



Swedish Section of the International Commission of Jurists

TRIAL OBSERVATION REPORT

**FROM THE PROCEEDING BEFORE THE COURT OF
FIRST INSTANCE, AIN SEEBA, CASABLANCA,
MOROCCO**

BROUGHT AGAINST

**BRAHIME DAHANE, ALI SALEM TAMEK, AHMED
ENNASIRI, DEGJA LECHGAR, YAHDID TERROUZI,
SALEH LEBEIHI and RACHID SGHAIR**

‘The Group of 7’

Case Number 8241-10-2010

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Executive Summary

During the period of October-December 2010, seven trial observers were commissioned by the Swedish Section of the International Commission of Jurists to observe three trials in Casablanca, Morocco, all three regarding the same case brought against seven defendants of Sahrawi ethnicity (the so called ‘ Group of 7’).

The seven defendants were arrested upon their return to Casablanca from a visit in the Sahrawi refugee camps in Tindouf, Algeria and were accused at before the military tribunal in Rabat for ‘having undermined Moroccan state’s security’ and treason. After eleven months the military tribunal established that it did not have jurisdiction over the case and that evidence were lacking, thus the case was transferred to the civil court of first instance in Casablanca with the charges consisting of ‘crimes against the internal safety of the Moroccan state’. After their arrest, the defendants awaited trial for almost twelve months. Three of them still remain in pre-trial detention.

All of the observed trials were postponed. The reasons for postponing were violent disturbances in the courtroom and on occasion the absence of the accused, due to the alleged delayed transport from the detaining prison to the court at the scheduled time.

With regard to the trial and the circumstances under which the trials were held, the Observers conclude that the following can be established; a breach of impartiality of the trial, the undermining of the defendants right to a public and transparent hearing, the exceeding of the standards for the right to be tried without undue delay, threats against the presumption of innocence and the contravening of the principle of equality of arms. The assessment of the trials raises serious concern whether the trials were conducted in a manner consistent with the principle of the right to a fair trial regarding the case against the seven defendants.

The report is based on the observations made by the Observers regarding the factual circumstances before, during and after the planned trial.

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INTRODUCTION

1. The Swedish section of the International Commission of Jurists (hereinafter ICJ Sweden) commissioned seven Observers to monitor the trial conducted at the Court of First Instance in Ain Seeba, Casablanca, Morocco, brought against the defendants Brahime Dahane, Ali Salem Tamek, Ahmed Ennasiri, Degja Lechgar, Yahdid Terrouzi, Saleh Lebeihi and Rachid Sghair (hereinafter ‘the Group of 7’), all of Sahrawi ethnicity. Two Observers, Ms. Hanga Sántha and Mr. Thomas Främby were commissioned to observe the trial of the 15th of October. The trial was postponed, hence ICJ Sweden commissioned three Observers, Ms. Cecilia Asklöf, Ms. Ylva Lennartsson Hartmann and Mr. Thomas Främby to observe the trial of ‘the Group of 7’ that was going to be held the 5th of November. The trial got postponed once again. Ms. Caroline Mitt-Holm and Mr. Urban T:son Nyström were commissioned to observe the trial of the 17th of December. The trial was postponed a third time.
2. In the framework of ICJ Sweden’s work, the Swedish Section conducts observations of trials of Sahrawis. The aim of assessing trials relating to Sahrawis is to monitor the respect of their human rights since they are considered particularly exposed to possible violations. This delimitation of trials is done due to financial limits. The selection of this particular trial stems from several reasons. First, to endeavour the protection of the rights of the accused and to advance the cause of the right to a fair trial in the country selected. Second, the anticipated irregularities in the conduction of the trial were taken into consideration at the selection process. Third, there are seven defendants widening the scope of the trial (for a more detailed description of the defendants see below). Fourth, all of the defendants are involved in activities relating to human rights. Fifth, defendant Brahime Dahane was awarded the Swedish government’s prize for humanitarian work and initiatives in the name of democracy, Per Anger Prize, in 2009. This conveys a particular Swedish interest in the outcome of the trial.
3. As mentioned in the previous paragraph, Brahime Dahane is a recognized human rights defender. Mr. Dahane is the President of the Sahrawi Association of Victims of Grave Human Rights Violations Committed by the Moroccan State (ASVDH). He has been subject to forced disappearance during three years and seven months. Ali Salem Tamek is the vice-president of Collective of Sahrawi Human Rights Defenders (CODESA). Mr. Salem Tamek has also been active in Moroccan trade unions. Ahmed Ennasiri is a member of the Sahrawi Committee for the Defense of Human Rights in Smara. Mr. Ennasiri has been subject to forced disappearance for a period of 18 months. Degja Lechgar is a member of the ASVDH and the Committee for the Defence of the Right to Self-determination for the People of Western Sahara (CODAPSO). Ms. Lechgar has been subject to forced disappearance during eleven years and two months. Mr. Rachid Sghair is a member of the Committee Against Torture in Dakhla. Mr. Yahdid Terrouzi and Mr. Saleh Lebeihi are human rights defenders.

An *Ordre de Mission* for each Observer was issued by the ICJ Sweden (Appendix I), stating the purpose of the mission.

4. In sum, the Observers became aware of the following:

- i. ICJ Sweden was notified about the approaching trial against the ‘Group of 7’ through email. The defendants had been arrested on the 8th of October 2009 immediately after their return from a visit in the refugee camps in Tindouf, Algeria, accused of ‘undermining Moroccan state’s security’ and treason according to Article 190-193 in the Penal Code of Morocco.
 - ii. According to information provided by two of the defendants, Mr. Rachid Sgnaïr and Mr. Yehdid Teruzzi, the defendants were arrested at the Mohammed V Airport of Casablanca, where all their documents were confiscated. They were transferred to an unknown place with their eyes blind-folded and hands tied behind their backs.
 - iii. The defendants had been referred to a military court. On 21st of September 2010, after the case having been under prolonged investigation for nearly twelve months, the Military Tribunal in Rabat declined jurisdiction and referred it to the Civil Court of Casablanca, charged with ‘damage to internal safety of the state’ under articles 206 of the Moroccan Penal Code.
5. The trial was to be held on the 15th of October. However the trial was postponed to the 5th of November, due to the absence of the accused, three of the accused were detained in the prison of Salé in Rabat and did not get transported to the Court in right time, the remaining four were not informed about the trial’s cancellation. On the 5th of November the trial was postponed again due to violent disturbances in the Courtroom caused by the civil audience and the Moroccan lawyers,¹ to the 17th of December. The trial of the 17th of December was also cancelled because of the same reasons. This is why ICJ Sweden is presenting the observations of these three trials in the same report.
6. This report focuses exclusively on the proceedings and procedures at the Court of First Instance of Ain Seeba during the 15th of October, the 5th of November and the 17th of December. Moreover, it reviews the Moroccan judiciary in connection to the proceedings. It studies the trial’s compliance with international standards of the right to a fair trial. It briefly mentions the background to the human rights issues in the context but does not analyze the human rights issues outside the mandate of the mission.
7. The Observers note that the general situation of violent disturbances of the trial, the commotion witnessed in and around the court, the continuous postponement of it and

¹ The ICJ-S Observers recognized the Moroccan lawyers by their distinctive dress code, a black robe with white details.

the more than one year pre-detention of three of the defendants, raise serious concerns of human rights violations and of the deficiency of the Moroccan judiciary system.

8. This report expresses solely the views of the Observers in their capacity of independent trial Observers.

I. BACKGROUND

The International Court of Justice stated in an advisory opinion in October 1975 that no legal ties of territorial sovereignty existed between the territory of Western Sahara, the Kingdom of Morocco (and of Mauritania).² In November 1975, a month after the advisory opinion was delivered Morocco annexed the northern two-thirds of Western Sahara and four years later, after the withdrawal of Mauritania, the whole territory. The United Nations (UN) has since then adopted repeated resolutions regarding the right of Western Sahara to self-determination. Western Sahara is furthermore included in the UN list of non-self-governing territories. In a letter from the Under Secretary-General for Legal Affairs, Mr. Hans Corell, to the President of the Security Council, Mr. Corell points out that the territory of Western Sahara is a non-self-governing territory since no transfer of the sovereignty had been made by Spain, the former colonial power.³ In spite of the abovementioned facts, Morocco claims sovereignty over the territory and administers it as if it were part of its national territory.

A. The Human Rights Situation in Western Sahara

The restriction on rights and the violation of human rights is a matter of serious concern in the territory of Western Sahara. Numerous human rights NGO's such as Amnesty International and Human Rights Watch have voiced concerns about the human rights situation.⁴ In April last year the Secretary-General of the United Nation, Mr. Ban-Ki Moon expressed concern about the violations of human rights in Western Sahara.⁵ The ongoing violations include repression of the right to speak, assemble and associate in the context of the right to self-determination for Western Sahara and on behalf of the Sahrawis' human rights. Repression is carried out by means of arbitrary arrests, unfair trials, restriction on movement, association and assemblies and through excessive police violence that goes without investigation or punishment. Sahrawis claiming self-determination are oppressed by Moroccan authorities by the rather frequent use of penalizing what is considered to be an "affront against the territorial integrity of Morocco".⁶

² International Court of Justice, Advisory Opinion of 16 October 1975 concerning Western Sahara, para. 162.

³ Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161.

⁴ See for instance Human Rights Watch, *World Report 2010 - Morocco / Western Sahara*, 20 January 2010, Amnesty International, *Morocco must end harassment of Sahrawi activists*, 9 April 2010.

⁵ UN News Service, Secretary-General voices concern about human rights in Western Sahara, 23 April 2010.

⁶ Human Rights Watch, *Human Right in Western Sahara and in the Tindouf Camps*, 2008, p.2.

The mandate of the United Nations Mission for the Referendum in Western Sahara (MINURSO) is repeatedly extended but the demand for inclusion of the monitoring of human rights into the mission's mandate was yet again declined.

B. Human Rights Conventions

Morocco has ratified some of the most important international human rights conventions. Only those that fall within the scope of the right to a fair trial will be mentioned in this report. Morocco has, amongst others, ratified the International Covenant on Civil and Political Rights of 1966 (ratified 1979), the International Covenant on Social, Economic and Cultural Rights of 1966 (ratified 1979) and the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment and Punishment of 1984 (ratified 1993). Nevertheless, it has been held that ratification is rarely followed by the harmonization of domestic Moroccan law in accordance with the standards of the international conventions.⁷ As a result, local judges, who lack sufficient education in international human rights law, might not consider the enforcement of international standards to be a priority. In this regard it must also be noted that the Constitution does not entail any provisions confirming the supremacy of international treaties over domestic law. In addition, the government's refusal to allow treaty bodies to hear individual complaints has obstructed the impact of the international conventions. For instance, Morocco has not yet ratified the optional protocol of the International Covenant on Civil and Political Rights, which gives the Human Rights Committee jurisdiction to hear individual complaints regarding alleged breaches of the rights set forth in the Covenant.⁸

C. Impartiality of the judiciary in Morocco

In an earlier trial observation report dated 28th of May 2010, trial Observers from ICJ Sweden has presented their view of the impartiality of the Moroccan judiciary, generally speaking.⁹ The report focuses on the criteria for appointment, remuneration, promotion of and disciplinary measures taken against Moroccan judges, as established by Moroccan law.

In short, the Observers came to the following conclusion. The fact that the king, i.e. the executive, presides over the High Judicial Council, which is competent in matters regarding both the promotion of judges and disciplinary actions to be taken against them, raises serious concerns about the independence and impartiality of the Moroccan judiciary. By virtue of Article 14 subparagraph 1 ICCPR, Moroccan courts do not qualify for the term "independent tribunal", as defined in the UN General Comment on the right to equality before courts and tribunals and to a fair trial (number 32).

⁷ Abdelaziz Nouaydi, Morocco – The Imperative of Democratic Transition in Av' Abd Allāh Aḥmad Na' im (ed.), Human rights under African constitutions: realizing the promise for ourselves.

⁸ United Nations Treaty Collection, May 2010.

⁹ The report, written by Ms. Asklöf och Ms. Sántha and dating from 28 May 2010, can be ordered from the ICJ Sweden secretariat at the following address: secretariat@icj-sweden.org

This report does not seek to reiterate the contents of the earlier report. Wherever the impartiality of the judiciary is invoked in the present report, comments are initiated by findings in the context of the trial observation.

D. Proceedings Before the Military Tribunal

Initially, the defendants were to be prosecuted by a Moroccan military court, suspected for having threatened Morocco's territorial integrity and the external safety of the Moroccan state.

The proceedings before the Military Tribunal are part of the chain of events, which should be analyzed, given that the right to a fair trial should be perceived as a whole.¹⁰ This is illustrated by the fact that it is possible to derogate from some of the provisions of the right to a fair trial but not to make a general reservation to the right as a whole.¹¹ Moreover, the defendants believed during almost a year (October 2009 – September 2010) that they were going to appear before a military tribunal, accused for having violated Articles 190-193 of the Moroccan Penal Code.

Section II : Des crimes et délits contre la sûreté extérieure de l'Etat

Article 190:

Est coupable d'atteinte à la sûreté extérieure de l'Etat tout Marocain ou étranger qui a entrepris, par quelque moyen que ce soit, de porter atteinte à l'intégrité du territoire marocain. Lorsque l'infraction a été commise en temps de guerre, le coupable est puni de mort. Lorsqu'elle a été commise en temps de paix, le coupable est puni de la réclusion de cinq à vingt ans.

Article 191:

Est coupable d'atteinte à la sûreté extérieure de l'Etat, quiconque entretient avec les agents d'une autorité étrangère des intelligences ayant pour objet ou ayant eu pour effet de nuire à la situation militaire ou diplomatique du Maroc. Lorsque l'infraction a été commise en temps de guerre, la peine est celle de la réclusion de cinq à trente ans. Lorsqu'elle a été commise en temps de paix, la peine est celle de l'emprisonnement d'un à cinq ans et d'une amende de 1 000 à 10 000 dirhams.

¹⁰ *Bykov v. Russia*, European Court of Human Rights, Appl. no. 4378/02, 10 March 2009, Strasbourg, § 89-90 e.g.

¹¹ General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 52nd session 1994, CCPR/C/21/Rev.1/Add.6, 4th of November 1994.

Article 192:

Est coupable d'atteinte à la sûreté extérieure de l'Etat:

1. tout Marocain ou étranger qui, dans un but autre que celui de le livrer à une autorité étrangère ou à ses agents, s'assure, par quelque moyens que ce soit, la possession d'un secret de la défense nationale ou le porte, sous quelque forme et par quelque moyen que ce soit, à la connaissance du public ou d'une personne non qualifiée;

2. tout Marocain ou étranger qui, par imprudence, négligence ou inobservation des règlements, laisse détruire, soustraire ou enlever, en tout ou en partie, et même momentanément, des objets, matériels, documents ou renseignements, qui lui étaient confiés, et dont la connaissance pourrait conduire à la découverte d'un secret de la défense nationale, ou en laisse prendre, même en partie, connaissance, copie ou reproduction;

9. tout Marocain ou étranger qui, sans autorisation préalable de l'autorité compétente, livre ou

communiqué à une personne agissant pour le compte d'une autorité ou d'une entreprise étrangère, soit une invention intéressant la défense nationale, soit des renseignements, études ou procédés de fabrication se rapportant à une invention de ce genre, ou à une application industrielle intéressant la défense nationale.

Lorsque les infractions prévues aux alinéas précédents sont commises en temps de guerre, la peine est celle de la réclusion de cinq à trente ans.

Lorsqu'elles sont commises en temps de paix, la peine est celle de l'emprisonnement d'un à cinq ans et d'une amende de 1 000 à 10 000 dirhams.

Article 193:

Est coupable d'atteinte à la sûreté extérieure de l'Etat:

1. tout Marocain ou étranger qui s'introduit sous un déguisement ou un faux nom, ou en dissimulant sa qualité ou sa nationalité, dans une forteresse, un ouvrage, poste ou arsenal, dans les travaux, camps, bivouacs ou cantonnements d'une armée, dans un bâtiment de guerre, ou un bâtiment de commerce, employé pour la défense nationale, dans un appareil de navigation aérienne ou dans un véhicule militaire, dans un établissement militaire ou maritime de toute nature ou dans un établissement ou chantier travaillant pour la défense nationale;

2. tout Marocain ou étranger qui même sans se déguiser, ou sans dissimuler son nom, sa qualité ou sa nationalité, a organisé d'une manière occulte, un moyen quelconque de correspondance ou de transmission à distance susceptible de nuire à la défense nationale;

3. tout Marocain ou étranger qui survole le territoire marocain au moyen d'un aéronef étranger sans y être autorisé par une convention diplomatique ou une permission de l'autorité marocaine;

10. tout Marocain ou étranger qui, dans une zone d'interdiction fixée par l'autorité maritime, exécute sans l'autorisation de celle-ci, des dessins, photographies, levés ou opérations topographiques à l'intérieur ou autour des places, ouvrages, postes ou établissements militaires et maritimes;

11. tout Marocain ou étranger qui séjourne, au mépris d'une interdiction édictée par l'autorité légitime, dans un rayon déterminé autour des ouvrages fortifiés ou des établissements militaires et maritimes.

Lorsque les infractions prévues aux alinéas précédents sont commises en temps de guerre, la peine est celle de la réclusion de cinq à trente ans.

Lorsqu'elles sont commises en temps de paix, la peine est celle de l'emprisonnement d'un à cinq ans et d'une amande de 1 000 à 10 000 dirhams.

Thus, by virtue of Articles 190-193 of the Moroccan Penal Code, anyone who conducts activities by any means whatsoever that threatens to undermine the integrity of the Moroccan territory may be considered to be guilty of damaging the external safety/security of Morocco. The scale of imprisonment for these offences runs from five to thirty years.

Pursuant to international human rights law, military tribunals are not in principle competent to try civilians.¹² The Moroccan authorities have at no point upheld that the defendants have any military functions or duties. According to the Third Geneva Convention, a person with military functions is a member of the armed force or other militias or volunteer corps.¹³ Given that none of the defendants are members of the armed force, or members of militias or other volunteer corps, they are civilians and it would have been contrary to public international law to prosecute them before a military jurisdiction.

¹² Principle 5 of the Draft principles governing the administration of justice through military tribunals and Principle L of the Principles and Guidelines on the right to a fair trial and legal assistance in Africa. Human Rights Committee: Concluding Observations of the Human Rights Committee: Peru, CCPR/CO/70/PER, para. 11. See also Concluding Observations of the Human Rights Committee: Egypt, CCPR/CO/76/EGY, 1 November 2002, para. 16(b), Russian Federation, CCPR/C/79/Add.54, 26 July 1995, para. 25, Kuwait, CCPR/CO/69/KWT, 27 July 2000, paras. 17 and 18, Slovakia, CCPR/C/79/Add.79, 4 August 1997, para. 20, Uzbekistan, CCPR/CO/71/UZB, 26 May 2001, para. 15, Cameroon, CCPR/C/79/Add.116, 4 November 1999, para. 21, Algeria, CCPR/C/79/Add.1, 25 September 1992, para. 5, Nigeria, CCPR/C/79/Add.64, 3 April 1996, Poland, CCPR/C/79/Add.110, 29 July 1999, para. 21, Lebanon, CCPR/C/79/Add.78, 1 April 1997, para. 14.; Chile, CCPR/C/79/Add.104, 30 March 1999, para. 9, Syria, CCPR/CO/71/SYR, para. 17, Venezuela, CCPR/C/79/Add.13, 28 December 1992, para. 8. Inter-American Court of Human Rights, Judgment of 30 May 1999, Castillo Petruzzi et al. v. Peru, Series C No. 52; Judgment of 29 September 1999, Cesti Hurtado v. Peru, Series C No. 56. Inter-American Commission on Human Rights: Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002. European Court of Human Rights, Judgment of 10 May 2001, Cyprus v. Turkey, Application No. 25781/94 and Judgment of 4 May 2006, Ergin v. Turkey (No. 6), Application No. 47533/99.

¹³ Third Geneva Convention, 1949, Article 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: [

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. [...]

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

Moreover, military tribunals should only have jurisdiction over military offences. The nature of the defendants' alleged offences in the present case is not military. The African Commission on Human and People's Rights have affirmed that military tribunals only are competent to hear overall military cases; "The purpose of Military Courts is to determine offences of a pure military nature committed by military personnel".¹⁴ Consequently the Military Tribunal would not have jurisdiction over the defendants neither *rationae personae* nor *rationae materiae*.

The 21st of September 2010 the Military Tribunal declared that it did not have jurisdiction to hear the case, which subsequently was transferred to the Court of First Instance of Ain Seeba, Casablanca. Charges under Articles 190-193 were also dropped since there was no evidence at hand indicating that the suspected acts had affected the external safety of the Moroccan state.

The indictment before the Civil Court was based on Article 206 of the Criminal Code, incriminating crimes against the internal safety of the Moroccan state:

Article 206 :

Est coupable d'atteinte à la sûreté intérieure de l'Etat et puni de l'emprisonnement d'un à cinq ans et d'une amende de 1 000 à 10 000 dirhams quiconque, directement ou indirectement, reçoit d'une personne ou d'une organisation étrangère et sous quelque forme que ce soit, des dons, présents, prêts ou autres avantages destinés ou employés en tout ou en partie à mener ou à rémunérer au Maroc une activité ou une propagande de nature à porter atteinte à l'intégrité, à la souveraineté, ou à l'indépendance du Royaume, ou à ébranler la fidélité que les citoyens doivent à l'Etat et aux institutions du peuple marocain

Thus, by virtue of Article 206, anyone who receives any form of donation from a foreign organization to conduct any activity aimed at undermining the integrity, sovereignty or independence of the Kingdom of Morocco is guilty of damaging the internal safety/security of Morocco and will be subject to imprisonment for one to five years and will pay a fine of 1000 to 10 000 dirham.

¹⁴ Resolution on the Right to Fair Trial and Legal Assistance in Africa, Comm. No. 224/98, 14th Annual Activity report 2000 – 2001, African Commission on Human and Peoples' Rights § 62.

II. THE TRIALS

A. The Trial of the 15th of October

The trial against the defendants took place at the Court of First Instance in Ain Seeba, Casablanca. The Observers had no difficulties accessing the building of the court and were also before the beginning of the trial granted a brief audience with the judge presiding the trial, Mr. Jaber Hassan as a 'gesture of courtesy'. There was, however, no possibility to pose questions regarding the present proceeding.

Also the Observers' request to gain access to the documents from the preliminary investigation was denied.

Up until the actual starting point of the trial, contradictory information as to the commencing of the trial was given to the Observers. The reason for this was said to be the fact that the three defendants still in prison were under transport to Casablanca from Salé and that the time of arrival was yet uncertain. The trial eventually commenced at 2.30 pm in Court Room 8.

As regards to the constellation of the court room it should be noted that it was set out in a way implying that the judge was equal to the Prosecutor and vice versa. The judges were sitting in the front of the room on a raised bench with the Prosecutor sitting on their right hand side and the secretary/court clerk on their left hand side. The Tribunal was installed, consisting of the presiding judge, two assessors and on their right the Deputy Prosecutor and on their left the Clerk.

In the courtroom twenty international Observers were present (twelve from Spain, three from Italy, two from Sweden, one from France and one from Mexico), seated in the benches on the right hand, directly behind the Moroccan defence lawyers. There were numerous Moroccan defence lawyers, approximately fourteen and a large group of civil Sahrawis traveling to Casablanca to behold the trial. The four defendants on provisional freedom entered the court room, one of them raising his arms in the victory sign, all of them singing a song for the independence of Western Sahara and the right to self determination, showing the victory sign. The song is immediately followed by the other Saharawis present in the court room.

The reaction to the Sahrawi song was hostile and violent; the Moroccan defence lawyers standing between the Bar Table and the Court, in the lawyers's robe, commenced shouting pro-Moroccan slogans in Arabic and French, eventually also evoking into insulting the civilian Sahrawis present as well as the international Observers. During the turmoil it was also noted by the Observers that one of the Moroccan lawyers kicked Mr. Yahdid Taruzzi, one of the provisionally released in the stomach. The judge, the prosecutor and the clerk left the court room, where the manifestation of the Moroccan lawyers continued for almost half an hour, before the trial was postponed and the crowd dissolved.

B. The Trial of the 5th of November

The Observers arrived at the Court of First Instance of Ain Seeba, Casablanca early in the morning of November the fifth. According to information received the trial was to be held at 1 pm. There were no difficulties entering the Court building.

The Observers tried to get access to the case file and asked for a meeting with the judge presiding the trial. The request to see the case file was denied. After repeated demands, the Observers were however promised a meeting with the main judge, Mr. Jaber Hassan. Once the meeting with the judge was set, the Observers went out of the Court building in order to discuss the trial with a number of French and Spanish trial Observers and try to get in contact with the defence lawyers. The Observers were photographed while discussing the case. According to the interpreter, the people photographing the Observers were plain-clothes security agents.

When the Observers returned to the Court building for the meeting with Judge Jaber, the guards at the entrance stopped the Observers. In spite of the fact that the Observers presented their *ordre de mission* and explained that they had a meeting with the presiding judge, they were denied access to the building. After having waited outside for about half an hour, the Observers managed to access the Court by another entrance, without being stopped by the guards. However, the interpreter did not manage to enter the Court building when trying to join the Observers. Once inside, janitors tried to convince the Observers that the Judge was not in his office. After having once more repeated their request, the Observers finally got to meet with the Judge.

The Observers started the meeting by explaining their mission and mandate. Questions regarding the trial in October were put forward, as well as questions regarding the preparations of the trial at hand and the unusually long period of detention. The Judge was polite, but avoided giving detailed information or comment on the situation. The Judge repeatedly referred to the case file, which the Observers had not been able to scrutinize. When pointing this out the Observers were promised to return to the Judge's office after the trial in order to read the case file. Specific information regarding the questions asked and the answers received can be found under the respective heading below.

After the meeting the Observers went down to the courtroom, which by then was completely full. There were no seats left. A crowd of Moroccan defence lawyers with no relevant connection to the case at hand stood in front of the spectators' benches, blocking the view of the audience. When the process did not start as planned several persons started singing the Moroccan national anthem and screaming slogans regarding the Moroccanness of Western Sahara. In this context it should be noted that the trial, which took place on a Friday, was held the day before the 35th anniversary of the so-called Green March, when 350,000 Moroccans went across the border to settle on Western Saharan territory.

The atmosphere started to get threatening; people were shouting and pushing one another. The Observers noticed that they were being photographed, despite the Moroccan ban against taking photos in Court buildings. Photos were taken openly, the photographers using both full-scale professional cameras and small mobile phone cameras. At this point, the defendants entered the courtroom, making the victory sign with their hands. The audience grew even more agitated. Both civilians and Moroccan lawyers participated in the agitation. Moroccan lawyers were screaming and singing and some used the Moroccan flag as a cape.

The judges entered the courtroom and tried to start the hearing. It was hard to see anything because of the amount of people pushing around and it was impossible to hear anything because of the noise. After a couple of minutes the judges left the courtroom since it was unconceivable to start a hearing under these circumstances.

When the judges left the courtroom, the Observers discerned ongoing fights in at least two places in the courtroom. Furthermore, the Observers noted two Spanish journalists, which had brought their cameras. Since photographs otherwise were taken openly in the courtroom the journalists made the assessment that this was acceptable. When they started to photograph, the crowd however got provoked and attacked them. One of the ICJ Sweden Observers witnessed a Moroccan lawyer hitting one of the Spanish journalists. Subsequently, the Moroccan lawyer grabbed the Observer by the arm and tried to drag her out of the courtroom, but was prevented from doing this by another Observer.

At this point, Moroccan police asked the representatives of the Swedish Embassy and the Observers to leave the court since the Moroccan police and guards could no longer guarantee their safety. Two of the ICJ Sweden Observers left the Court building. Due to the fact that some of the French and Spanish Observers were blocked in one of the courtrooms and that several Sahrawis were locked up in another, the third ICJ Sweden Observer however decided to stay. In what followed, the Observer is conscious of the fact that by staying she was exposing herself to a certain degree of risk. Finally, the French and Spanish Observers were allowed to leave under police escort, by which point the last of the ICJ Sweden Observers accompanied them outside.

A large crowd of Moroccans was by this time assembled outside the Court. The aim of the crowd seemed to be to prevent the Sahrawi spectators from leaving. When trying to reach a car, several Sahrawis were subjected to shoving, kicks and punches. Small groups of Sahrawis managed to leave by car. Finally, the last of the Sahrawis ran for cover and were dispersed. The remaining Observers, French, Spanish and Swedish, agreed that no more could be done and decided to return to their hotels.

C. The Trial of the 17th of December

The Observers first arrived to the Court of First Instance in Ain Seeba, Casablanca, on the morning of the 17th of December. They had no problem reaching the Court building but were stopped by the entrance. They were informed by the security guards that they knew nothing

about the trial and that the Observers could come back in the afternoon. The Observers wanted to meet with the judge and prosecutor presiding the trial but was again told to come back in the afternoon.

When the Observers arrived at 1pm, the passage leading to the court building was barred with fences and security personnel. A crowd had gathered and after a short while people started to line up and were let through after showing identification. When the Observers showed their identifications and *Ordre de Mission* they were not let in but instead shown to stand aside while other people still were allowed to enter. While waiting, more and more international Observers came and they too were told to wait. After a while they tried to enter again, and after showing their identifications the Observers were allowed to pass. There were lots of people taking pictures as the Observers passed security.

Outside the court building there was a crowd waiting to be let in. After queuing for some time the Observers went through a new security check with security bars and then had to hand in their telephones and cameras in the reception to be allowed any further access into the building. When the items were handed in the receipt was the ticket past next security. It appeared as though this did not apply to everyone. Later in the courtroom there were people with both mobile phones and cameras.

Since the Observers had been told that the trial would begin at half past one they preceded to the security check outside the courtroom. The courtroom was also fenced in and guarded. The Observers were let in but the courtroom was full. There were no places left to sit and people were standing in the middle of the room and in front of the judges' bench. The Observers took place in the back of the courtroom. The atmosphere was tense and people in the audience argued. The Observers noticed people taking their pictures while they waited for the trial to begin. After some time the judges and the prosecutor entered the room and shortly after three of the defendants were led into the room. As they entered they showed the victory sign and chanted a song. This agitated and angered the people in the courtroom. People outside the courtroom also started chanting and getting worked up. A person in a lawyer robe was able to quite the room and the proceedings began. The defendants' counsel argued against the safety in the courtroom and under the circumstances, which the defendants were being held.

The people in the Courtroom frequently got so loud that it wasn't possible to hear what was being said and most of the time it was impossible to see the bench and the defendants due to people standing in the courtroom and on the benches. The impression however was that the crowd consisting of Moroccan lawyers was in the immediate proximity of the defendants and their counsel. This was supported by the fact that the counsel argued against his clients' safety in the courtroom. The attitude from the audience and the obvious support of the prosecutor (at some point the audience cheered when the prosecutor spoke and at one point they laughed at something the defendants counsel argued) were allowed to continue by the court. A couple of times a person in the crowd managed to silent the audience

for a short period. That person did not appear to be acting on behalf of the court or security personnel. Instead the Observers were told that the person was head of the Moroccan Nationalists, but could not get that confirmed. After a while the judges postponed the trial due to safety reasons.

As the defendants left the room, again showing the victory sign, the people in the courtroom got up on the benches and started waving the Moroccan flag and pictures of the Moroccan king Mohamed VI. When the public turned hostile after the trial had been suspended someone, deliberately or by accident, threw a pair of sunglasses at the photographer accompanying the Observers. Tempers flared again and the Observers were told to leave the room for their own security. Outside the courtroom the Observers were shown into a passage where they were told to wait. When they were let out, the area outside the courtroom had cleared. At this time, the Observer's translator left the building. During the whole time in the building and during the proceeding he had kept a distance from the Observers. Before entering the court he told the Observers that he had been questioned for three hours in connection to another translating job.

After a couple of minutes the bell rang, indicating a new proceeding. The courtroom again filled up quickly, but this time mostly with Moroccan lawyers. The room was just as full as during the first proceeding but it was not as agitated. The judges and the prosecutor entered as well as the defendants. The defendants' counsel argued for the defendants to be released until next trial. The judges informed that a decision would be taken on the 22nd of December.

Regarding the conduct of the interpreter, not wanting to be close to the Observers, in combination with that he told the Observers that he had been questioned for three hours in connection to another translating job at the court, give the impression that he was investigated due to interpreting for Observers or the nature of the specific case. If that is the case it is problematic.

III. ASSESSMENT OF THE TRIALS

A. Method of Assessment

According to the principles regarding trial observation set forth in the International Commission of Jurists' Trial Observation Manual (hereinafter the Manual) the observations should in principle focus on matters relating to judicial guarantees intrinsic to due process and the right to a fair trial. Concerning the evidence two issues are of great importance; the *first* being the principle of legal evidence (the ensuring of that the evidence has been lawfully obtained in accordance with procedural norms) and the *second* being the principle of the legitimacy of evidence (whether or not evidence submitted at the trial has been obtained using methods that are prohibited under international law, such as torture or death threats). In the respect to the latter, the question of the legitimacy of evidence cannot be assessed due to the lack of proper information regarding the preceding events.

Under limited circumstances Observers are also entitled to assess the substance and merits in a specific case. One of these situations foreseen by the Manual is the one where 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”.¹⁵ With reference to the fact mentioned above and the background of the criminal proceedings brought against the defendants the Observers deemed this case to be of a character referable to this category and thus to be evaluated also in substance.

In assessing the trial the Observers will refer only to norms whose legal foundation is undisputed such as

- i) the Constitution, Criminal Code and Code of Criminal Procedure of Morocco
- ii) the human rights treaties to which Morocco is a party
- iii) international standards on human rights and administration of justice that are declarative in nature and
- iv) norms of international customary law

It is universally recognized that states cannot invoke their national legislation in order to justify the failed compliance to international obligations, such as the right to a fair trial. States must under the principle of *pacta sunt servanda* perform all their obligations in good faith meaning that domestic authorities cannot claim obstacles under national law for not having applied their duties according to international conventions in a due manner.¹⁶

B. The Right to a Fair Trial

Using the above-mentioned list as a benchmark the principles of a fair trial will be described in this section. The Moroccan Constitution (adopted in 1996) does not contain any provisions aimed to guarantee the right to a fair trial. However, Article 5 prescribes that all citizens shall be equal before the law and according to Article 9 the constitution shall guarantee the citizens, *inter alia*, freedom of opinion, of expression in all its forms, of public gathering; of association, and the freedom to belong to any union or political group of their choice.

The right to a fair trial is enshrined in several international conventions including Articles 8, 10 and 11 of the Universal Declaration of Human Rights and Articles 14 and 15 of the International Covenant on Civil and Political Rights, both of which Morocco is party to.

C. Impartiality and Fairness

As mentioned, an overall assessment of the impartiality of the Moroccan judiciary has been made in an earlier trial observation report, dated 28th of May 2010. When commenting upon the impartiality of the judiciary in the present case, the observations are based solely on the

¹⁵ International Commission of Jurists, Trial Observation Manual for Criminal Proceedings, p. 21.

¹⁶ Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

Observers' meetings with Judge Jaber before the start of the trial and the chain of events that took place in the courtroom.

By virtue of Article 14, subparagraph 1 of the ICCPR, the requirement of impartiality has two aspects.¹⁷ Judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.

Furthermore, the Observers note that fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or if support for one party in the courtroom is tolerated by the court [...] or if one party is exposed to other manifestations of hostility with similar effects.¹⁸

At the meeting with the Judge on the 5th of November, the Observers started by asking questions about the Judge's view of the unrest and ensuing chaos that made it necessary to postpone the trial of the 15th of October. However, according to the Judge nothing untoward or unusual took place on that occasion. When provided with examples, the Judge maintained that he had seen nothing of the irregularities noted and reported by the ICJ Sweden Observers present at that trial - neither the conduct of the Moroccan lawyers instigating hostilities at the trial nor the alleged assault against one of the defendants.

When asked about why some of the defendants had not been summoned to the first trial in October, the Judge avoided to answer and stated that all of the defendants (in total seven, including the four released from detention) had been correctly summoned to this second trial. In this context, the Observers note that by virtue of Article 14, subparagraph 3 (d), trials are only compatible with requirements if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of the trial and to request their attendance.¹⁹ This subsequently also happened on the occasion of the trial of the 17th of December.

When asked about the defendants' possibilities to prepare their defence for the upcoming trial, the Judge answered that he did not know whether the defendants had had access to legal counsel prior to the trial. The Observers note that article 14, subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.²⁰ What counts as "adequate time" depends on the circumstances of each case.

¹⁷ Human Rights Committee: General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, para. 21.

¹⁸ Human Rights Committee, General Comment No. 32, para. 25

¹⁹ Human Rights Committee, General Comment No. 32, para. 36.

²⁰ Human Rights Committee, General Comment No. 32, para. 32.

Finally, the Observers asked the Judge of his view concerning the long period of pre-trial detention. The Judge stated that he did not want to express any opinion, legal or otherwise, regarding this fact.

As presented above, the chaos reported from the trial of October 15th was repeated during the trial of November 5th and the trial of December 17th. Moroccan lawyers with no apparent connection to the trial filled the courtroom, blocked the view of the Observers and rallied the crowd in open hostilities towards the defendants. Support of the prosecutor and hostile attitude towards the defendants was always demonstrated in a blatant way, both by lawyers and the audience in general. These demonstrations were allowed to continue for a long time and no visible efforts were made to calm the crowd before the start of the trial. Several acts of physical violence observed in the courtroom lead to no apparent reaction from the court or the attending guards.

Against the backdrop of the irregularities observed during the trials, the Observers make the following conclusions regarding their meetings with the Judge.

In the view of the Observers, the Judge's indifference relating to the public support of the prosecutor as well as the manifestations of hostility towards the defendants in the courtroom makes it reasonable to call his impartiality into question. Whereas the incidents of the first trial in October may have been the result of bad preparations and foresight, the repeated abuses during the second and third trial cannot be regarded as anything but highly problematic from the perspective of the right to a fair trial. The fact that lawyers in official garb are allowed to act as leaders of the crowd is unseemly. It is incumbent upon the court to safeguard order in the courtroom and neither tolerate a hostile attitude towards one party nor open support for the other. The courts' passivity in this respect cannot be regarded as anything but highly inappropriate and contrary to ICCPR article 14, subparagraph 1.

Furthermore, it is the duty of the court to ensure a fair trial, *inter alia* by ensuring that the defendants have proper access to legal counsel. The fact that the court had not taken any steps to ensure that the defendants had had adequate time and facilities to prepare their defence prior to the trials therefore amounts to a breach of article 14, subparagraph 3 (b).

D. The Right to a Public Hearing

The right to a fair and public hearing is stipulated in the ICCPR, ratified by Morocco. The public character and the transparency of the justice system is one of the cornerstones of the rule of law and a well-functioning democracy. A public hearing is also a guarantee of the fairness of a trial, as often reiterated by the aphorism “Not only must Justice be done; it must also be seen to be done.”

The public character of a hearing is intrinsically linked to international Observers' possibilities of assisting a trial. Thus being able to monitor the fairness of a particular trial and the justice system as a whole. It was difficult for the ICJ Sweden Observers to access the Court building on several occasions. When waiting by the guards at the entrance the ICJ Sweden Observers were held aside by the guards to an extent that the Observers were fearing that they would miss the approaching trials. Moreover, the Observers did not have the information regarding the exact time and location of the trials, which worried them even more since the trial could be held while they were waiting outside to get into Court building. This is contrary to the principle of a public hearing, the Human Rights Committee has proclaimed that "Courts must make information regarding the time and venue of the oral hearings available to the public",²¹ in order for a trial to be fair.

These circumstances led to general confusion, sense of arbitrariness and numerous uncertainties concerning the trial. Thus, several components of the trial were not in consistency with the principle of a public hearing.

E. The Right to be Tried without Undue Delay

Pursuant to article 14 § 3 (c) of the ICCPR, everyone has the right to be tried without undue delay. This undue delay has to be assessed on a case-by-case basis, taking into account the complexity and the special circumstances of each case.²² One could argue that the case of the 'Group of 7' is a complex case since there are seven defendants and that at the outset the case was going to be heard by a Military Tribunal. Nevertheless, three of the defendants have been incarcerated in pre-trial detention for over one year now. They were apprehended the 12th of October 2009 and will at least remain in pre-trial detention until the 7th of January 2011, when the trial is scheduled to take place.

The Human Rights Committee has declared its concern about time limits of Morocco's pre-trial detention periods. In its Concluding Observations in relation to Morocco's compliance to the provisions of the ICCPR, the Committee considers the period of custody during which a suspect may be held without being brought before a judge, 48 hours for ordinary crimes and 96 hours for crimes related to terrorism, to be excessive.²³ In total, the three of the defendants that remain incarcerated have been detained for much more than 48 hours (12th of October 2009 – 7th of January 2011). It is obvious that this period exceeds the standards considered as complying with the provisions of the right to a fair trial.

F. The Presumption of Innocence

The presumption of innocence principle is a fundamental part of the right to a fair trial; it is codified in article 14 § 2 of the ICCPR. The presumption of innocence is an absolute right; it

²¹ Human Rights Committee, General Comment No. 32, para. 28.

²² Human Rights Committee, General Comment No. 32, para. 35.

²³ Human Rights Committee: 82nd session, Concluding observations Morocco, CCPR/CO/82/MAR, 1 December 2004, page 3, § 15.

can never be derogated from.²⁴ In relation to the case of the ‘Group of 7’, the principle can be analyzed in a two-folded way. First concerning the unreasonableness of the period extending from the apprehension to the trial. Second concerning the risks of ill treatment during the pre-trial detention.

The presumption of innocence also extends to the prohibition of making public statements affirming the guilt of the defendants.²⁵ This underscores the importance of the presumption of innocence to the right to a fair trial. Being held in detention awaiting trial for more than one year can also be apprehended as contrary to the presumption of innocence, since taking the form of a not sentenced punishment. Almost in every country the time of pre-trial detention can be deducted of the outcome of a potential term of imprisonment. This shows that the period of pre-trial detention is key to the right to a fair trial.

Both the Human Rights Committee (HRC) and the Committee Against Torture (CAT) have raised concerns about risks of torture during detention in Morocco.²⁶ Moreover, the CAT affirms that there are no guarantees of rapid and appropriate access by persons in custody to a lawyer or doctor in relation to torture allegations.²⁷ The generalized threat pertaining to the risk of torture in detention-facilities in Morocco amplifies the risk of the pre-trial detention to be perceived as a punishment. Hence, reinforcing the threats against the presumption of innocence of the defendants.

G. 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. Concerning the trials of the “Group of 7”, it is important to point out that there is an imbalance in relation to the information about the trial. During two out of the three observed trials the four persons who were released awaiting trial did not appear before the court. Both times, it was held that they had not got information about the whereabouts and the time of the trial. Moreover, the fights, violence and screaming that bursted out in the courtroom against the defendants could influence the judge’s perception of the defendants’ guilt, putting them in an inferior position.

²⁴ Human Rights Committee, General Comment No. 29, para. 11, and General Comment No. 32, para. 6; Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, paras. 247, 253 and 261; and Inter-American Commission on Human Rights, Report No. 49/00 of 13 April 2000, Case No. 11.182, Rodolfo Gerbert Asensios Lindo et al. (Peru), para. 86.

²⁵ Human Rights Committee, General Comment No. 32, para. 30; and Views of 20 July 2000, Gridin v. The Russian Federation, Communication No 770/1997, paras. 3.5 and 8.3.

²⁶ Human Rights Committee: 82nd session, Concluding observations Morocco, CCPR/CO/82/MAR, 1 December 2004, page 3, Committee Against Torture: 31st session, Concluding observations Morocco, CAT/C/CR/312, 10-21 November 2003.

²⁷ Committee Against Torture: 31st session, Concluding observations Morocco, CAT/C/CR/312, 10-21 November 2003, page 3, § C. Subjects of concern § 5.

These circumstances could influence the outcome of the forthcoming trial and contravenes the principle of the equality of arms.

CONCLUSIONS

None of the trials the Observers attended were concluded. All of the trials concerned the same defendants and the same counts of indictments. Consequently, a joint assessment of the three trials will be made; the ICJ Sweden Observers draw the following conclusions:

- The indirect influence of the hostile circumstances, during which the three trials were held, added to the Judge's indifference relating to the public support of the prosecutor amounts to a breach of impartiality of the trial as of Article 14, subparagraph 1 of the ICCPR.
- The Observers experienced difficulties to access the court building, as well as to scrutinize the case file. The numerous uncertainties concerning information about the trial undermine the defendants' right to a public and transparent hearing. This amounts to a breach of Article 14 subparagraph 1 of the ICCPR.
- The defendants have been awaiting trial for approximately one year and four months, three of them in detention. This time exceeds the standards of the right to a fair trial and breaches Article 14 subparagraph 3 (c) of the ICCPR.
- The concerns raised about the generalized risk of torture during detention in Morocco, amplifies the risk of the pre-trial detention to be perceived as a punishment, reinforcing the threats against the presumption of innocence, infringing Article 14 subparagraph 2 of the ICCPR.
- The imbalance in relation to the information about the trial between the prosecutor and the defendants contravenes the principle of equality of arms and breaches Article 14 subparagraph 3 (b) of the ICCPR.

The above-mentioned breaches added to the serious lack of independence and impartiality of the Moroccan judiciary, raise serious concerns regarding the trial against 'the Group of 7', and its potentiality of never being able to be held in consistency with the principles of the right to a fair trial.

Trial Observation Report

Stockholm, 7th of February 2011

Cecilia Asklöf

Observed the trial of 5 November

Ylva Lennartsson Hartmann

Observed the trial of 5 November

Hanga Sántha

Observed the trial of 15 October

Thomas Främby

*Observed the trial of 15 October
and 5 November*

Caroline Mitt-Holm

Observed the trial of 17 December

Urban T:son Nyström

Observed the trial of 17 December
