

THE HIRAK EL-RIF APPEAL:
FINAL REPORT OF TRIAL OBSERVERS

In March and April 2019, the International Senior Lawyers Project (ISLP)¹ monitored the criminal proceedings against 43 activists (“Hirak El-Rif protesters”), including several journalists, all of whom had been arrested for their involvement in a series of mass protests and demonstrations in the northern Rif Berber region in 2016 and 2017. The defendants had been convicted at the trial stage of security-related offences and statutes that criminalize unauthorized protests and the peaceful criticism of public officials. Their sentences, ranging from one to twenty year prison terms, were upheld by the Court of Appeals in Casablanca on April 5, 2019. The defendants are appealing their convictions to the Court of Cassation, Morocco’s highest court of appeals. Due to the politicized nature of the case, ISLP observed the appellate proceedings at the Court of Appeals in Casablanca to evaluate their compliance with fair trial guarantees prescribed under international human rights law. Based on these observations, ISLP determined that the proceedings were marred by significant irregularities and failed to comply with international obligations to uphold the right to a fair trial. Throughout the proceedings, defendants were denied access to their attorneys, the right to an impartial tribunal, the right against self-incrimination when evidence improperly obtained was used against them, all in violation of international legal standards.

¹ This Final Report is presented by International Senior Lawyers Project (ISLP), an independent, not-for-profit, non-governmental organization of about 2,000 lawyers who provide pro bono legal services abroad to advance human rights, sustainable economic development, and the rule of law. The ISLP lawyers who observed one or more proceedings were Richard Winfield, Walid Taha, Houda Haouami and Hend El-Feki.

Last month, on the 20th anniversary of his ascension to the throne, King Mohammed VI granted royal pardons to hundreds of detainees, including several of the Hirak El-Rif protesters. While we welcome the royal pardons, the underlying fair trial violations that led to the 43 convictions remain a failure in adhering to international human rights standards.

It has yet to be determined if all 43 defendants have been pardoned.

BACKGROUND

In October 2016, the death of a local fish monger spurred a wave of protests, with thousands taking to the streets to accuse government authorities of abuse of power and corruption. Protests erupted in El Hoceima, a predominantly Berber city in Northern Morocco and spread to surrounding cities through 2017. The protesters sought to rectify the marginalization of the Berber-speaking communities, with protesters demanding an end to dwindling economic opportunities, failing healthcare systems, poor infrastructure and high levels of corruption. The Hirak movement, as the protests came to be labeled, spread throughout the northern Rif region, and about 400 people were detained. The Moroccan government retaliated with severe and abusive police and criminal justice measures, the latter of which forms the basis of this Final Report. The crackdown by the government was widely denounced by both domestic and international human rights organizations.

On November 17, 2017 Amnesty International released a report of its investigation, excerpted as follows:

"The crackdown on Rif protesters in recent months has been relentless."

"Since May, security forces have arrested hundreds of protesters."

"At least 410 people are currently detained."

Many have already been convicted, with some handed harsh prison terms of up to 20 years."

"Journalist Hamid El Mahdaoui has also been detained for several weeks in prolonged solitary confinement at the same prison."

"Most charges brought against protest leader Nasser Zefzafi and his co-defendants are inconsistent with Morocco's human rights obligations since they criminalise the peaceful exercise of the rights to freedom of assembly, association and expression."

"Protesters described torture and other ill-treatment, including heavy beatings, suffocation, stripping, rape threats and insults, inflicted by police upon arrest and during interrogation, sometimes to force them to 'confess' to crimes. In July, the Minister of Justice announced investigations into at least 66 cases of suspected police torture."

"Judges have also failed to exclude statements possibly extracted under torture."

"The prosecution has also accused journalist Hamid El Mahdaoui of failing to alert the authorities about phone calls he received from a man who claimed he planned to buy weapons and send them to Morocco to trigger a 'war'. The journalist told the court he did not know the man or take him seriously."

Among the various criminal charges against defendants were the following: "organizing unauthorized demonstrations", "holding public gatherings without permission," "open incitement against the territorial integrity of Morocco," "insulting an official body and law enforcement officials," "undermining the internal security of the state," "inciting protesters to assault security forces," "participating in armed insurgency," and "holding public gatherings without prior authorization."

After trial before a criminal court, over 50 defendants were convicted in June 2018 and sentenced to imprisonment for up to 20 years. Several defendants were pardoned for undisclosed reasons and 43 of the original defendants proceeded to appeal their conviction. The investigative branch of the Court of Appeal commenced proceedings in February 2019 sitting about one day each week.

The Court, an intermediate tribunal, concluded its hearings on April 5, 2019 and affirmed the convictions and sentences of all defendants. Defendants are pursuing final appeals in the Court of Cassation.

On April 26, 2019, Amnesty International released a further report following the April 5 verdict, excerpted as follows:

"The decision on 5 April by a Casablanca court of appeals . . . is a disturbing miscarriage of justice."

". . . the Court of Cassation, must now address the serious flaws that have been raised and conduct an independent and impartial review of the allegations of torture and other violations of the right to a fair trial."

"Amnesty International expressed concern that several convictions were based on 'confessions' extracted under torture and that the trial had been marred by other human rights violations, including arbitrary arrests, the obstruction to the right to inform the families of the arrest, hindrance in access to legal counsel, and prolonged solitary confinement in at least seven cases. Defence lawyers were not granted access to available evidence in order to prepare their defence, and the court refused to accept statements from more than 50 defence witnesses without providing adequate reasons."

"Judges failed to exclude as evidence in the trial statements that the defendants said had been extracted under torture and other ill-treatment."

A. The Hearings

In the three hearings, the court consisted of six appellate judges, all of whom sat silently except for the Presiding Judge. One or two assistant Prosecutor Generals acted as public prosecutors. The number of defense attorneys varied from about one to two dozen. Observers included defendants' family members, occasionally a reporter, human rights activists, and numerous uniformed policemen. Observations took place on March 5, 15, and April 5.

Observations

B. The Architecture of Inequality

If a government sought to design a courtroom and its actors in order to convey a message of inequality of arms, it would elevate the physical level of the public prosecutor equal to that of the judges, and lower the level of defense counsel. It would clothe the public prosecutors in the same uniform as the judges, and deny defense counsel the right to wear that uniform. In the Casablanca court, defense lawyers wore traditional black robes with white fur features. The judges and public prosecutors, however, both

wore black robes with distinctive green piping. Seated on a raised platform, their heads were three feet higher than the groundlings of the defense.

The right to a fair trial is firmly guaranteed under Article 14(1) of the ICCPR. One such stipulation is to avoid such an unmistakable physical appearance of unfairness. The Court of Appeal courtroom in Casablanca exhibited this architecture in all its inequity. To consider the power of optics, if a total stranger to courtrooms were to view this scene, he would conclude that public prosecutors and judges were one and visibly superior to the lowly defense counsel.²

1. The Right Against Self-Incrimination

Article 14(g) of the ICCPR explicitly provides that “no one charged of a criminal offence shall be compelled to testify against himself or to confess guilt.” The right against self-incrimination is one of the most fundamental aspects of a fair trial. Statements admitted into evidence must be made voluntarily and with informed consent. Authorities may not take “undue advantage” of the situation of an imprisoned person for the purpose of coercing confessions.

At the hearing on March 5, 2019, the prominent journalist defendant Hamid El Mahdaoui spoke at length asserting his innocence. Although not specifically addressed in his oral arguments, it appears that security forces had taped his telephone conversation without a warrant, and that the civil court had admitted the taped evidence as conclusive proof of this guilt. El Mahdaoui is based near Rabat, far from the Rif; as a journalist covering the protests, he had no direct connection with the protest movement. He argued that he knew none of the co-defendants. Nonetheless, he was tried and convicted along with the many active, local protesters with no evidence to his culpability produced. Although El Mahdaoui was not charged with any violent acts, he was reportedly held in solitary confinement for 470 days. Not surprisingly, he became very nervous and spoke very loudly.

² For a discussion of the importance of such optics, see *Legal Architecture: Justice, Due Process, and the Place of Law*, by Linda Mulcahy. (Oxford and New York: Routledge, 2011).

The Presiding Judge continually interrupted him and directed him only to answer the Presiding Judge's questions, cease citing cases, and cease reading from his pleadings. The Presiding Judge appeared to treat the defendant with an unusual affect of respect. On the other hand, our observer, Houda Haovami, described the journalist as having shown disrespect to the Court. He argued that the case against him was a "setup" because he is a famous journalist. (His reputation for critical coverage of the regime is widely known). The defendant's wife, Bouchra Khouchaki, explained her husband's demeanor as follows: "He is a calm person, in general, but the fear and psychological pressure and his stay in jail made a change in his behavior to a different and agitated person."

About 24 defense lawyers were in attendance, although some did not remain throughout the five hours of the hearing. The public prosecutor concluded, requiring the defendant to cease speaking. Patronizingly, he said the defendant "could be thirsty and to make the hearing just and fair, it was necessary to stop the hearing." Our observer noted that the public prosecutor "was very kind and did his job correctly."

One explanation for the conscious display of civility by the Presiding Judge and the public prosecutor comes from a Moroccan lawyer in France who stated that he had received reports from eye-witnesses and activists who had attended the hearing. "The court proceedings was (sic) completely different . . . due to the presence of the ISLP observer. The court changed its attitude to show the observer it's fair." There was a "big change in the attitude of the chief judge during the March 5 hearing which was different from all previous hearings."³

Whatever the truth of these observations, the demeanor of the Court and the public prosecutor was not repeated in two later hearings.

³ E-mail message from Ali Ramadhan of ABA CHR to Richard Winfield and Walid Taha, March 11, 2019. (Copy in the author's possession).

2. Right to an Impartial Tribunal

The principle of an impartial tribunal, enshrined in Article 14(1) is an absolute right that is not subject to exception. The right requires that neither the judiciary in general nor judges in particular be subjected to or under influence or pressure of political entities. The requirement of impartiality prevents judges from allowing personal bias or prejudice to factor into their judgements. Nor can they harbor 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.

This appellate tribunal purported to examine the written record of the verdicts rendered against the defendants by the Court of First Instance. Yet the Presiding Judge summoned each of the six defendants to stand before the court with his defense counsel. The Presiding Judge, in turn, and in a loud, angry voice, then subjected each defendant to fifteen or twenty minutes of withering interrogation. The questions of the Presiding Judge, accompanied by constant gesticulations, covered all aspects of the public prosecutor's case. He pressed each defendant for responses and frequently interrupted them. Faced with this line of attack, two defendants stated, "I am a defendant, not a witness."

One defendant stressed that he participated in the protests as a result of the deteriorating social situation in the region. The Presiding Judge interrupted, warning the defendant to avoid such statements since they had a "political dimension and this trial is not political." The Court declined to hear any extended arguments from defense counsel.

A defense lawyer stood mute behind each defendant undergoing the Presiding Judge's hostile examination. At one point, a female defense lawyer spoke to the Court. The Presiding Judge promptly shut her off with a warning and continued to interrogate her client. She remained mute. Defense counsel were thus barred from objecting to the Presiding Judge's line of attack. Nor were defense counsel permitted to question their clients in order to clarify the record.

If there were any doubt that this was a show trial, these theatrics ended the debate. The fact that such theatrics seem to have become normalized does not mitigate their violations of the rule of law.

The prosecution's conduct in the proceedings falls short of widely accepted best practices. The United Nations Guidelines on the Role of Prosecutors establish that prosecutors should "perform their duties fairly, consistently and expeditiously."⁴

While standing and looking down on the six seated judges, the public prosecutor then delivered closing arguments. He asserted that this was a criminal, not a political case, that it was based on police reports and the testimony of witnesses, and that due process was observed. The government respected the rights of the defendants beginning with their arrests, and the government followed the required criminal procedures. The police notified the defendants' families, which were allowed to visit the defendants in detention. The government gave the defendants' lawyers the files and the criminal charges. Looking at us, the public prosecutor stated that outside observers, including international observers, were permitted to observe the trial.

The public prosecutor reiterated that the case file is not political, that the defendants are not political people, nor are they members of any party. Rather, they are charged with criminal acts. The defendants made "manifestations" (demonstrations) of protest daily for over six months, which had political, economic and social impact, injuring commerce. He stated that the defendants used three terms, namely that theirs is a "blessed movement," that they were "peaceful" and that theirs is a "good" movement. The public prosecutor, however, stated that it is "all criminal."

The public prosecutor said all of the evidence gathered by the police is legal, and that the prosecution verified all of the evidence and investigations by the police. The prosecution obtained warrants to arrest the defendants and obtained a warrant to intercept telephone conversations. The prosecution

⁴ United Nations Office of the High Commissioner for Human Rights, "United Nations Guidelines on the Role of Prosecutors", 1990, para. 12. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

verified the testimonies of witnesses and allowed the defendants to testify. The prosecution, moreover, has tape recordings of the "manifestations."

Referring to one of the alleged leaders, the public prosecutor stated that the prosecution had asked Nasser Zefzafi, and that he had answered that the police had not used any violence against him.

The public prosecutor said that the government had shown that this constituted a criminal conspiracy, that defendants offended society as a whole, and that they must face heavy sanctions since they offended all Moroccans.

CONCLUSION

Among those missing from the hearing was advocate Abdessadek Elbouchtawi. According to his defense colleagues, Mr. Elbouchtawi had served pro bono as a leading counsel for these clients. Fearing arrest, he suddenly fled Morocco a few weeks earlier to seek political asylum in France. The government's purpose or effect, of course, was to sow fear among his remaining colleagues in the defense bar. There was, however, no evidence of intimidation among the twelve to fifteen defense lawyers in court. One of the leading counsel present, Maître Mohamed Aghnaj, told us that about 60 Moroccan lawyers are serving pro bono to represent these 43 defendants.

Adapting the line from Hamlet, "The (judge) doth protest too much, methinks," captures the facial absurdity of the Court's repeated protestations that politics had nothing to do with this infamous prosecution. The hearings we observed presented a textbook case of the high-visibility show trial featuring the familiar ingredients: confessions extracted by torture; extended pre-trial detentions with solitary confinement; overreaching public prosecutors; overcharging indictments; vaguely worded laws; reliance on illegally obtained evidence; defense counsel in fear of arrest; a Presiding Judge's language and demeanor devoid of any semblance of impartiality; and the foreordained outcome, all accomplished while maintaining a facade of conventional, institutional normality.

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