Algeria - Angola – Botswana - Bolivia - Cuba - Ecuador - Mozambique - Namibia - Nicaragua - Nigeria - South Africa - Tanzania - Timor Leste - Venezuela - Zimbabwe

Members of the

**Geneva Support Group for Western Sahara**

**Invite all delegations to the 38th session of the UN Human Rights Council**

**to a High-Level side-event on**

**Administration of Justice in Western Sahara:**

**the violations of prisoners’ rights**

**Tuesday 19th June 2018 – 12:30 to 2:00 PM – Room XXIV**

**Panelists:**

***H.E. Amb. Marciano da Silva*** *– Permanent Representative of Timor Leste*

***H.E. Mr. Bachir Sayed –*** *Minister for the Occupied Territory and the Diaspora of the Sahrawi Arab Democratic Republic*

***Prof. Mads Andenæs –*** *Professor of Law at University of Oslo, Former Chair of the Working Group on Arbitrary Detention*

***Mrs. Tone Sørfonn Moe –*** *International Observer at the Gdeim Izik trial*

***Mrs. Claude Mangin -*** *Spouse of Naâma Asfari condemned to 30 years imprisonment at the Gdeim Izik trial*

***Mr.******Hassanna Abba*** *- League for the Protection of Sahrawi detained in the Moroccan prisons*

***Moderator:***

***Mr. Gianfranco Fattorini –*** *American Association of Jurists*

***Oriental buffet will be served before the meeting***

***English / French interpretation***

Afrique du Sud - Algérie - Angola – Botswana -Bolivie - Cuba - Equateur - Mozambique - Namibie - Nicaragua - Nigeria - Tanzanie - Timor Est - Venezuela - Zimbabwe

Membres du

**Groupe de Soutien de Genève pour le Sahara occidental**

**Invitent toutes les délégations à la 38ème session du Conseil des droits de l’Homme**

**à un side-event de Haut-Niveau**

**L’Administration de la Justice au Sahara occidental :**

**les violations des droits des prisonniers**

**Mardi 19 Juin 2018 – 12:30 à 14:00– Salle XXIV**

**Intervenants:**

***S.E. Amb. Marciano da Silva*** *– Représentant Permanent de Timor Oriental*

***S.E. M. Bachir Sayed –*** *Ministre pour le territoire occupé et la Diaspora de la RASD*

***Prof. Mads Andenæs*** *– Professeur de droit à l’Université d’Oslo, ancien Président du Groupe de travail sur la Détention Arbitraire*

***Mrs. Tone Sørfonn Moe –*** *Observatrice internationale au procès de Gdeim Izik*

***Mme Claude Mangin –*** *Epouse de Naâma Asfari, condamné à 30 ans d’emprisonnement au procès de Gdeim Izik*

***M.******Hassanna******Abba*** *- Ligue pour la Protection des détenus Sahraouis dans les prisons marocaines*

***Modérateur:***

***Mr. Gianfranco Fattorini –*** *Association Américaine de Juristes*

***Un buffet oriental sera servi avant l’événement***

***Interprétation français / anglais***

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**High-Level Side-event at the 38th session of the HRC**

**19 June 2018**

**The Administration of Justice in Western Sahara:**

**the violation of prisoners’ rights**

**Introductory remarks by H.E. Mr. Marciano da Silva**

**Ambassador and Permanent Representative of Timor-Leste**

Honourable Bachir Sayed, **Minister for the Occupied territory and the Diaspora of the Sahrawi Arab Democratic Republic,**

**Your Excellencies,**

**Distinguished panellists,**

Distinguished delegates,

Ladies and gentlemen,

In my capacity as coordinator of the Geneva Support Group for Western Sahara, I would like to welcome you all to this side event. I wish to remember that this Group is composed of fifteen countries (Algeria, Angola, Bolivia, Botswana, Cuba, Ecuador, Mozambique, Namibia, Nicaragua, Nigeria, South Africa, Tanzania, Timor-Leste, Venezuela and Zimbabwe). I would like to inform that the Polisario Front and the American Association of Jurists are also part of the Geneva Support Group for Western Sahara.

It is a privilege for me to coordinate this Group and since the time allowed for the side-event has been shortened, I give immediately the floor to the moderator who will introduce the panellists.

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**Republique Arabe Sahraouie Démocratique**

**S.E. Monsieur Bachir Sayed**

**Ministre des Territoires Occupés et de la Diaspora**

**Evénement parallèle de Haut-Niveau**

**38ème session du Conseil des Droits de l’Homme**

**Palais des Nations – Genève, 19 juin 2018**

**L’Administration de la justice au Sahara Occidental :**

**La violation des droits des prisonniers**

Excellences, collègues, Mesdames et Messieurs,

C’est un grand honneur pour moi de m’adresser à vous aujourd’hui dans l’enceinte des Nations Unies à Genève en tant que responsable du Front Polisario et Ministre de la République Arabe Sahraouie Démocratique.

Je tiens tout d’abord à remercier chaleureusement les membres du Groupe de Soutien de Genève pour le Sahara Occidental pour avoir organisé cette réunion. Je remercie également les distingués intervenants pour leur apport à la réflexion et au débat sur un sujet particulièrement sensible pour le Peuple Sahraoui qui vit depuis 43 ans sous occupation du Royaume du Maroc.

- 2 -

En tant que Ministre des Territoires Occupés, je suis quotidiennement confronté aux conséquences subies, par le Peuple Sahraoui, des violations de leurs droits fondamentaux liées à cette occupation illégale. Le mur, érigé par les forces d’occupation marocaines, représente une blessure béante au milieu du territoire du Sahara occidental.

Ce mur, parsemé de milliers de mines anti-personnel qui au fil du temps ont causé des milliers de victimes, a détruit le tissus économique traditionnel du Peuple Sahraoui et sépare encore aujourd’hui la quasi-totalité des familles. Alors qu’à l’est du mur, la troisième génération de réfugiés n’a pas grand espoir dans son avenir, à l’ouest du mur, le Peuple Sahraoui est soumis à l’oppression de l’occupant qui viole systématiquement leurs droits économiques, sociaux et culturels, y compris leur droit au développement, ainsi que leurs droits civils et politiques, y compris leur droit à l’autodétermination et à l’indépendance.

Je dois souligner ici que le Sahara Occidental est le seul Territoire Non Autonome listé par les Nations Unies qui n’a pas de Puissance administrante reconnue qui présente un rapport annuel devant l’Assemblée Générale. Je saisie cette occasion pour lancer un appel au Conseil des Droits de l’Homme et ses Procédures spéciales, pour qu’ils prêtent une attention particulière à la situation que vit le Peuple Sahraoui.

Le conflit armé provoqué après l’invasion marocaine et l’occupation illégale prolongée qui s’en est suivie, rendue possible uniquement par une forte présence armée, impose au Royaume du Maroc le respect du Droit International Humanitaire au Sahara Occidental.

Alors qu’aucun Etat, aucune Organisation internationale, ni aucune juridiction nationale ou internationale ne reconnaît la souveraineté du Royaume du Maroc sur le Sahara Occidental, les autorités marocaines ont englobé la partie occupée du Sahara Occidental dans la répartition administrative régionale du Royaume, ce qui représente un acte d’annexion illégale.

Un acte qui a des conséquences directes sur l’administration de la justice, notamment au Sahara Occidental et pour toute question qui lui est liée. En effet, cette annexion illégale est interprétée, en droit marocain, en relation avec l’article 275 c) du Code Pénal qui punit, entre autres, toute atteinte à l’intégrité territoriale d Royaume.

Comme on a pu le constater tout au long de la procédure judiciaire du Groupe de Gdeim Izik qui a conduit, sans aucune preuve matérielle, à la condamnation à de longues peines d’emprisonnements un groupe de défenseurs des Droits Humains pacifiques, ni les avocats marocains ou sahraouis représentant les accusés, ni les juges des différents instances judiciaires n’ont pu aborder la question du statut juridique du Sahara Occidental.

- 3 -

Quand les avocats français engagés dans la procédure ont osé le faire, ils ont été expulsés du Tribunal par le Président de la Cour. Cet exemple, qui n’est pas le seul, montre que le système judiciaire marocain n’est pas indépendant dès lors qu’il doit aborder la question du Sahara Occidental : les avocats sont contraints au silence et les juges doivent faire abstraction des normes du droit international et des décisions des organes onusiens.

J’ai évoqué avant les obligations auxquelles la Puissance occupante marocaine est soumise en vertu du Droit International Humanitaire : l’article 76 de la Quatrième Convention de Genève impose que les ressortissants du Territoire occupé soient jugés et, le cas échéant, incarcérés sur le sol de leur territoire d’origine. Or, la grande majorité des condamnés sahraouis, y compris ceux de Gdeim Izik, sont incarcérés sur le territoire du Royaume du Maroc, tel que reconnu internationalement.

En réalité, il faut avoir à l’esprit que toute arrestation des hommes et femmes sahraouis qui expriment leur opinion ou qui manifestent pacifiquement pour la réalisation du droit à l’autodétermination et l’indépendance du Sahara Occidental sont victimes d’arrestation arbitraires de la part de la Puissance occupante.

Toutes ces personnes, et les membres de leurs familles, sont également victimes d’actes d’intimidation, d’agression, de traitements humiliants et souvent de torture. Ce qui constitue une violation des droits de la personne, mais également une violation de la Quatrième Convention de Genève.

En décembre 2016, le Comité contre la Torture a adopté une décision[[1]](#footnote-1) portant sur le cas de Naâma Asfari, un des condamnés au procès de Gdeim Izik, dans laquelle il invite le Royaume du Maroc à indemniser le requérant de façon adéquate et équitable, à initier une enquête impartiale et approfondie sur les événements en question et à s’abstenir de tout acte de pression, d’intimidation ou de représailles susceptible de nuire à l’intégrité physique et morale du plaignant et de sa famille.

Au jour d’aujourd’hui, Madame Claude Mangin, l’épouse de Naâma Asfari n’est toujours pas autorisée à rendre visite à son époux et le Royaume de Maroc se refuse à mener une quelconque enquête sur les actes de torture survenus depuis l’arrestation de Naâma Asfari.

Encore une fois, dès qu’on aborde la question du Sahara Occidental, l’indépendance du système judiciaire marocain est tributaire des décisions politiques prises au plus haut niveau du Royaume.

Je ne peux pas terminer mon intervention sans avoir une pensée pour tous les Sahraouis disparus depuis l’invasion du Territoire Non Autonome de la part du Royaume du Maroc. On estime qu’aujourd’hui encore plus de 400 cas n’ont pas trouvé de réponse.

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Bien que le Royaume du Maroc ait ratifié la Convention internationale pour la protection de toutes les personnes contre les disparitions forcées, le Comité chargé de surveiller son application attend toujours la présentation du premier rapport marocain.

Là encore, l’indépendance du système judiciaire marocain est mise à mal par des décisions liées à la politique coloniale d’occupation du Royaume.

Le processus de l’Instance Equité et Réconciliation mené au début des années 2000 ne peut en aucun cas être considéré comme un processus de justice transitionnelle au Sahara Occidental car il a été mené de manière partielle et partiale de la part de la Puissance occupante.

Excellences, collègues, Mesdames et Messieurs,

Les violations des droits des prisonniers Sahraouis sont systématiques et graves et, malheureusement, ce ne sont pas les seules. Je veux ici saisir l’opportunité pour encourager vivement le Bureau du Haut-Commissariat aux Droits de l’Homme à mettre en place un programme de coopération technique et de renforcement des capacités avec le Front Polisario, la Commission Nationale Sahraouie pour les Droits de l’Homme et les ONGs sahraouies reconnues par le représentant du Peuple Sahraoui désigné depuis 1979 par l’Assemblée Générale de l’ONU[[2]](#footnote-2).

Je vous remercie pour votre attention.

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**Prof. Mads Andenæs (Oslo University)**

**Former Chair-Rapporteur of the UN Working Group on Arbitrary Detention**

**High-Level side-event at the 38th session of the UN Human Rights Council**

**Palais des Nations – Geneva, 19 June 2018**

**The Administration of Justice in Western Sahara:**

**the violation of prisoners’ rights**

*1. Arbitrary Detention and Western Sahara*

Western Sahara is the subject of a political failure of international and European institutions. Anti-terror policies, trade and the normal way in which of conducting international transactions weigh in favour of the Government of Morocco wishing to assert sovereignty over Western Sahara. The Moroccan human rights abuses that take place in this context are pushed aside and provide another example on human rights supervision blocked by political considerations.

The International Court of Justice and the European Court of Justice have applied international and EU law when many states wished to disregard the law. That also applies to the UN level.

The UN Torture Committee and the UN Working Group on Arbitrary Detention have held Morocco in violation of its human rights obligations.

This provides a strategy where independent bodies with their judicial processes become ever more important. These bodies provide some remedies. More importantly they may also make political action unavoidable.

- 2 -

*2. Morocco and UN Human Rights Supervision*

In my 2014 report to the UN Human Rights Council I brought attention to confessions obtained under torture. Article 293 of the Code of Criminal Procedure stated that a confession, like any other evidence, is subject to the discretion of the judge and that any confession obtained under torture is inadmissible. I noted the considerable importance accorded to confessions in the context of a trial. Through interviews with detainees serving long sentences, the United Nations Working Group on Arbitrary Detention had found that confessions had often been obtained as a result of torture. Such confessions were set out in the police records and served almost exclusively as evidence for prosecution and conviction.

According to representations made by the Moroccan authorities, confessions alone are not sufficient for a conviction and the provision of other corroborating material evidence is necessary. However, the United Nations Working Group on Arbitrary Detention learned that the minutes of the preliminary interview, as established by the police on the basis of confessions obtained under torture, are in practice rarely rejected by the trial court.

Testimonies received indicate that many cases that are submitted to the courts are based solely on confessions by the accused, in the absence of material evidence. The United Nations Working Group on Arbitrary Detention had also learned that courts and prosecutors did not comply with their obligation to initiate an ex officio investigation whenever there are reasonable grounds to believe that a confession has been obtained through the use of torture and ill-treatment, or to order an immediate, independent medical examination. This was required under arts. 74 (8) and 135 (5) of the Code of Criminal Procedure if they suspect that a detainee has been subjected to ill-treatment. This is the case even if the person recants before the judge and claims to have been tortured. It appeared that judges favour an interpretation of article 291 of the Code of Criminal Procedure whereby records established by the judicial police are prima facie evidence. Such an interpretation is tantamount to reversing the burden of proof by requiring the accused to prove his innocence, which is contrary to the principle of the presumption of innocence, as stated in article 23 of the Constitution. It also creates conditions that encourage the torture and ill-treatment of suspects.

In its jurisprudence concerning Morocco, the United Nations Working Group on Arbitrary Detention has consistently expressed its concern with regard to convictions on the basis of confessions made in the course of a preliminary hearing. The cases of *Mohamed Dihani* (Opinion No. 19/2013), *Abdessamad Bettar* (Opinion No. 3/2013) and *Mohamed Hajib* (Opinion No. 40 /2012) show a pattern where those individuals were convicted solely on the basis of reports drawn up by the police while they were in custody, during which time they were subjected to torture. It was also on the basis of confessions obtained under torture that *Ali Aarrass* (Opinion No. 25/2013) was sentenced in November 2011 to a 15-year prison sentence, after having been extradited from Spain[[3]](#footnote-3).

- 3 -

In my 2014 report to the UN Human Rights Council I emphasized that confessions made in the absence of a lawyer are not admissible as evidence in criminal proceedings. This applies in particular to confessions made during the time spent in police custody.

I recalled the concluding observations of the United Nations Committee against Torture following its consideration of Morocco in 2011, in which the Committee expressed its concern that “under the State party’s current system of investigation, confessions are commonly used as evidence for purposes of prosecution and conviction”. The Committee noted “with concern that convictions in numerous criminal cases, including terrorism cases, are based on confessions, thus creating conditions that may provide more scope for the torture and ill-treatment of suspects (arts. 2 and 15)”[[4]](#footnote-4).

The guarantees of a fair and equitable trial laid down in article 11 of the Universal Declaration of Human Rights and in article 14 of the International Covenant on Civil and Political Rights exclude self-incrimination and grant the right to legal assistance and representation and to other measures of protection in order to ensure that no evidence is obtained by confession. Under article 14, paragraph 3 (g), of the Covenant, no person may be compelled to testify against himself or to confess guilt. 38. In its jurisprudence, the United Nations Human Rights Committee has stated that that provision “must be understood in terms of the absence of any direct or indirect physical or psychological coercion from the investigating authorities on the accused with a view to obtaining a confession of guilt”.[[5]](#footnote-5)

In its views on communication No. 1769/2008, *Bondar v. Uzbekistan*[[6]](#footnote-6), the Committee found violations of article 14, paragraph 3 (b) and (d), on the grounds that the victim was not provided with a lawyer during the interrogation and his right to have the assistance of a lawyer of his own choosing was denied[[7]](#footnote-7). The Committee also found a violation of article 14, paragraph 3 (g), owing to a confession being obtained under torture.

I also recalled General Comment No. 32 (2007) of the United Nations Human Rights Committee, in which the Committee stated that article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.

- 4 -

Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will (par. 41).[[8]](#footnote-8)

According to the United Nations Special Rapporteur on torture “interrogation should take place only at official centres and the maintenance of secret places of detention should be abolished under law”. He added: “It should be a punishable offence for any official to hold a person in a secret and/or unofficial place of detention. Any evidence obtained from a detainee in an unofficial place of detention and not confirmed by the detainee during interrogation at official locations should not be admitted as evidence in court. No statement of confession made by a person deprived of liberty, other than one made in presence of a judge or a lawyer, should have a probative value in court, except as evidence against those who are accused of having obtained the confession by unlawful means.”[[9]](#footnote-9)

One of the aims of the provisions of article 11 of the Universal Declaration of Human Rights and article 14 of the International Covenant on Civil and Political Rights is to provide guarantees against all forms of direct or indirect, physical or psychological pressure by the authorities on the accused with a view to obtaining a confession. The right not to be compelled to testify against oneself or to confess guilt, and access to counsel and legal aid are not only measures intended for the protection of the interests of the individual, but are also measures, in the interest of society as a whole, of the trustworthiness and effectiveness of the judicial process, and of the reliability of evidence. Confessions made in the absence of legal counsel are not admissible as evidence in criminal process.

*3. The 2013 UN Mission to Morocco*

In my report to the Human Rights Council on the 2013 UN Mission to Morocco I noted the ongoing efforts by the Government to establish and consolidate a culture of human rights in Morocco. Today it is clear that the extensive process of structural reform in Morocco has continued after the visit. One concern was that many countries were more concerned about Moroccan participation in anti-terror cooperation than in the reform process. Western Sahara raised further concerns.

A further concern today is that the international pressure on Morocco to comply with international law and the UN Security Council Resolutions on Western Sahara may not be very effective and that some major European countries support the Government policies which are in breach of international law and Security Council Resolutions.

- 5 -

In 2013 the United Nations Working Group on arbitrary detention also visited Laâyoune, Western Sahara as a part of the mission to Morocco. We stated that as the visit of a group of independent mandate holders, it should not be interpreted as expressing any political view concerning the present or future status of the Non-Self-Governing Territory. The territory is subject to the right to self-determination in conformity with the principles contained in General Assembly resolutions 1514 (XV) and 1541 (XV).

In cases related to State security, such as those involving terrorism, membership in Islamist movements or supporters of independence for Western Sahara, the Working Group found that there is a pattern of torture and ill-treatment by police officers, in particular by agents of the National Surveillance Directorate (DST). I repeated this in my report to the Human Rights Council on the 2013 UN Mission to Morocco.

Many individuals have been coerced into making a confession and sentenced to prison on the sole basis of that confession. Article 23 of the Constitution explicitly states that secret or arbitrary detention and enforced disappearance are crimes of the utmost gravity, the Working Group received allegations, from sources deemed to be credible, of past and present instances of incommunicado detention which would warrant further investigation. The Working Group also received allegations that Morocco had served as a departure point, a transit country and a destination for illegal extraordinary renditions carried out in the context of the international fight against terrorism. The Working Group also received allegations of increased mass arrests of and violence against migrants and asylum seekers by the security forces, particularly in the north of the country.

Despite legal provision for access to a lawyer during the first 24 hours after arrest in ordinary criminal cases, that period seems not to be fully observed in practice. In addition, authorization has to be obtained from the Crown Prosecutor-General. Moreover, the Anti-Terrorism Act (No. 03-03) provides for police custody for up to three consecutive periods of 96 hours, with no right to a lawyer, except for a half-hour, monitored visit at the mid-point of those 12 days.

The Working Group noted that the Moroccan criminal justice system relies heavily on confessions as the main evidence to support conviction. Article 293 of the Code of Criminal Procedure prohibits the admission of any confession or statement made under duress, in accordance with international law. However, complaints indicate the use of torture by State officials to obtain evidence or confessions at the stage of initial questioning, in particular in counter-terrorism or internal security cases.

The Working Group also noted the excessive use of detention on remand. In general, detention as a means of punishment still seems to be the rule rather than the exception. There was a lack of alternatives to detention. Prison overcrowding as a consequence of this situation is a serious problem, which needs to be addressed. Although article 460 of the Code of Criminal Procedure provides that the judicial police officer in charge of juveniles may detain a juvenile in a dedicated place, the Working Group found a significant number of children as young as 14 years old in ordinary prisons.

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Reports indicate that the Prosecutor General’s Office rarely requests alternative forms of detention, as provided for in articles 501 to 504 of the Code of Criminal Procedure. In addition, juveniles often remain in custody for a long period before being admitted to a child protection centre.

Regarding Laâyoune, Western Sahara, the Working Group received numerous complaints of arbitrary detention, complaints that torture and ill-treatment were used to extract confessions and complaints indicating a pattern of excessive use of force in repressing demonstrations and arresting demonstrators calling for self-determination for the Sahrawi population.

These complaints were confirmed in interviews and prison inspections that the Working Group undertook during its mission. I highlighted this in my report to the Human Rights Council on the 2013 UN Mission to Morocco.

*4. Criminal Proceedings Against “the Gdeim Izik Group”*

With Tone Sørfonn Moe and several other observers or monitors I sat through the final proceedings of the Court of Appeal in the case against “the Gdeim Izik Group”. Previously, in the United Nations Working Group on Arbitrary Detention, I had heard four complaints against Morocco. In 2013 I had been on a UN mission to Morocco, and in 2014 reported to the UN Human Rights Council on the findings. In my report to the Human Rights Council I had noted the ongoing efforts by the Government to establish and consolidate a culture of human rights in Morocco. The extensive process of structural reform in Morocco has continued after the mission. One concern at the time was that many countries were more concerned about Moroccan participation in anti-terror cooperation than in the reform process. Western Sahara raised further concerns.

In the course of the criminal proceedings against “the Gdeim Izik Group”, so many serious violations of fair trial guarantees have taken place that the convictions are rendered unsafe. The current report documents serious violations of international law on torture and fair trial. The convictions were not based on sufficient evidence. The detainees have been subjected to torture. The overt bias in the proceedings with judges who could not control their court against a domineering prosecutor and advocates from the victims, was an undignified spectacle.

*5. International Observers and the Criminal Proceedings Against “the Gdeim Izik Group”*

Tone Sørfonn Moe’s 2017 report documents serious violations of international law on torture and fair trial. The breach of the international law on the right to a fair trial in the Universal Declaration of Human Rights and of Morocco’s other international obligations renders the deprivation of liberty of the 19 detainees arbitrary. The 19 detainees were subjected to abductions or arrest involving torture or cruel, inhuman or degrading treatment or punishment. Their unlawful treatment has continued during their detention.

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The group has been detained for some seven years. Their conviction was not based on sufficient criminal material evidence.

The reports by the police and the gendarmerie have been relied on as evidence, and the defence has not been able to challenge it. These are grave breaches of international law. There is no doubt that the detainees of the Group of Gdeim Izik have been subjected to torture. Morocco is in breach of several article of the UN Convention against Torture, for torture during arrest and interrogation, Article 1, failure to investigate, Article 12, violation of the right to complain, Article 13, the obligation to provide compensation and reparation, Article 14, reliance of confessions obtained through torture, Article 15, and inhuman treatment in detention, Article 16.

It has not helped that the judges declared on several occasions that the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment of 1984, and the CAT decision in Ennaâma Asfari (CAT/C/59/D/606/2014) have no legal force in their court.

The file in the court case contained illegally obtained evidence and other evidence which is inadmissible. The defence was not allowed to challenge the witnesses identifying the detainees’ participation in the crimes they have been convicted of.

The court proceedings were in multiples breaches of the right of equality of arms and right to defence.

*6. Way forward*

Human rights supervision is often blocked by political considerations. States may wish to shield their allies.

That creates obstacles in political bodies.

The International Court of Justice clarified and maintained the Security Council resolutions on Western Sahara in its 1975 Advisory Opinion. The European Court of Justice has applied international and EU law to the EU trade arrangements with Morocco.

This show how independent bodies with their judicial processes steps into the breach when the political process fails.

That also applies to the UN level.

The UN Human Rights Committee, the UN Torture Committee, the UN Working Group on Arbitrary Detention are even more important for a when international political processes fail. They have held Morocco in violation of its human rights obligations.

This provides a strategy where independent bodies with their judicial processes become ever more important. These bodies provide some remedies. More importantly they may also make political action unavoidable.

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**Mrs. Tone S. Moe**

**International observer at the Gdeim Izik trial**

**High-Level side-event at the 38th session of the UN Human Rights Council**

**Palais des Nations – Geneva, 19 June 2018**

**The Administration of Justice in Western Sahara:**

**the violation of prisoners’ rights**

Thank you so much for having me here,

I will take the opportunity to comment on the application of international humanitarian law to the Western Sahara conflict – and the unlawful detention of Saharawi’s, advocating for the right to self-determination - and the breach of prisoners right under the law of occupation.

It was Richard Baxter that famously said that “the first line of defence against international humanitarian law is to deny that it applies at all”. According to Eyal Benvenisti, one of the most used defences against the obligations imposed by the law of occupation is to assert their own sovereign title to the occupied land, and to dispute the sovereign title of the ousted government to the land.

Well in line with the mentioned tradition, Morocco denies the application of humanitarian law and holds that Western Sahara is part of the Kingdom of Morocco, and disputes the external right to self-determination for the Saharawi people. In the Western Sahara conflict, the political tensions underlying the conflict have created a brutal reality for the Saharawi people – as the protection of the law of occupation has been allowed, for over 40 years, to be casted into doubt as a consequence of the Occupying power disputing the status of the territory.

- 2 -

At the heart of the law of occupation and its applicability lies the concept of foreign domination.

According to The Hague Regulations article 42, the central question is whether a hostile army holds effective control over a foreign territory. The Geneva Conventions article 2 extends the scope of the Convention to include occupations which does not meet armed resistance.

As noted by the International Court of Justice in their Advisory Opinion on the Legal Consequences of the Construction of a Wall in the occupied Palestinian territories: the aim of the Fourth Geneva Convention is to protect the local population placed under foreign domination, also in territories that are disputed between the parties. According to the Eritrea-Ethiopia Claims Commission, the opposite solution would frustrate essential humanitarian principles and create an ex post facto nightmare. The Eritrea-Ethiopia Claims Commission holds therefore, similar to the International Court of Justice, that the legal title of a territory is not decisive to the determination of whether an occupation exists, as the exercise of effective control over a foreign territory and its population automatically sets in motion the law of occupation - in order to protect the local population living under occupation.

In the case of Western Sahara, Morocco invaded, at that time Spanish Sahara, a territory falling under the administration of a High Contracting Party. Morocco has no sovereignty over the territory of Western Sahara, and, the territory is not part of Morocco´s territorial integrity. The people of Western Sahara have a right to independence and an external right to self-determination - which prohibits all types of external interference and intervention with the governance of a territory and of its people. The placement of the people of Western Sahara under foreign domination, without their consent, renders the law of occupation immediately applicable to the occupied territories and its population, in order to limit the power of the occupying state.

The law of occupation is intended to protect “protected persons” – those who “finds themselves in the hands” of an “Occupying Power of which they are not nationals”. Within the protection given under international humanitarian law, there exists an inherent distinction between those who are nationals of the occupying power, and those who are subjected to foreign domination.

With regard to the Western Sahara conflict, the demographic of the occupied territories of Western Sahara has been drastically changed due to the Moroccan settlement policy where Moroccan settlers has been directly and indirectly transferred into the territory, turning the Saharawi population into the minority - constituting a grave breach to the Fourth Geneva Convention article 47.

In Western Sahara, the local population of the occupied territories is the people of Western Sahara, those entitled to the right to self-determination. In other words, the Convention sets out to protect Saharawi’s living under occupation. Moroccan settlers are not protected by international humanitarian law as they are nationals of the occupying power.

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In its essence, humanitarian law differs from human rights law: whilst human rights law is universally applicable and entitled to every human being, the law of occupation sets out to protect those individuals who find themselves in the hands of a state of which they are non-nationals.

At the heart of the Fourth Geneva Convention lies the prohibition against depriving protected persons of the benefits of the Convention, as stated in article 47. The principles of the Convention, such as, the right to a fair trial, held in the occupied territories, whilst obliging the court to take into consideration that the accused person is not a national of the occupying power, and therefore owe no allegiance to it, and the detention of the mentioned protected persons in the occupied territory, are fundamental safeguards for the protection of individuals living under occupation.

As part of the Moroccan annexation of the territory, all Saharawi’s were forcibly deprived of their Spanish nationality on the outset of the occupation in 1975 and 1979, and given Moroccan identity cards. All Saharawi´s were therefore compelled to accept Moroccan nationality - and obliged to show their allegiance and loyalty to the Kingdom of Morocco. Saharawi’s, living under occupation, are therefore entitled, but not given, the status as protected persons.

At the heart of the Moroccan occupation of Western Sahara lies the use of military power in order to suppress the right of self-determination for the people of Western Sahara, and to claim it as part of Morocco. At the start of the occupation Morocco started an anti-nationalist campaign directed towards the Saharawi population. The preferred method was to simply “disappear” activists and their entire families. The state of fear in Western Sahara has continued ever since, with the usage of excessive police violence towards demonstrators, arbitrary arrest and arbitrary detention – aimed at silencing the call for self-determination.

The cornerstone of the protection given to the local population living under occupation is enshrined in article 45 of The Hague Regulations:

“it is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power”.

The people of Western Sahara, living under occupation owe their allegiance to the ousted sovereign, in this instance - the Front Polisario.

As their allegiance lies with the ousted sovereign, -- Saharawi’s, the local population of Western Sahara -- have an inherent right to peacefully call for the right to self-determination in line with the UN General Assembly’s Resolution on the Granting of Independence to Colonial Countries and peoples.

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The imprisonment of protected persons or use of reprisals against protected persons due to their allegiance to the ousted sovereign is unlawful – and lies at the heart of the protection protected persons are entitled to under the Convention.

The prohibition of compelling inhabitants to swear their allegiance to the Occupying power, and the prohibition against depriving protected persons of the benefits of the Convention, entails that protected persons cannot lose their nationality.

Consequently, Moroccan courts have, as stated in the Fourth Geneva Convention article 67, an obligation to take into account the fact that the accused is not national of the occupying power.

However, the Moroccan judiciary does not take into account that Saharawi’s are the indigenous people of Western Sahara living under occupation, and that they owe no allegiance or loyalty to the occupying power. The Moroccan courts treat Saharawi’s who advocate in favour of the right to self-determination as separatists, claiming that they threaten the territorial integrity of the Kingdom – punishable by law under the Moroccan penal code.

The best-known case is the Gdeim Izik group.

19 of original 25 members of the Gdeim Izik group are now serving sentences ranging from 20 years to life - imprisoned in Morocco, far from their families.

The imprisonment of the group is a response to their refusal to swear allegiance to the Kingdom of Morocco – the Occupying Power – subjecting them to foreign domination - depriving them of the most fundamental human right, the prerequisite for all other human rights, the right to self-determination.

The Gdeim Izik group were arrested and imprisoned prior to, during and after the dismantlement of the Gdeim Izik camp, and was held accountable for what had happened during the dismantlement.

The “Gdeim Izik” was a protest camp situated in the occupied territories in October/November 2010, and had social and economic demands. According to the UN Secretary-General, the protest camp is “believed to have reached over 15,000”, and had, according to the UN-Secretary General, the potential to alter the conflict’s “status quo”. Morocco launched a security operation at the Gdeim Izik camp on 8 November 2010.

The group was brought before the Military Court of Rabat in 2013, the capital of Morocco, and later re-trailed at the Court of Appeal in Salé, Morocco, in 2017. The group of Saharawi human rights defenders chose to withdraw themselves from the proceedings in May 2017, as a consequence of the court’s failure to provide a fair proceeding - they held that a Moroccan courthouse could never be independent and impartial when sentencing Saharawi nationals.

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The prisoners advocated that the court had to apply humanitarian law. They urged that the court had an obligation to take into account that they were not Moroccan nationals and demanded to be treated as Saharawi’s – the local population of Western Sahara.

Similarly, they demanded to be tried in a court house located in the occupied territories – and to be detained in a prison located in the occupied territories.

The Saharawi activists held that a Moroccan courthouse, located in Morocco within the country of the Occupying power, did not have the competence to judge them – as they were not Moroccan nationals, they were nationals of Western Sahara.

The court held that that all inhabitants of what it called “the Moroccan Sahara” were the sons of the Kingdom of Morocco, and consequently held that the activists were Moroccan nationals. The court similarly prohibited the group’s French lawyers from invoking humanitarian law during the proceedings and the French lawyers were effectively stopped at the beginning of their advocacy. Consequently, the court failed to uphold their duty under humanitarian law: to take into account that protected persons are not nationals of the occupying power.

Consequently, as the Gdeim Izik group are advocating in favour of the right to self-determination, the Saharawi activists were treated as separatists, threatening the territorial integrity of the Kingdom of Morocco.

The “bill of rights” under International humanitarian law are fundamental safeguards for the protection of individuals living under occupation – and is of a different character then the rights that we find under international human rights law, precisely due to the vulnerable position the local population finds themselves in: the subjection of non-nationals to military foreign domination.

As of now, Saharawi’s, protected persons under international humanitarian law, are not given the protection stipulated in the Fourth Geneva Convention. Morocco as an occupying power explicitly denies the existence of a local population holding a different nationality, with an inherent strategy of silencing the call for self-determination, with methods of brutal repression.

Whilst the people of Western Sahara owe their allegiance to the ousted sovereign, the Polisario Front, the population is simultaneously forced, with the use of military power, to swear their allegiance to the Kingdom of Morocco – or to face the consequences.

The consequences of supporting the right to self-determination for the Saharawi people entails - among other forms of retaliations - arbitrary arrest and arbitrary detention, as the imprisonment of the Gdeim Izik group currently illustrates.

I thank you for your attention.

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**Madame Claude Mangin - Asfari**

**Evénement parallèle de Haut-Niveau**

**Palais des Nations – Genève, 19 juin 2018**

**L’Administration de la justice au Sahara Occidental :**

**La violation des droits des prisonniers**

Bonjour à tous,

Pour des raisons indépendantes de ma volonté, je ne peux malheureusement pas être avec vous aujourd’hui, mais je remercie les organisateurs de cette conférence de me permettre de vous transmettre ce court message.

Mon nom est Claude Mangin-Asfari, je suis citoyenne française et je suis mariée depuis 2003 à Ennaâma Asfari, défenseur des droits humains sahraoui, descendant d’une famille de caravaniers et commerçants sahraouis dont les parents avaient subi la répression des autorités marocaines, suite à l’invasion du Sahara occidental, car ils manifestaient leur opposition à l’occupant. Le père d’Ennaâma, après avoir été arrêté par les autorités marocaines, avait disparu de 1976 à 1991, quand il a été libéré avec 300 autres disparus.

La mère d’Ennaâma, Moguef Ment M'Hamed, icône de la Résistance Sahraouie, fut arrêtée en 1978 à Rabat alors qu’elle accompagnait un groupe de femmes Sahraouies parties se renseigner sur le sort de leurs maris. Ces femmes furent déportées vers la ville de TanTan où la mère d’Ennaâma passa plus de deux mois en prison. Quand elle fut libérée, elle fut assignée à résidence à TanTan.

Ennaâma, est diplômé en Droit à l'Université Cadi Ayyad de Marrakech et a obtenu un Diplôme d’Etudes Supérieures de Droit International Public à l'UFR de Sciences Juridiques et Politiques à l'Université de Paris X-Nanterre.

Aujourd’hui, Ennaâma est incarcéré à la prison de Kenitra suite à la condamnation à 30 ans d’emprisonnement qu’il s’est vu infligé par la Cour d’Appel de Rabat en juillet 2017, dans le cadre du procès dit de « Gdeim Izik ». Il paie, comme ses compagnons de lutte, le prix de son combat pour le respect des droits fondamentaux du Peuple Sahraoui, dont le droit à l’autodétermination et à l’indépendance.

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Je sais que d’éminents experts sont au podium pour aborder les questions juridiques. Pour ma part, je peux témoigner de la volonté d’Ennaâma et de ses compagnons d’exiger le respect également des normes du Droit International Humanitaire au Sahara occidental occupé par le Royaume du Maroc.

Depuis le mois de septembre dernier, les autorités marocaines ont transférés les prisonniers du groupe de Gdeim Izik dans différents lieux de détention et leur font subir des traitements cruels et inhumains dans l’indifférence générale.

Bien que le Comité des Nations Unies contre la Torture, en 2016 déjà, ait reconnu qu’Ennaâma a été victime de traitements dégradants et inhumains, ainsi que d’actes de torture et qu’il ait demandé au Royaume du Maroc de dédommager Ennaâma et de s’abstenir de tout acte de pression, d’intimidation ou de représailles susceptible de nuire à l’intégrité physique et morale du plaignant et de sa famille, malgré cela, les autorités marocaines ont isolé Ennaâma du reste du groupe et depuis 2016 elles m’empêchent systématiquement de lui rendre visite.

Au mois d’avril dernier, encore une fois, j’ai été refoulée à mon arrivée à l’aéroport de Rabat. Le lendemain de mon retour en France j’ai entamé une grève de la faim afin d’attirer l’attention des autorités françaises sur les violations de la part des autorités marocaines des droits fondamentaux de mon mari et de mon droit de visite. J’ai suspendu la grève de la faim au bout de 30 jours, suite à l’engagement pris par le Ministre des Affaires Etrangères de la France devant l’Assemblée Nationale de discuter directement de cette question avec les autorités marocaines.

Je saisie cette occasion pur attirer également l’attention sur les difficultés à exercer leur droit de visite de la part des familles des autres condamnés qui sont incarcérés dans différentes prisons marocaines, à des centaines de kilomètres de leur domicile, alors qu’ils devraient l’être dans le Territoire occupé du Sahara occidental.

Je vous remercie pour votre attention et pour tout ce que, chacun à son niveau et selon ses responsabilités, pourra faire pour le respect des droits fondamentaux du Peuple Sahraoui.

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***Mr. Hassanna Abba***

***League for the protection of Saharawi Prisoners in Moroccan prisons***

**High-Level side-event at the 38th session of the UN Human Rights Council**

**Palais des Nations – Geneva, 19 June 2018**

**The Administration of Justice in Western Sahara:**

**the violation of prisoners’ rights**

Ladies and gentlemen,

Allow me to thank you for this opportunity to talk about the suffering of the Sahrawis in the Occupied territory of Western Sahara, especially the political prisoners.

The Occupied territory of Western Sahara has known the phenomenon of arbitrary detention since the Moroccan invasion in Western Sahara in 1975. It popped up at the beginning of the phenomenon of enforced disappearances, when the occupation authorities kidnapped the unarmed Sahrawi citizens and tortured them in secret detention centers, just because they were Sahrawi.

The first case of arbitrary detention was known in 1979 with the group (Group 26) of people kidnapped in 1977; the members of that group spent two years in secret detention centers where they were tortured and subsequently they were tried in 1979 , Since the members of the group were raising political slogans, confirming their membership to the Polisario Front and demanding freedom and independence for the Saharawi people within the Moroccan courts, the trial didn’t respect the minimum conditions of a fair trial.

Furthermore, even though Morocco adhered to four Geneva Conventions, it didn’t respect them. The Fourth Geneva Convention prohibits torture, but the Moroccan authorities tortured the Sahrawi prisoners , The Fougrth Geneva Convention also prohibits enforced disappearance but, since the Occupation of Western Sahara, hundreds of Sahrawis have disappeared and still today more than 400 cases have to be solved , At the beginning of the 1990s, others groups were victims of arbitrary detention, such as the ASSA group and the ELAMSSAID group. Military and civilian trials of human rights activists and Sahrawi activists will follow.

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Those some example : the 2003 group and were arrested and condemning ,and trials in 2005 with the start of the intifada of independence and the 2006 , through the group of 7 who faced a military trial , after that the Gdeim Izik group and the last group of Sahrawi students in Marrakech prison.

It is worth mentioning that the Moroccan occupation authorities have increased the number of arrests, especially targeting media activists because of their coverage of peaceful demonstrations. I wish to highlight here the arrest of Sahrawi journalists Mohamed Elbambari, Mohamed El Joumaai, Laroussi Endour and Mohamed Salem Mayara: this is a result of a systematic policy against Human Rights Defenders.

Ladies and gentlemen,

Regarding the violation of the rights of Saharawi political Moroccan prisons, two main points must be addressed:

* first, the phenomenon of political and arbitrary detention of human rights defenders, its only because their demand in peaceful demonstrations the Right of the Saharawi people to self-determination ,
* second, the violation of their rights is a systematic policy of the occupation authorities

It is often used In order to take revenge for the struggle of the political prisoners ,for example the Court pleadings of the PPS Groupn Gdiem Izik when they expressed that the Moroccan is an occupation authority , and They declared that the Polisario Front Is the legitimate representative of the Saharawi people .

For that there are more than 53 "Sahrawi political prisoners" whose suffer from harsh conditions and suffer in difficult situation.

According to the figures, the total sentences issued against Sahrawi political prisoners exceed 441 years without counting the sentences for life of 10 PPS. It is also possible to talk about the dire situation of political detainees. Which is reflected in the denial of all their legitimate rights conferred by international law and the International Convention, Where we see the phenomenon of hunger strike rampant?

In an attempt by the detainees to obtain their legitimate rights, the Gdeim Izik group entered a number of open hunger strikes. was 305 days without the counting of individual warning strikes for 24 and 48 hours for the group of Saharawi students who were arrested for Their activity within universities, The total number of days in which they entered open strikes on food to "142", there is also the group, "Yahya Mohamed Hafid Iazza," who arrived in one strike 62 days, which affected his health, there is also the group "Embark Daoudi" and the rest of the Sahrawi political prisoners.

The reasons of all these hunger strikes are related to denial to provide fair trial conditions, the violation of the legitimate rights of the prisoners, the cases of arbitrary detention and the use of torture by the Moroccan authorities. The Sahrawi political prisoners also demand to have the right to study, to have access to books and newspapers, and to visit.

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They also request to be isolated from the Moroccan detainees condemned for common offenses in order to preserve their safety. Testimonies mention Moroccan detainees incited by the prisons’ staff to threaten the safety of the Sahrawi detainees.

Reference should also be made in the same context of deaths within prisons, because of lack of due diligence, because of torture or because of the poor health conditions of Sahrawi political detainees. I should mention Hassanna Elwali – Abdellah Echayhab – Elmoutawakil Mbarek – Abdellah Intahah – Fdayli Mohamed Lamin – Sadik Mohamed Fadil - Mohamed Bourhim – Bouktib Elkouchi, etc.

A particular mention has to be made to the martyr of torture - Mohammed al-Ayoubi - who was released by the occupation authorities after confirming his deteriorating health conditions.

Finally, I wish to stress that it is not possible to talk about any rights of the Sahrawis people under occupation, because their basic right - the right to self-determination - is still not respected.

For that we demand from the international community to intervene urgently, in order to put pressure on the Moroccan state to release all Sahrawi political prisoners and to enable the people of Western Sahara to exercise their right to self-determination and independence.

I thank you for your attention.

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1. CAT/C/59/D/606/2014 [↑](#footnote-ref-1)
2. AG Résolution 34/37 (21 novembre 1979) [↑](#footnote-ref-2)
3. A/HRC/27/48/Add.5 [↑](#footnote-ref-3)
4. Committee Against Torture, CAT/C/MAR/CO/4, para. 17 [↑](#footnote-ref-4)
5. Human Rights Committee, communication No. 1033/2001, Singarasa v. Sri Lanka, para. 7.4; also communications No. 253/1987, Kelly v. Jamaica, para. 5.5; No. 330/1988, Berry v. Jamaica, para. 11.7; No. 912/2000, Deolall v. Guyana, para. 5.1 [↑](#footnote-ref-5)
6. Committee on Human Rights, Bondar vs. Uzbekistan, Communication No. 1769/2008 (CCPR/C/101/D/1769/2008). See also the jurisprudence of the Inter-American Court of Human Rights, including the cases of Tibi v. Ecuador, Judgment of 7 September 2004, Series C, No. 114, para. 146; Maritza Urrutia v. Guatemala, Judgment of 27 November 2003, Series C, No. 103, para. 93; Cantoral-Benavides v. Peru, Judgment of 18 August 2000, Series C, No. 69, para. 104. [↑](#footnote-ref-6)
7. CCPR/C/101/D/1769/2008, para. 7.4. 8 Ibid, para. 7.6. A/HRC/27/48/Add.5 10 [↑](#footnote-ref-7)
8. Human Rights Committee, general comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial (CCPR/C/GC/32), para. 41. [↑](#footnote-ref-8)
9. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment (E/CN.4/2003/68), para. 26 (e). [↑](#footnote-ref-9)