**Tone Sørffonn Moe
Bergen, Norway / February 2017**

