THE "GDEIM IZIK" TRIAL

REPORT BY THE INTERNATIONAL OBSERVER

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HEARING OF THE 12TH OF JULY 2017

Appeal Chamber of the Rabat Appeal Court, Morocco

Final Pleadings, Replies of the General Attorney and the Civil Parties

This report was prepared by Nicolò Bussolati in his personal capacity. The opinions expressed hereby are the author's own and do not necessarily reflect the view of the Associazione Nazionale Giuristi Democratici, nor of the Turin Bar Association.

Background information.

Facts.

The 8 October 2010, a Saharawi mass protest camp was set in Gdeim Izik, not far from Laayoune, the administrative capital of the occupied Western Sahara territories. In the early morning of 8 November 2011, the Moroccan soldiers forcibly evacuated the camp – which at the time hosted about 20.000 persons, children, women and old people included – with tear gasses and water cannons. According to the Moroccan authorities, during the clashes with the Saharawi activists, 11 soldiers were killed. 24 Saharawi were subsequently arrested and accused of their homicides.

Trial history.

The 24 Saharawis were firstly tried before the Rabat Permanent Military Tribunal (MT) which, according to the Code of Military Justice in force at the time, held jurisdiction over the case on the basis of the passive personality principle (whereas the victims were members of the armed forces). On 16 February 2013 the MT sentenced: nine defendants to life sentence; four to 30 years of jail; seven to 25 years of jail; three to 20 years of jail; two to 2 years of jail. The main pieces of evidence grounding the decision were their confessions to the police, which the defendants contested had been signed under torture. On this very point, with regard to one of the accused, Ennaâma Asfari, in 2016 the UN Committee against Torture condemned Morocco for violation of Articles 1 and 12 to 16 of the Convention against Torture (CAT/C/59/D606/2014), recognizing that torture had been used in order to extract confession.

The MT judgement was subsequently brought before the Supreme Court, following the procedural rules of the Moroccan military justice system. The Supreme Court delivered its judgment on the 27 July 2016, finding the MT judgment to be null and void, mainly due to the lack of evidences grounding the decision (and its motivational defect). The Supreme

Court recognized that: since the promulgation of a new Military Justice Code in July 2015, the Military system is no longer competent on crimes committed by civilians; accordingly, the case should be send back to a civil court; that, on the basis of the crimes contested, the Court of Appeal have jurisdiction *ratione materiae*. The case was thus sent back (rather interestingly) to the *Appeal Chamber* of the Rabat Court of Appeal, as a court of "last resort". Since this decision, a series of issues related to the nature of the trial (i.e. is it a court of first or second instance?) remain unresolved. These issues are likely to be addressed only in the judgment of the Appeal Chamber, although they clearly affect the procedural norms that had to be followed at this very stage of the trial.

Therefore, the case is now pending before the Appeal Chamber of the Rabat Court of Appeal… even though it is concretely hosted in the courtrooms of the Sale Court of First Instance.

At the hearing of the 11th July 2017, the Royal General Attorney (GA) and the Civil Parties (CP) replied to the final pleadings of the Defence. The "re-replies" of the Defence – and possibly the judgment – are scheduled for the 18th of July 2017.

Issues.

A series of problematic issues appear to permeate the whole trial. These will be addressed in a subsequent paper, as they do not form part of the material observation of the trial done on the 11th of July 2017. The following list briefly mentions the main issues at stake (with no claim of being exhaustive):

- Role of international law in the trial (related to the status of Western Sahara and of the defendants, to the CAT decision, and, more generally, to the direct applicability of international norms within the Moroccan domestic system);
- Nature of the proceedings (first or second instance), competence of the Appeal Chamber, applicable procedural rules (in particular, with regards to the active participation of Civil Parties and the admission of new evidences);

- Postponing of pivotal decisions that should have been addressed before the commencement of the trial (see *supra*);
- Use of new, altered, or even extracted by torture evidences;
- Possible influence of extra juridical factors (e.g. media, politics) on the trial;
- State of detention incurred by the defendants pending the trial;
- Separation of the position of one of the accused, due to his health problems (although the case appeared to remain the same, his examination, at the time of the final pleadings, was not conducted);
- Possibility to appeal the judgment in front of the Supreme Court.

Hearing of the 12th of July 2017.

The hearing started at 10 am, in a courtroom located in the Sale Court of First Instance. Outside the building, approximately 300 protesters, with large banners and loudspeakers, were strongly demanding for the conviction of the accused.

The courtroom presented the following spatial composition:

- four judges on their front bench, plus the presiding judge (the only one who publicly spoke);
- the Royal General Attorney, who, according to the typical structure of an inquisitorial procedural system, was sitting at the right of the judges, at their same "level";
- in front of the judge's bench:
  - the civil parties (on the left side of the room), together with a few Saharawi delegates (although is not clear who has appointed them as "delegates");
  - the defence (in the center of the room), together with the families of the victims;
  - the public (on the right side of the room).

Observers from Belgium, France, Denmark, Germany, Norway, Portugal and Spain (and myself, representing Italy) were present – together with staffs from four European embassies. Interestingly, some observers (Belgian and French, sitting with the civil parties) were wearing their official court robe, although they did not have an active part in the proceeding.

The **Royal General Attorney** commenced his replies to the final pleading of the defence. Overall, his discourse was not easy to follow. It lacked basic logical consistency, as he was touching upon crucial issues without duly developing them, or skipping between arguments without a sound analytical structure.

Firstly, he hinted at the nature of the procedure by saying that victims enjoy a full right to be heard as witnesses. He then briefly commented the trial history, from its start at the MT, praising its correspondence with the applicable domestic laws.

Secondly, he addressed the Supreme Court's decision on one of its main points: the lack of material elements supporting the contested crime of acts of violence against public officials leading to their death (Article 267 Penal Code). By quoting case law from the Moroccan (judg. n. 1601/1997), the Syrian and the Egyptian Supreme Courts, he stated that, in case of group violence, it is not required to demonstrate the existence of a material element directly linked with the event for each of the accused. Yet, Yet, he failed to justify such statement by elaborating whether modes of application linking the coperpetrators (complicity or criminal association) exists in the case at stake. Only later on, he stated that evidence shows that an accused had rented a car which was used to run over a soldier, and that some witnesses testified on having seen some of the accused distributing weapons among the protesters. Moreover, with regards to the existence of a criminal association, he stated that the prosecution already indicated precisely both the place where the criminal agreement was made (Algeria), and elements proving the existence of the required *dolus* of the association (intention to commit crimes against persons and property in furtherance of the agreement). Finally, he notices how the existence of the criminal association as demonstrated by the MT was not contested by the Supreme Court [ed.: all these points, related to a pivotal issue of the trial, were however scattered among the whole reply].

Returning to a mere chronological description of the GA's reply, he then noticed that many of the accused had been previously convicted for violent crimes.

A fourth point raised by the General Attorney has been that the expert witness reports regarding autopsies [ed. the selection procedure of the experts remains unclear to me] had been inserted in the file since March 2017, and thus were for long time available to the defence.

Furthermore, with regard to victims' possibility of participating in the proceeding as Civil Parties, the General Attorney quoted a series of domestic ordinary and constitutional norms as well as international treaties and declarations recognizing the right of the victims to

reparation and justice. While discussing about international law, he struck two blows against the table and damaged the microphone. At this point, a 15 minutes "technical" break was called.

When the hearing resumed, the General Attorney discussed the procedure followed by the soldiers in evacuating the camp. It stated that the applicable law was duly followed [ed.: without any detailed analysis of it]; that no crime had indeed been contested to the soldiers; that the soldiers had the precise duty to aid the Saharawi children, women and old people involved in the clashes; that no civil victims among the Saharawi were reported; that the militaries used only sticks while the Saharawi activists employed knifes, Molotov's cocktails and cars; and, finally, that the UN Report n. 249/2011 states that only sticks were used, and that the soldiers were attacked by the activists, and not the contrary.

In response to the defence's point challenging the arbitrary "selection" of the accused, the GA repied that the arrests were made *in flagrante delicto* and under indications of eyewitnesses.

In reference to the allegation of torture, he stated that these had been examined, in accordance to the Istanbul Protocol, by legal experts appointed by the Court. These experts had investigated the correlation between existing wounds of the arrestees and possible acts of torture, and between their wounds and the declared acts of torture. The experts, according to the GA, excluded any correlation.

With regards to the photos used for the recognition of the accused, the GA stated that these were taken in jail, at the moment of the accused arrival.

Finally the GA evidenced that – besides Moroccan soldiers – also three Saharawis testified against the accused.

The final request was thus to reject all the requests of the defence, and to uphold all the requests of the prosecution.

At this point, the **Civil Party** took the stage.

The first lawyer opened the argument with some peculiar remarks on a supposed relation between the presumption of innocence and an "impunity principle".
He then requested the Court to consider a different legal qualification of the facts. He acknowledged that the Supreme Court – taking into account the contested crime of violence against public officials, leading to death, envisaged by Article 267 of the Penal Code – evidenced the lack of a causal nexus between the acts of the accused and the events [ed.: although he talked about relation between acts and victims]. The CP stated that the Court has a legal duty ex Art. 432 of the Code of Criminal Procedure [ed.: although the lawyer erroneously quoted two different articles] to requalify the facts – on the basis of the evidentiary results – as one of the crime of the Section III (*Des crimes et delits contre la surete interieure de l'Etat*) of the First Chapter (*Des crimes et delits contre la sûrete de l'Etat*) of the Code, also considering the existence of a wider *dolus specialis* of the accused. Indeed, being association crimes, these crimes do not require the same causal nexus between act and event as Article 267: such requalification (or the correct use of the complicity or conspiracy doctrines, as the Prosecutor seemed to suggest) may solve one of the biggest substantive legal problem of the trial. However, according to the author of this report, it is doubtful that the Appeal Chamber has the power to such a strong requalification of the facts at this stage of the trial. This may indeed be contrary to the duty to conform to the Supreme Court's judgment, and even produce a sort of *bis in idem*.
The presiding judge then stopped the CP, requesting to limit its reply to the challenge the pleadings of the defence. A sort of discussion between the two actors arose, lasted for a couple of minutes, after which the CP remarked on its requalification request.

The second lawyer (the former President of the Bar Association) hinted to the public nature of the victims. He closed his replies by stating "*your role in history, Mr. President, is not only to render justice to the victim, but also to stop all conspiracies against Morocco*".

Finally, the presiding judge decided to "allow" two lawyers of the defence to re-reply. He recognized his discretionary power to allow the defence to take the stage after the replies (although the Code, at Article 428, clearly states that "the Defence always has the last word").

The hearing finished at 14.30 approximately. The next hearing, with the replies of the Defence, will be held on the 18th of July 2017.

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