

Crimes Against Humanity in Western Sahara: The Case Against Morocco

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Abstract: Western Sahara is occupied by Morocco. The referendum on the territory's final status set forth by the United Nations Mission for the Referendum in Western Sahara (MINURSO) has repeatedly been postponed and the so far brokered proposals have been rejected by both parties. Since the Moroccan occupation the Saharawis have been continuously repressed through arbitrary arrests, enforced disappearances, and attacks of the civilian population, persecution and oppression of peaceful demonstrations. The violations of human rights is an ongoing issue. It is argued that these violations may constitute crimes against humanity, further on this article suggests that the international community should act as soon as possible to end Moroccan impunity and to make greater efforts for a just and lasting solution of the question of Western Sahara.

I. INTRODUCTION

The territory of Western Sahara has been occupied partly by Morocco and Mauritania since 1975. In 1979 Mauritania withdrew due to the pressure from Frente Polisario. The annexation of the territory was not only a violation of the right to self-determination of the Saharawi people but is in our days still a source for massive human rights violations and the cause of 165,000 Saharawis living in refugee camps in Algeria.¹ The territory of Western Sahara is divided by a 2200 kilometers long wall, combined with mine fields, barbed wire and ditches built with technological support from France and the US and guarded by over 150,000 soldiers dispersed in bases at every fifth kilometer.²

The human rights situation of the Saharawis can be examined in a two folded way: primarily the situation of the Saharawis under direct Moroccan occupation on the territory of Western Sahara and secondly the one of the refugees settled in the four refugee camps (Alayun, Awserd, Dakhla and Smara) in the Tindouf governorate (*wilaya*) in the south-west of Algeria. In order to delimit, this article aims to focus on the previous situation and thereby on the violations of human rights committed on the territory of Western Sahara by the Moroccan authorities. The concern about the seriousness of the human rights violations committed against the Saharawis has been voiced from several fora³ and constitutes the core approach of this article, namely whether the continuous violation of the Saharawis' human rights constitute crimes against humanity. In order to properly investigate the issue we have compared the reports of the documented human rights violations made by several NGO's and the different bodies of the United Nations. The lack of continuity in the documentations has made the investigative work more obstructive. Moreover, the United Nations Mission for the Referendum in Western Sahara (MINURSO) that has been part of the picture since 1991 still does not have a mandate to investigate and monitor human rights violations, such reports

¹ Estimation made by the Algerian government, UNHCR Country Operations Plan for Algeria, 2007, p. 1.

² Michael Bhatia, *Western Sahara under Polisario Control: Summary Report of Field Mission to the Sahrawi Refugee Camps (near Tindouf, Algeria)*, available at <http://www.arso.org/bhatia2001.htm>

³ UN Working Group on Enforced or Involuntary Disappearances (A/HRC/13/31/Add.1, 9 February 2010), UN Special Representative of the Secretary-General on the situation of human rights defenders (E/CN.4/2004/94/Add.3, 23 March 2004, A/HRC/4/37/Add.1, 27 March 2007), UN Human Rights Committee (CCPR/CO/82/MAR, 1 December 2004), UN Committee on Economic, Social and Cultural Rights (E/C.12/MAR/CO/3, 4 September 2006), UN High Commissioner for Refugees (UNHCR submission to UPR on Morocco 31 March 2008, p. 1, citing CESCR/12/MAR/CO/2, para. 13 (b) 4 September 2006) MP's from the European Parliament (B7-0249/2009, 15 December 2009), and MP's from the Parliamentary Assembly from the Council of Europe (Doc. 12166, 5 February 2010), U.S. Department of State, 2009 Human Rights Report: Western Sahara, 11 March 2009. See also reports from NGO's: Amnesty International, Human Rights Watch, International Bureau for the Respect of Human Rights in Western Sahara, The Movement against Racism and for Friendship among Peoples and Front Line Defenders of Human Rights Defenders - International Foundation for the Protection of Human Rights Defenders.

would also have facilitated the documentation and the collection of evidence. In 2006 there was support among 14 of the Security Council's 15 members for adding a provision to resolution 1720(2006) expressing concern about human rights violations by Morocco in Western Sahara. However, France as a close ally of Morocco, managed to keep it out of the text.⁴

The article reviews briefly the historical context of Moroccan occupation and thereafter seeks to outline the atrocities committed against the Saharawi population by the occupant along with evidence underscoring the crimes. It argues why these violations not only violates human rights treaties but also constitute crimes against humanity under customary international law. This is done by more closely examining the history and development of the norms of international criminal law and through the jurisprudence of the International Military Tribunal of Nuremberg, the two *ad hoc* tribunals and the ICC.

II. BACKGROUND

Already in the 15th century the rich waters outside the coast of Western Sahara started to be exploited by Spain, the final colonization was completed at the Berlin conference in 1884, when the territory was given to Spain and thereby got the name Spanish Sahara. In 1912 the borders were consolidated and whilst the government in Madrid did not show too far-reaching interest in the region, France took a firm grip of their neighbouring colonized countries Morocco, Algeria and Mauritania.⁵

The United Nations General Assembly adopted in 1960 the *Declaration on the Granting of Independence to Colonial Countries and Peoples*,⁶ and already the Charter of the United Nations contains a provision setting forth the right to self-determination. The states have not been able to reach consensus on the definition of “peoples” in this regard, therefore the genuine and most far-reaching right to self-determination can only be claimed in the context of decolonization.⁷ Self-determination is also considered to have reached the status of a peremptory norm (*jus cogens*) with an *erga omnes* effect, meaning that not only are all states obliged to comply with these norms, but also to do all in their power to make other parties comply by them.⁸

Spain was in 1966 urged by the United Nations to set forth a referendum regarding the self-determination and the question of independence for the population in Western Sahara. Spain, however, managed to postpone the referendum several times and when the international community had set enough pressure for the referendum to take place in 1974, Morocco entered the political arena making territorial claims on Western Sahara, allegedly going back to the times before the Spanish colonization. To stop the referendum that would probably have turned the territory into an independent state, King Hassan II of Morocco convinced the United Nations to ask the International Court of Justice (ICJ) for an advisory opinion. As a result, the General Assembly of the United Nations asked the International Court of Justice (ICJ) for an advisory opinion whether there might be such legal

⁴ Reuters, *UN shuns W. Sahara rights plea after France objects*, 31 October, 2006

⁵ International Court of Justice, Advisory Opinion of 16 October 1975 concerning Western Sahara, para. 77.

⁶ Adopted by the General Assembly, res. 1514, 15 UN GAOR, Supp. (No. 16), UN Doc. A/4684 (1960)

⁷ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination – The Accommodation of Conflicting Rights*, University of Pennsylvania Press, Philadelphia, 1996, p. 45-46.

⁸ International Law Commission: report of the ILC, 53rd sess. Supp. No. 10, A/56/10, *East Timor case*, ICJ Rep. 1995, p. 90, at p. 102 (para. 29), Halim Morris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA j. Int'l & Comp. L. 204 (1997), David Raic, *Statehood and the Law of Self-Determination*, Kluwer Law International, 2002.

ties affecting the policy to be followed in the decolonization of Western Sahara. In its conclusions the Court stated that the material presented to it showed the existence of some “*legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara*”, however, “*the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco [or the Mauritanian entity]*”.⁹ All parties chose to interpret the quoted passage in a selective way so it would justify and suit their respective claims, resulting in Morocco and Mauritania annexing Western Sahara.¹⁰

In 1975 Morocco annexed the northern two-thirds of Western Sahara through a strategic mass demonstration referred to as the “Green March” under the parole of ‘reuniting’ the territory with the mother state. There was massive propaganda and a well-organized march by 350,000 Moroccans who went across the border to Western Sahara and by all this the attention was drawn away from the parallel military occupation.¹¹ The march also served as a cover for the negotiations taking place in Madrid between Spain, Morocco and Mauritania about the future of Western Sahara, where neither the opinion nor the interests of the Saharawis were represented. The agreement gave Morocco the right to annex the northern parts and Mauritania the right to the southern. Spain withdrew as the former colonial power, although would, according to the publicized terms of the agreement, still retain 35% of the shares in the Fosbucraa company regarding the deposits in the phosphate mine Bu Craa.¹² Reportedly there was also an unpublicized part of the agreement giving Spain fishing rights in the territorial water of Western Sahara.¹³ The legality has been challenged by numerous fora in the international community and also by the United Nations through the General Secretary for Legal Affairs and Legal Counsel Hans Corell in 2002, stating that “*[t]he Madrid Agreement did not transfer sovereignty over the territory, nor did it confer upon any of the signatories the status of an administering Power - a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the territory to Morocco and Mauritania in 1975, did not affect the international status of Western Sahara as Non-Self-Governing Territory*”.¹⁴

The *de facto* invasion by Morocco and Mauritania immediately led to people fleeing their homes in mass panic, leaving animals and property behind. Most of the refugees headed east, where refugee camps were established in Tifariti and Oum Dreiga. In January 1976 the number of refugees in the Tifariti camp was estimated to 15,000. In the same month the refugee camp was put under severe aerial attacks by the Royal Moroccan Air Force using napalm and white phosphorus, forcing the refugees to flee across the Algerian border, causing thousands of deaths, injuries and disappearances.¹⁵ At the end of 1976 the UNHCR gave an estimate of 50,000 Saharawis living as refugees in southern Algeria.¹⁶ Later on even larger

⁹ Cuervo, José Ignacio Alguero, *The Ancient History of Western Sahara and the Spanish Colonisation of the Territory*, International Law and the Question of Western Sahara, (IPJET), Leiden, 2007, p. 28, International Court of Justice, Advisory Opinion of 16 October 1975 concerning Western Sahara, para. 162.

¹⁰ United States Library of Congress study of Mauritania, Washington D.C. 1990.

¹¹ Jensen, Erik, *Western Sahara: anatomy of stalemate*, International Peace Academy Occasional Paper Series, Lynne Rienner Publishers, Colorado, 2005, p. 27.

¹² Thompson, Virginia and Adloff, Richard, *The Western Saharans: Background to Conflict*, New Jersey, Barnes & Noble, 1980, p. 175.

¹³ Jensen, 2005, p. 27.

¹⁴ 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.

¹⁵ Surendra Bhutani, *Conflict on Western Sahara*, Strategic Analysis, 1754-0054, Volume 2, Issue 7, 1978, p. 251– 256, Tomás Bárbulo, *La historia prohibida del Sáhara Español*, Destino, Imago mundi, Volume 21, 2002, p. 284-285.

¹⁶ UNHCR Program of Humanitarian Assistance in the Tindouf Area, Doc HCR/155/42/76.

refugee camps were established between the Algerian city Tindouf and the border to Western Sahara, where the refugees have lived ever since. At present, according to the estimation made by the Algerian government the number of the Saharawi refugees living there is 165,000.

After Spain took its final leave from the territory in February 1976 the Saharawi Arab Democratic Republic (SADR) was proclaimed in the small town of Bir Lahlou, by the Provisional Saharawi National Council. Madagascar and Burundi were among the first to recognize the SADR and when Algeria did so a couple of days later, Morocco broke off diplomatic relations with Algiers.

III. CRIMES AGAINST HUMANITY – JUSTICE FOR WESTERN SAHARA

Well-documented evidence suggests that the Moroccan government committed crimes against humanity from the beginning of the occupation in 1975 and onwards, continuously violating the human rights of the Saharawi population living on the occupied territories. Western Sahara and the Saharawis are in need of justice, reconciliation and the recognition of the wrongful acts committed against them.

Crimes against humanity, as the notion itself reveals, refer to crimes that affect in a particular manner the whole international community. It comprises some of the most serious crimes such as murder, extermination, enslavement, deportation and torture for instance. Due to the seriousness of the crimes, they are apprehended as crimes not only against the victim of the crime but also as a crime against the humanity in its whole. The notion was coined already in 1915 when France, the United Kingdom and Russia referred to the atrocities committed against the Armenian population in Turkey as crimes against humanity.¹⁷ It was first proclaimed by the Charter of the International Military Tribunal of Nuremberg.¹⁸ The notion's contours have progressively been drawn up by the statutes of international criminal courts as well as their jurisprudence.¹⁹ In determining the elements constituting crimes against humanity, distinguishing them from ordinary crimes, we have turned to relevant treaty provisions and customary international law. This is done with consideration of the fact that neither SADR nor Morocco is State Party to the Rome Statute of the International Criminal Court. The Rome Statute does not exclusively codify or exhaust international criminalization.²⁰

Before the more detailed outlining of the registered offences committed by the Moroccan authorities against Saharawi civilians, it needs to be established whether the notion of crimes against humanity can be applied to the situation of human rights in Western Sahara. The situation has to comply with two different sets of criteria, *primo* the objective elements and *secundo* the subjective elements.

¹⁷ *Principles of International Criminal Law*, Gerhard Werle, T.M.C Asser Press, The Hague, 2005, p. 217.

¹⁸ Article 6(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

¹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia adopted 25 May 1993 by Resolution 827 (1993), (ICTY Statute), article 5; Statute of the International Criminal Tribunal for Rwanda adopted 8 November 1994 by resolution 955 (1994), (ICTR Statute) article 3; Rome Statute of the International Criminal Court, 17 July 1998, 2187 U.N.T.S. 90 (Rome Statute), article 7

²⁰ Broomhall, Bruce, Article 22 – *Nullum crimen sine lege*, Triffterer, Otto (Ed.), Commentary on the Rome Statute of the International Criminal Court, 713-729, Second Edition, C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008, p. 726.

1. Objective Elements of the Crime (*actus reus*)

The objective elements of a crime correspond to the ones that objectively can be assessed without turning to the intentional explanations of a crime.

A. *The Saharawis are a civilian population*

In order for a crime to be characterized as a crime against humanity it has to be directed against ‘any civilian population’. This population has to hold some common features distinguishing them as targets.²¹ It is easy to see that the Saharawis are a population *per se*, because they have ever since 1976 and the creation of the Saharawi Arab Democratic Republic, claimed sovereignty over the territory of Western Sahara. Both the ICJ and the UN Security Council have during the years repeatedly referred to the Saharawis as the “people of Western Sahara”²² and the “population of Western Sahara”.²³ The Constitution of Western Sahara first adopted in 1976 and revised in 1991, 1995 and 1999, continuously refers to the population of Western Sahara as ‘*the Saharawi people – an Arab, African and Muslim people*’.

This population has also to be of a predominantly civilian nature.²⁴ Since the ceasefire signed by Morocco and the Frente Polisario in 1991 and monitored by the MINURSO, the Saharawi quest for self-determination has been conducted in a peaceful manner, excluding thus the military character of the population. It is, at any event, impossible to confer a military character to the whole population of a territory. Hence, it is possible to define the Saharawi population as a ‘civilian population’.

B. *The widespread and systematic character of the attack*

The attack directed against the civilian population has also to be widespread or systematic in order to be defined as a crime against humanity. The two criteria are disjunctive, thus both of them do not have to be fulfilled.²⁵ The notion ‘widespread’ refers to the large scale of the attack and the number of victims,²⁶ while the adjective systematic indicates the organized nature of the attack.²⁷

The fact that 165,000 Saharawis are living in refugee camps in Algeria, the Western Saharan territory is divided by a 2200 kilometers long wall surrounded by mine fields, barbed wire and soldiers bear witness of the large scale of the violations. It is also possible to uphold that the violations are systematic since they have been committed against

²¹ ICTY Statute, article 5; ICTR Statute, article 3; Rome Statute, article 7; Prosecutor vs. Kunarac Trial Judgment, Case no. ICTY-IT-96-23-T& IT-96-23/1-T, 22 February 2001, para. 423.

²² ICJ Advisory Opinion of 16 October 1975.

²³ United Nations Security Council, resolution 690 (1991) adopted April 29 1991

²⁴ *Prosecutor vs. Tadić* Trial Chamber Judgement, 7 May 1997, para. 638; *Prosecutor vs. Kordić and Čerkez* Trial Judgment, Case no. ICTY-IT-95-14/2-T, 26 February 2001, par 180; *Prosecutor vs. Kayishema and Ruzindana* Trial Judgment, Case no. ICTR-95-1-A, 21 May 1999, par 128; *Prosecutor vs. Kunarac* Trial Judgment, para. 425; *Prosecutor vs. Bagilishema* Trial Judgment, Cae no. ICTR-95-1A-T, 7 June 2001, par 80.

²⁵ ICTR Statute, article 3, Rome Statute, article 7(1)

²⁶ *Prosecutor vs. Kunarac* Appeal Judgment, 12 June 2002, para. 94; *Prosecutor vs. Tadić* Trial Judgment, para. 648; *Prosecutor vs. Blaškić* Trial Judgment, Case no. IT-95-14-T, 3 March 2000, para. 206; *Prosecutor vs. Vasiljević* Trial Judgment, Case no. ICTY-IT-98-32-T, 29 November 2002, para. 35; *Prosecutor vs. Stakić* Trial Judgment, Case no. ICTY-IT-97-24-T, 31 July 2003, para. 625; *Prosecutor vs. Akayesu* Trial Judgment, Case no. ICTR-96-4-T, 2 September 1998, para. 580; *Prosecutor vs. Kajelijeli* Trial Judgment, Case no. ICTR-98-44A-T, 1 December 2003, para. 871.

²⁷ *Prosecutor vs. Kunarac* Trial Judgment, para. 429; *Prosecutor vs. Vasiljević* Trial Judgment, para. 35; *Prosecutor vs. Stakić* Trial Judgment, para. 625; *Prosecutor vs. Blaškić* Appeal Judgment, 29 July 2004, para. 101; *Prosecutor vs. Akayesu* Trial Judgment, para. 580; *Prosecutor vs. Semanza* Trial Judgment, Case no. ICTR-97-20-T, 15 May 2003, para. 329; *Prosecutor vs. Kamuhanda* Trial Judgment, Case no. ICTR-95-54A-T, 22 January 2004, para. 665.

the Saharawi population throughout their quest for self-determination, i.e. during 34 years (1976-2010).

C. The crimes at issue State-sponsored

In assessing crimes against humanity it is also relevant to see to the policy element of the crimes. Although it is not a requirement for a policy to exist in determining whether there have been crimes against humanity committed or not,²⁸ the policy element helps to underscore the *actus reus* of a widespread and systematic attack, since it is perceived as inherent to such an attack.²⁹

Concerning the case of Morocco and Western Sahara, the policy element can be relevant to underline since Morocco's constant position has been to completely ignore the Saharawis' right of self-determination. The general understanding of Morocco is that Western Sahara is an integral part of the Kingdom of Morocco. Already in 1975, Morocco contended in its written submission to the ICJ that Western Sahara is under Moroccan sovereignty and that the territory in question is home of the Moroccan nation, *Le Sahara occidental, foyer de la nation marocaine*.³⁰ On the occasion of the 34th anniversary of the Green March on 6th November 2009, King Mohammed VI reasserted the firmness of the Moroccan position concerning Western Sahara. The King underlined the "Moroccanness of the Sahara" and that Morocco will "not give up or bargain over as much as a grain of sand from our Sahara". He also underscored that the country will not let human rights be "exploited in a shameful way", for instance by conspiring against the country's sovereignty and unity.³¹

2. The Offences

The Saharawis' right to self-determination has not been respected and the discussions between Morocco and Western Sahara have reached a dead lock, which has led to a general situation of violations of human rights. People are and have been displaced by the conflict and large parts of the Saharawi population are living in refugee camps where it is impossible to enjoy all the universal human rights to which a person is rightfully entitled. The Committee on Economic, Social and Cultural Rights for instance, has expressed their worry about this situation where people, in particular women and children, suffer "multiple violations of their rights".³² The general situation of human rights is worrying, nevertheless, reasoning in the framework of crimes against humanity we have identified solely the gravest violations of human rights recorded; torture, imprisonment or arbitrary arrests, persecutions on political, racial or religious grounds and enforced disappearances.

A. Torture

²⁸ Charter of the International Military Tribunal annexed to the London Agreement, 8 August 1945, 82 U.N.T.S. 280 (IMT Charter), article 6(c); Charter of the International Military Tribunal for the Far East, 19 January 1946 amended 26 April 1946 (IMTFE Charter), article 5(c); ICTY Statute, article 5; ICTR Statute, article 3; *Prosecutor vs. Simić et al.* Trial Judgment, Case no. ICTY-IT-95-9-T, 17 October 2003, para. 44: "There is no requirement in customary international law that the acts which form the attack be connected to a policy or plan". Compare with Rome Statute, article 7(2)(a)

²⁹ *Prosecutor vs. Bagilishema* Trial Judgment, para 78: "... the requirements of widespread or systematic will be enough to exclude acts not committed as part of a broader policy or plan. Also, the requirement that the attack must be committed against a "civilian population" presupposes a kind of plan".

³⁰ ICJ Pleadings, Oral Arguments, Documents, Western Sahara Volume III, 27 March 1975.

³¹ King Mohammed VI's speech on the occasion of the 34th anniversary of the Green march, 6 November 2009, <http://www.maroc.ma/PortailInst/An/Actualites/HM+the+King+launches+program+of+school+education+promotion.htm> 2010-03-16.

³² CESCR, E/C.12/MAR/CO/3, 4 September 2006, 36th Session, para. 13(b).

The crime against humanity of torture, in the terms of international criminal law, can be defined as infliction of severe physical or mental pain or suffering.³³ While it is possible to identify some practices as torture *per se*,³⁴ it is impossible to elaborate an exhaustive list of practices that would be defined as torture.³⁵ According to the case law of the ICTY and the ICTR the crime in question must also be inflicted with a particular purpose to obtain information, to coerce or discriminate somebody.³⁶ The ICTY has even pronounced that these purposes have become a part of customary international law.³⁷

Several NGOs have voiced concerns about torture practices committed against Saharawis by Moroccan officials. Amnesty International reports about torture and ill-treatment of Saharawis when arrested for having led demonstrations against Moroccan dominion of the Saharan territory. The torture is aimed at intimidating the arrested, punishing them for their opinions about the self-determination or even to force them signing confessions.³⁸ In its report “Human Rights in Western Sahara and in the Tindouf Refugee Camps”, Human Rights Watch (HRW), presents ten Saharawis’ testimonies of torture. HRW has also taken part of reports of medical examinations showing proofs of torture.³⁹ The famous human rights defender Aminatou Haidar, published a testimony of torture in “International law and the question of Western Sahara”, she was arrested on the 17th of June 2005 and tortured in public. Aminatou Haidar got three costal fractures and two serious wounds to the skull and had to get eleven stitches.⁴⁰

An additional grave problem, next to the factual torture issue, is that there are no independent mechanisms that can examine the allegations of torture, and partial or complete impunity rules over crimes of torture.⁴¹ When asked about accountability for torture crimes, the Moroccan authorities repeatedly quote the case of two police officers who got imprisoned for two years for beating a Saharawi man, Hamdi Lembarki, to death in 2005 as a proof of a case being examined in a proper way.⁴²

B. Imprisonment – arbitrary arrests and detentions

³³ Rome Statute, article 7.2(e)

³⁴ *Prosecutor vs. Kvočka et al.* Trial Judgment, Case no. ICTY-IT-98-30/1-T 2 November 2001, para. 144: “Beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, as well as threats to torture, rape, or kill relatives were among the acts most commonly mentioned as those likely to constitute torture. Mutilation of body parts would be an example of acts *per se* constituting torture.”

³⁵ *Prosecutor vs. Kvočka et al.* Trial Judgment para. 147: “Clearly, an exhaustive list of torturous practices is impossible to devise”.

³⁶ *Prosecutor vs. Akayesu* Trial Judgment, para 594; *Prosecutor vs. Mucić et al.* Trial Judgment, Case no. ICTY-IT-96-21-T, 16 November 1998, para. 470- seq.; *Prosecutor vs. Kunarac et al.* Trial Judgment, para. 497; *Prosecutor vs. Kvočka et al.* Trial Judgment para. 141; *Prosecutor vs. Krnojelac* Trial Judgment, Case no. ICTY-IT-97-25-T, 15 March 2002, para. 179.

³⁷ *Prosecutor vs. Kunarac et al.* Trial Judgment, para. 485: ” The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person.”

³⁸ Human Rights Council, summary prepared by the Office of the High Commissioner for Human Rights to the Universal Periodic Review concerning Morocco, A/HRC/WG.6/1/MAR/3, 11 March 2008, p. 9 para. 42.

³⁹ Human Rights Watch, *Human Rights in Western Sahara and in the Tindouf Refugee Camps*, 2008, <http://www.hrw.org/sites/default/files/reports/wsahara1208webwcover.pdf> 2010-03-16.

⁴⁰ Aminatou Haidar, *A Testimony of Human Rights Violations against Saharawis*, International law and the question of Western Sahara, International Platform of Jurists for East Timor (IPJET), Leiden, 2007, p. 348.

⁴¹ Lauri Hannikainen, *The Case of Western Sahara from the Perspective of Jus Cogens*, International law and the question of Western Sahara, International Platform of Jurists for East Timor (IPJET), Leiden, 2007, p. 72.

⁴² HRW Report 2008, p. 62.

When it comes to imprisonment, it can only be defined as a crime against humanity when it is connected to an arbitrariness of the proper deprivation of liberty,⁴³ i.e. when there is a lack of a due process of law preceding the imprisonment. At the outset, imprisonment was not included in the Nuremberg Charter, nor in the Tokyo Charter, it was subsequently included in the Allied Control Council Law No. 10⁴⁴ and the Statutes of the ICTY, ICTR and ICC.⁴⁵ The imprisonment is not only confined to situations where a person is actually imprisoned, but can also extend to cases of an enclosed space from where the person is prevented from moving.⁴⁶ Examples of arbitrary arrests are the clan custodies, family or clan members are repeatedly detained so as to arrest the persons wanted or to put pressure on the family.

Amnesty International reports about fathers being held in custody in order to impede their children from demonstrating against the Moroccan occupation.⁴⁷ HRW reveals testimonies from youths getting detained and driven to isolated locations by the police for being suspected of participating in street protests in favour of the self-determination of Western Sahara.⁴⁸ Aminatou Haidar attests the existence of secret detention centres in Kallaat Magouna, Agdz, Derb Mouly Chrif and PC CMI (*Poste de Commandement des Compagnies Mobiles d'Interventions* – Office of Command of the Mobile Intervention Companies). She submits that several police stations are being used as concentration camps for Saharawis.⁴⁹ When it comes to her own situation, Aminatou Haidar was expelled from Morocco when returning after receiving the Civil Courage Prize in New York. Eventually she got the right to return to Layoune and to her family but remains under a *de facto* house arrest.⁵⁰

C. Persecutions on political, racial or religious grounds

Customary international law on persecution can be derived from the various international instruments that have prohibited crimes of persecution and judgments relating to these instruments; the crime has been included in the elements of crime in all relevant international criminal instruments since Nuremberg.⁵¹ Under customary international law the discriminatory ground may be political, racial, ethnic or religious.⁵² The Rome Statute broadens the discriminatory grounds by adding ‘cultural’, ‘gender’ and ‘other grounds that universally recognized as impermissible under international law’ in its Article 7(1)(h).

The phenomenon of persecution has been apparent for a long time and reached its possibly most obvious shape during Hitler’s Third Reich in the so called “Night and Fog” decree, ordering the persecution of people who were “guilty of offenses against the Reich”.⁵³ The

⁴³ *Prosecutor vs. Kordić and Čerkez* Trial Judgment, para. 302; *Prosecutor vs. Krnojelac* Trial Judgment, para. 110.

⁴⁴ Article II.1(c).

⁴⁵ ICTY Statute, article 5(e); ICTR Statute, article 3(e); Rome Statute, article 7(1)(e)

⁴⁶ Werle, 2005, p. 243.

⁴⁷ Human Rights Council, summary prepared by the Office of the High Commissioner for Human Rights to the Universal Periodic Review concerning Morocco, A/HRC/WG.6/1/MAR/3, 11 March 2008, p.10 para. 42.

⁴⁸ HRW Report 2008, p. 65.

⁴⁹ Aminatou Haidar 2007, p. 347.

⁵⁰ Democracy Now, *Aminatou Haidar Under House Arrest: "They Are Silencing Saharan Voices So They Can Say I'm Alone"*, 11 december 2009,

http://www.democracynow.org/blog/2009/12/11/breaking_news_morocco_blocks_ailing_western_saharan_hum_an_rights_activist_aminatou_haidar_from_returning_home, available 2010-03-16

⁵¹ IMT Charter, article 6 (c); Control Council Law No. 10, article II(c); IMTFE Charter, article 5(c); ICTY Statute, article 5(h); ICTR Statute, article 3(h)

⁵² Cassese, Antonio et al., *The Rome Statute of The International Criminal Court: A Commentary*, Oxford University Press, New York, 2002, p. 376-77.

⁵³ *Nacht und Nebel* Erlass, issued by Adolf Hitler and signed by Field Marshall Wilhelm Keitel, Chief of the German Armed Forces High Command on December 7, 1941.

Nuremberg Tribunal convicted the defendant Wilhelm Keitel for war crimes on this basis.⁵⁴ Difficulties with a precise definition of the crime of persecution have been an issue, but what is considered to be clear is that persecution may take diverse forms and does not necessarily require a physical element, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present.⁵⁵ The fundamental rights in this context are the rights set out in, for example, the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.

The judgments of both the ICTY and the ICTR have in several cases successfully clarified the characteristics of the crime of persecution under customary international law,⁵⁶ further on an explicit contribution to this issue was made by French courts in the *Barbie*⁵⁷ and *Touvier*⁵⁸ cases. The French courts stated that persons *persecuted* in a systematic manner in the name of a State practicing a policy of ideological supremacy, the former by reason of their membership of a racial or religious community, the latter by reason of their opposition to that policy, can equally be the victims of crimes against humanity.

The material elements require that the group or community being persecuted is identifiable and the mental element firstly that the persecution is committed with intent and knowledge and secondly that the persecution is based on the above mentioned discriminatory grounds. A perpetrator is considered to act on political grounds if he or she discriminates the victim because of his or her political beliefs.⁵⁹

Since the beginning of the occupation in 1975 the remaining indigenous Saharawi population has suffered from severe discrimination by the Moroccan authorities. Only during the last couple of years several human rights organisations have reported of the continuous “Moroccanisation” aimed against the Saharawi culture and identity by the above mentioned arbitrary arrests and detentions, oppressions of demonstrations, unfair trials, murders, torture and forcible disappearances of independence activists.⁶⁰ The summary of this conduct set forth by the Moroccan authorities against the Saharawi population shows clearly that the requirement of persecution on political grounds is fulfilled: the victims are solely being persecuted on the basis of their political activity in the sense of request for the right to self-determination, which is not persistent with the official opinion of the Kingdom of Morocco. There should be no question raised as to the identifiability of the concerned group (see above, under 1.A): the Saharawis are unequivocally the collective targets of this political persecution and it must be held that the policemen, judges and other state officials are aware of the official repressing state policy of the Saharawis.

⁵⁴ IMT Judgement of 1 October 1946, *The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg*, Germany, Part 22, p. 493.

⁵⁵ *Prosecutor vs. Kupreškić et al.*, ICTY (Trial Chamber), judgment of 14 January 2000, paras. 568 et seq and *Tadić* Trial Chamber Judgement, 7 May 1997, at para. 707

⁵⁶ Werle, 2005, p.253. See judgments *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Trial Judgement, 1 June 2000, paragraph 19; *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, Trial Judgement, 3 December 2003, paragraph 981; *Prosecutor v. Kupreškić et al*, Case no. IT-95-16-T, ICTY Trial Judgment, 14 January 2000, paragraph 625, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, ICTY Trial Judgment, 7 May 1997, paragraph 708.

⁵⁷ *Prosecutor vs. Klaus Barbie*, Chambre Criminelle de la Cour de Cassation, judgment of 20 December 1985

⁵⁸ *Prosecutor vs Paul Touvier*, Chambre d'Accusation de la Cour d'Appel de Paris, judgment of 13 April 1992

⁵⁹ Werle, 2005, p. 258.

⁶⁰ For example Human Rights Watch's reports from 2008 (*Human Rights in Western Sahara and in the Tindouf Refugee Camps*), 2009 (*World Report 2009 Morocco/Western Sahara*) and 2010 (*World Report 2010 Morocco/Western Sahara*) and Amnesty International's reports from 2008 (*State of the World's Human Rights Report 2008 Morocco and Western Sahara*), 2009 (*State of the World's Human Rights Report 2009 Morocco and Western Sahara*) and 2010 (*Broken Promises: The Equity and Reconciliation Commission and its Follow-Up*).

D. Enforced disappearances

Enforced disappearance is since the creation of the Rome Statute set out as a separate crime against humanity,⁶¹ but was already earlier classified as a crime against humanity in the *1994 Inter-American Convention on the Forced Disappearance of Persons* and thereafter became a part of the *1996 Draft Code*.⁶² In 1992 the UN General Assembly adopted the *Declaration on the Protection of All Persons from Enforced Disappearances*⁶³ and in 2006 the *International Convention for the Protection of All Persons from Enforced Disappearance*.⁶⁴ The Convention now (April 2010) has 82 signatory states and 18 ratifications, meaning that two more ratifications are still needed for the Convention to enter into force.⁶⁵ Morocco is a signatory state to the Convention but has yet to ratify it.

The crime of enforced disappearance can be considered to have two alternative types of conduct: deprivation of liberty and withholding information.⁶⁶ The former one has to occur at the behest of or with the approval of a state or political organization and in addition it is necessary that no information be provided upon request by family members, other relatives, etc. The purposely provided false information is also considered a refusal to provide information. The latter type of conduct resembles the already mentioned withholding of information, however, in this case it is only satisfied if information is withheld at the behest of or with the approval of a state or political organization.⁶⁷

There are numerous well-documented cases of enforced disappearances of Saharawi activists and their families: patterns of disappearances and secret detentions facilities were already found and identified in the early 1960's.⁶⁸ Since the reinstating of Western Sahara, hundreds of Sahrawi men and women known or suspected of pro-independence activities had disappeared after having been arrested by Moroccan security forces.⁶⁹ According to reports made by Amnesty International not only suspected sympathizers with Frente Polisario had disappeared, but also children, elders and other relatives to the suspected supporters of the independence of Western Sahara.⁷⁰ Until 1991 the Moroccan authorities continuously denied not only the knowledge about these detention facilities but also their existence as a whole.⁷¹ In 1991 hundreds of Saharawis were released,

⁶¹ Rome Statute, article 7(1)(i)

⁶² International Law Commission draft *Code of Crimes Against Peace and Security for Mankind*.

⁶³ Adopted in General Assembly Resolution A/RES/47/133 of 18 December 1992, UN Doc. A/47/49 (1992).

⁶⁴ Adopted in General Assembly Resolution A/RES/61/177 20 December 2006.

⁶⁵ United Nations Treaty Collections as of 5 April 2010

⁶⁶ Werle, 2005, p. 261.

⁶⁷ *Id.*, p. 261.

⁶⁸ Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1993/SR.17), para. 59. See also the report of the Working Group Enforced or Involuntary Disappearances (E/CN.4/1987/15), paras. 150-108; and the report of the Working Group on Arbitrary Detention (E/CN.4/1993/24), dec. No. 38/1992.

⁶⁹ Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, Human Rights Council, Doc. No. A/HRC/13/42, p. 38-39 (para. 76).

⁷⁰ See for example, Amnesty International, *Broken Promises: The Equity and Reconciliation Commission and its Follow-Up*, Report 2010, p. 10

⁷¹ For instance, in response to a question by the Human Rights Committee in November 1990 about the secret detention centres of Qal'at M'Gouna and Tazmamart, the Moroccan delegation replied that "these prisons are

but today, in 2010, around 450 Saharawis remain unaccounted for, being either dead or still kept in secret detention.⁷² Since the mass release in 1991 there have been no further ones.

In 2003 King Mohamed VI established the Equity and Reconciliation Commission (*Instance Équité et Réconciliation*, IER) to investigate cases of enforced disappearances and arbitrary detention that had occurred between 1956 and 1999. Due to the Commission's effort on the area, the Moroccan state acknowledged responsibility for disappearances and other grave abuses in the past.⁷³ In its submission concerning this report, the Government of Morocco stated that all cases of enforced disappearances registered in Morocco were considered by the IER and that in most of these cases compensation was granted. However, no Moroccan officials or security force members are known to have been prosecuted for these violations committed during the period from 1956 to 1999 that the IER investigated. As an addition, the family members of the disappeared persons investigated by the IER had not (by October 2009) yet received full record of the findings concerning their relatives.⁷⁴

3. *The Subjective Elements of Crime (mens rea)*

Next to the objective elements of a crime, the subjective or mental element has also to be met in order for a crime to be defined as a crime against humanity. The perpetrator has to, beyond the simple criminal intent to commit the offence, know that his/her act is a part of the attack on the civilian population.⁷⁵ Meaning that the offender does not necessarily have to be aware of the details of the attack,⁷⁶ but should act out of his/her own intention to commit a crime. This criterion has to be assessed on a case-by-case basis.

IV. MODE OF LIABILITY

The evidence and other information available suggest that Moroccan officials, including police, have been involved in torture, arbitrary arrests, persecution and enforced disappearances. Moroccan officials may thus have been principals in perpetration of these crimes as well as have responsibility as accessories or as commanders.

1. *Perpetration*

The concept of perpetration is well established in international criminal law.⁷⁷ It is synonymous with “commission”. Perpetration, as defined in the *Tadić* case refers to “the

not on any list held in the prison administration division at the Ministry of the Interior”, written statement submitted by Amnesty International 8E/CN.4/1996/NGO/26.

⁷² Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Morocco : Saharawis*, available at www.unhcr.org/refworld/docid/49749cdfc.html.

⁷³ Human Rights Watch, Country Summary for Morocco/Western Sahara, January 2010, further on Equity and Reconciliation Commission, summary of its findings, available at www.ictj.org/static/MENA/Morocco/IERreport.findingssummary.eng.pdf.

⁷⁴ Information from the Association for the Families of Saharawi Prisoners and the Disappeared (AFAPREDESA), available at afapredesa.org.

⁷⁵ *Prosecutor vs. Kunarac* Trial Judgment, para. 434; *Prosecutor vs. Blaškić* Appeal Judgment, para. 124-127; *Prosecutor vs. Tadić* Appeal Judgment para. 248; *Prosecutor vs. Kupreškić* Trial Judgment, para. 556; *Prosecutor vs. Kordić and Čerkez* Trial Judgment para. 185; *Prosecutor vs. Kayishema and Ruzindana* Trial Judgment para. 134; *Prosecutor vs. Niyitegeka* Trial Judgment, Case no. ICTR-96-14-T, 16 May 2003, para. 442; *Prosecutor vs. Kajelijeli* Trial Judgment, para. 880.

⁷⁶ *Prosecutor vs. Kunarac* Trial Judgment, para. 434; *Prosecutor vs. Kunarac* Appeal Judgment, para. 102.

⁷⁷ Cryer, Robert, Friman, Håkan, Robinson, Darryl & Wilmshurst, Elizabeth, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2007, p. 302

physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.”⁷⁸

The concept of perpetration enshrined in Article 25(3)(a) in the Rome Statute distinguishes between direct or immediate participation (“as an individual”), co-perpetration (“jointly with another person”), and intermediary perpetration (“through another person”).⁷⁹ All three forms of perpetration require proof that the accused intended the criminal result and that he or she was aware of the substantial likelihood that a criminal act or omission would occur as a consequence of his or her conduct.

Perpetration “as an individual” can be understood that the perpetrator acts on his or her own without relying on or using another person. Direct perpetration also covers the case where there are other parties to the crime who are merely rendering accessory contributions to the commission by the direct perpetrator.⁸⁰

Co-perpetration or perpetration “jointly with another person” is characterized by a functional division of the criminal tasks between the different co-perpetrators, who all share the same criminal intent.⁸¹ Perpetration is determined by way of test of control or domination of the act, i.e. the “functional control over the act”.⁸² The Rome Statute’s reference to co-perpetration is dissociated from the ICTY case law; the latter has rejected the concept.⁸³

Intermediary perpetration or perpetration “through another person” is characterized by the predominance of a direct perpetrator who uses the person that physically carries out the crime as his or her instrument. Whereas this human tool is typically an innocent agent, the indirect perpetrator – as a kind of master mind – employs higher knowledge or superior willpower to have the crime executed. It requires more than inducing or soliciting a person to commit a crime, as otherwise this mode of perpetration would hardly be discernible from instigation in the terms of Article 25(3)(b) of the ICC Statute.⁸⁴ The *actus reus* consist in conduct aimed at instrumentalizing another person to commit a crime, by use of force, the exploitation of an error or any other handicap of the tool’s side or in some other way. To establish criminal responsibility for intermediary perpetration, it is immaterial whether the person physically carrying out the crime is criminally responsible for the crime.⁸⁵ It is probable that physical perpetration of crimes may only be attributed to low or medium level Moroccan officials. In order to establish criminal responsibility of higher level officials other modes of liability may be relevant.

⁷⁸ *Prosecutor v. Dusko Tadić*, ICTY Appeals Chamber, Judgment 15 July 1999, para. 188

⁷⁹ Eser, Albin, *Individual Criminal Responsibility*, Cassese, Antonio, Gaeta, Paola & Jones, John R.W.D (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 767-822, Oxford University Press, Oxford, 2002, p. 771; Ambos, Kai, *Article 25 - Individual Criminal Responsibility*, Triffterer, Otto (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, 743-770, C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008, pp. 747-753

⁸⁰ Eser, 2002, p. 789; Ambos, 2008, p. 747

⁸¹ Eser, 2002, p. 790; Ambos, 2008, p. 748;

⁸² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the confirmation of charges, 29 January 2007, paras. 343-348; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, PTC I, Decision on the confirmation of charges, 30 September 2008, paras. 480-486; Ambos, Kai, *International criminal law at the crossroads: from ad hoc imposition to a treaty-based universal system*, Stahn, Carsten & van den Herik, Larissa (Eds.), *Future Perspectives on International Criminal Justice*, 161-177, T • M • C Asser Press The Hague, 2009, p. 166-168

⁸³ *Prosecutor v. Stakić*, (IT-97-24), Appeal Judgment 22 March 2006, para. 62

⁸⁴ Eser, 2002, p. 793f; Ambos, 2008, pp. 750-752

⁸⁵ See Rome Statute, article 25(3)(a). The deficiency on the tool’s side includes lack of jurisdiction over persons under 18 (article 26), incapacity due to a mental disease or intoxication (article 31(1)(a) and (b)), justification by self-defence or excuse by duress (article 31(1)(c) and (d)), mistake of fact or law (article 32) or any other ground of excluding criminal responsibility (article 31(3)) and perhaps the Case that the instrumentalized person lacked the quality of a superior (article 28(b)(i)). See also Eser, 2002, p. 794f.

The International Military Tribunals of Nuremberg and Tokyo both provided that those who participated in a “common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”⁸⁶ Conspiracy in this context refers to the situation where the plans are put into effect. It should be distinguished from the use of “conspiracy” in common law, where the offence is an agreement to commit an offence, which does not require any further action in pursuance of that agreement.⁸⁷ The Statutes of the ICTY and ICTR has no explicit provision on this form of liability. Instead, the ICTY has in case law developed what it terms “joint criminal enterprise” (or common purpose) liability,⁸⁸ which is a form of commission.⁸⁹ Article 25(3)(d) of the Rome Statute presents a compromise with earlier “conspiracy” provisions which since Nuremberg have been controversial. Subparagraph (d) appears to be a disguised “conspiracy rule” which provides the lowest objective threshold for participation under article 25 by using the notion “in any other way contributes to [...] a crime”.⁹⁰

2. Aiding and Abetting

Liability for aiding and abetting is recognized in Article 7(1) of the ICTY Statute, Article 6(1) of the ICTR Statute and Article 25(3)(c) of the Rome Statute. According to the ICTY case law the acts of the principal offender that the accused is alleged to have aided and abetted must be established.⁹¹ Furthermore, the act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.⁹² The assistance may consist of an act or omission, and it may occur before, during, or after the act of the principal offender.⁹³ Again, it may be difficult to establish that higher level officials have aided or abetted. Instead one should consider modes of liability such as ordering and command responsibility.

3. Ordering, Instigating, Soliciting and Inducing

The statutes of the ICTY, ICTR and the ICC all treat ordering as a separate form of liability.⁹⁴ The core of this mode of liability, as interpreted by the *ad hoc* tribunals, is that a “person in a position of authority uses it to convince another to commit an offence”.⁹⁵

Instigation has been described by the ICTY as “prompting” another to commit an offence.⁹⁶ This is largely the same crime as soliciting or inducing in Article 25(3)(b) of the Rome Statute.⁹⁷ This means that military as well as civilian leaders in Morocco could be held accountable if it is established that they have ordered or instigated others to commit crimes.

⁸⁶ IMT Charter, article 6; IMTFE Charter, article 5(c)

⁸⁷ Cryer/Friman/Robinson/Wilmhurst, 2007, pp. 304-305

⁸⁸ *Tadić*, ICTY Appeals Chamber, Judgment 15 July 1999, paras. 189-190

⁸⁹ *Prosecutor v. Vasiljević*, ICTY Appeals Chamber, Case No. IT-98-32-A, Judgment 25 February 2004, para. 102; *Prosecutor v. Kvočka et al.* (IT-98-30/1), Appeals Chamber, Judgment 28 February 2005, para. 79

⁹⁰ Eser, 2002, p. 802; Ambos, 2008, pp. 757-759; Werle, Gerhard, *Principles of International Criminal Law*, Second Edition, T • M • C Asser Press, The Hague, 2009, p. 169

⁹¹ *Tadić*, ICTY Appeals Chamber, Judgment 15 July 1999, para. 229; *Prosecutor v. Aleksovski*, Case IT-95-14/1, Appeals Chamber, Judgment, 24 March 2000, para. 165

⁹² *Prosecutor v. Vasiljević*, Judgment 25 February 2004, para. 102

⁹³ *Prosecutor v. Blaškić*, Appeals Chamber Judgment, 29 July 2004, para. 48; see also Gallmetzer, Reinhold & Klambert, Mark, *Individual Responsibility for Crimes Under International Law: The Un Ad Hoc Tribunals and the International Criminal Court*, The Summer School on International Criminal Law, pp. 60-77, p. 67

⁹⁴ ICTY Statute, article 7(1); ICTR Statute, article 6(1); Rome Statute, article 25(3)(b)

⁹⁵ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 483; *Prosecutor v. Blaškić*, ICTY Trial Chamber, Judgment 3 March 2000, para. 281

⁹⁶ *Blaškić*, ICTY Trial Chamber, Judgment 3 March 2000, para. 280

⁹⁷ Cryer/Friman/Robinson/Wilmhurst, 2007, p. 314; Werle, 2009, pp. 180-181

4. Command Responsibility

Command responsibility is inculpatory doctrine in international criminal law which is justified by the privileges, honours and responsibilities that command entails.⁹⁸

The Appeals Chamber of the ICTY has held that “[t]he principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well established in conventional and customary law.”⁹⁹ The jurisprudence of the ICTY has established the following three-pronged test for criminal liability pursuant to Article 7(3) of the Statute:

1. the existence of a superior-subordinate relationship between the superior (the accused) and the perpetrator of the crime;
2. the accused knew or had reason to know that the crime was about to be or had been committed; and
3. the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.¹⁰⁰

The existence of a superior-subordinate relationship is characterised by a formal or informal hierarchical relationship between the superior and subordinate.¹⁰¹

Article 28 of the Rome Statute establishes responsibility for omission for certain categories, namely military commanders, persons acting as a military commander and other superiors. The aforementioned types of command responsibility are similar to the law and jurisprudence of the ICTY. They all require a hierarchical relationship, a mental element, and failure on behalf of the accused to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.¹⁰² The reference to “other superiors means that not only military, but also civilian leaders in Morocco may be held responsible if they failed to take measures to prevent or punish offences committed by subordinates.

V. PROPER FORUM

Legal proceedings concerning international crimes may take place before an international court or tribunal, a domestic court or a hybrid of these. Though Moroccan courts could try individual actors responsible for crimes potentially committed it is uncertain, or maybe even unlikely, that domestic authorities would investigate and prosecute agents of the Moroccan state responsible for alleged atrocities. Domestic courts in other countries or an international court may serve as better venues.

First we will consider investigation and prosecution at the domestic level in a country other than Morocco. Traditional grounds for criminal jurisdiction in a domestic setting are the territorial, nationality, passive personality and protective principles. In addition, several states have adopted, usually with limitations, a principle allowing jurisdiction over acts of non-nationals. This universality principle allows prosecution for particularly offensive crimes irrespective of the place of the commission of the crime and regardless of any other link recognized by international law. The principle of universality may be invoked in relation

⁹⁸ Cryer/Friman/Robinson/Wilmhurst, 2007, p. 320

⁹⁹ *Prosecutor v. Zejnir Delalić et al. (Čelebići)*, Case No. IT-96-21, ICTY Appeals Chamber, Judgement, 20 February 2001, para. 195

¹⁰⁰ *ibid*, paras 189-198, 225-226, 238-239, 256 and 263.

¹⁰¹ *ibid*, para. 303

¹⁰² Gallmetzer and Klamburg, pp. 76-77

to crimes against humanity.¹⁰³ For example, the defendant *Eichmann* was convicted by the District Court of Jerusalem (1961) and the Supreme Court of Israel (1962), *inter alia*, for crimes against humanity pursuant to the principle of universal jurisdiction.¹⁰⁴ Belgium even allowed prosecution under the universal jurisdiction model and trial in absentia, but this was changed 2003.¹⁰⁵ Immunity presents an obstacle for prosecution against acting Heads of State and Ministers for Foreign Affairs in domestic courts, but after a person ceases to hold the office of Head of State or Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States.¹⁰⁶

The second venue is prosecution before an international criminal court. Following the examples of the tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) an *ad hoc* tribunal may be set up for the Western Saharan situation. This would however either require the consent of Moroccan Government or a decision by the UN Security Council under chapter VII of the UN Charter. This appears an unlikely scenario given the position of Morocco and the fact that each of the five permanent members of UN Security Council has a veto power. Another venue is the already established International Criminal Court (ICC) where three alternative ways of establishing jurisdiction should be considered. First, the jurisdiction of the ICC is treaty and thus consent based. Through accession to the Statute of the ICC (the Rome Statute), a state such as Morocco may give its consent to the Court's jurisdiction over acts committed on the state's territory or by its nationals.¹⁰⁷ Even though Morocco is only a signatory to the Rome Statute and not a state party, there are additional ways in which the Court may fulfil the preconditions for jurisdiction. Morocco may *ad hoc* accept the jurisdiction of the Court, pursuant to article 12(3) of the Rome Statute. The Court may exercise jurisdiction over non-state parties if a situation by a referral from the Security Council,¹⁰⁸ as illustrated by the referral of the Darfur Situation.¹⁰⁹ Again, this may be an unlikely scenario the fact that each of the five permanent members of UN Security Council has a veto power in relation to such decisions. The third alternative is a scenario where SADR becomes an independent state and ratifies the Rome Statute. As a State Party SADR could make self-referral and declare under article 12(3) of the Rome Statute that it accepts the jurisdiction of the Court as of the entry into force of the Rome Statute, and hence extending the temporal jurisdiction back to 1 July 2002.¹¹⁰ This scenario may encourage the Moroccan government to bring its actions in compliance with international law.

VI. CONCLUSIONS AND RECOMMENDATIONS

The human rights situation in Western Sahara is still serious, there is an urgent need for reconciliation, dealing with the past, the ongoing abuses and atrocities committed against the

¹⁰³ Brownlie, Ian, *Principles of Public International Law*, Sixth edition, Oxford University Press, Oxford, 2003, pp. 299-305; Shaw, Malcolm N., *International Law*, Sixth Edition, Cambridge University Press, Cambridge, 2008, pp. 652-686.

¹⁰⁴ *Prosecutor v. Eichmann*, Judgment of the Supreme Court of Israel, 29 May 1962

¹⁰⁵ Shaw, 2008, pp. 672.

¹⁰⁶ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), ICJ, Judgment 14 February 2002, para. 61.

¹⁰⁷ Rome Statute, article 12(2).

¹⁰⁸ *ibid*, article 13(b).

¹⁰⁹ Resolution 1593 (2005) UN Doc S/RES/1593, 2005.

¹¹⁰ *Situation in Uganda*, ICC-02/04, Letter from the Prosecutor, 5 July 2004; Schabas, William A. & Williams, Sharon A., *Article 12 - Preconditions to the exercise of jurisdiction*, Triffterer, Otto (Ed.), Commentary on the Rome Statute of the International Criminal Court, 547-561, Second Edition, C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008, p. 560.

Saharawi population. A recently (May 2010) published report made by Amnesty International confirms the systematic use of torture or other ill-treatment,

the enforced disappearance of hundreds of individuals and the arbitrary detention of thousands during the darkest period of the human right violations between the 1960s and the 1990s.¹¹¹ The report also underscores the ongoing human rights violations and noted the increase in reports of harassment of Saharawi human rights defenders. Crimes against humanity are amongst the most serious crimes of concern to the international community. Considering the extensive consensus on the seriousness of this crime, it may be claimed that it is the duty of every single state to act against another state exercising this crime. As already indicated, there are several issues that need to be resolved.

First, the status of Western Sahara should be settled. All efforts should be deployed in order to realize the referendum in Western Sahara and in addition to that the Security Council should adopt a resolution reaffirming Western Sahara's right to self-determination. States should recognize the Saharawi Arab Democratic Republic and thereby Western Sahara's inherent right to self-determination.

Second, measures could be taken to prevent human rights violations and international criminal law. Morocco and Algeria should facilitate the repatriation of Saharawi refugees living in refugee camps mainly in Algeria. Morocco should as soon as possible deconstruct the wall on the territory of Western Sahara, which as a whole is inconsistent with international law as stated by the ICJ in the case of the construction of the wall by Israel in the Palestinian Occupied Territories.¹¹² Morocco should also disarm the mines that are situated on the territory surrounding the wall as they continue to be a source of fatal accidents. According to figures registered at the Moroccan authorities 2,171 accidents have been caused due to mines and explosive remnants of war since 1975.¹¹³ Taking into account the lack of the record of human rights violations in Western Sahara, it would be most and urgent desirable to include the monitoring of human rights violations in Western Sahara in the mandate of the MINURSO. The mandate of the MINURSO was recently extended until 30 April 2011; however, the monitoring of human rights was yet again excluded from the mandate.¹¹⁴ It would be most desirable and timely to include a clear mandate regarding the monitoring of human rights as soon as possible in order to properly document the human rights violations. The European Union should consider the option of postponing the re-negotiation of the EU-Morocco Association Agreement and condition its prolongation to the absolute and strict respect of human rights obligations, as stated in the agreement itself: "...observance of human rights [...] form[s] the very basis of the association".¹¹⁵

Third, human right violations should be investigated and prosecuted. Morocco has the primary responsibility to take steps to fight impunity by investing all past abuses and bring all suspected perpetrators to justice without further delay and thus prosecuting crimes in its own courts. Morocco should also ratify the Rome Statute and recognize the jurisdiction of the International Criminal Court. If Morocco should fail to fulfill its obligations in these regards, the international community has a responsibility to act. Also the African Union (AU) as the regional power should act upon the crimes against humanity committed on the territory of Western Sahara, given that Western Sahara (more precisely the Saharawi Arab Democratic

¹¹¹ Amnesty International: *Broken Promises Report*, 2010

¹¹² Advisory Opinion of the ICJ on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004.

¹¹³ Report of the Secretary-General on the situation concerning Western Sahara, Doc. No S/2008/251, 14 April 2008.

¹¹⁴ UN Security Council resolution S/res/1920 (2010)

¹¹⁵ Euro-Mediterranean Agreement establishing an association between the European Communities and their Members States, of the one part, and the Kingdom of Morocco, of the other part. L 70/2, 18 March 2000, Preamble, para. 3.

Republic) is a Member State of the AU and several provisions of AU treaties, including the Constitutive Act oblige the Union to act when crimes against humanity occur.¹¹⁶ Given that the Security Council mandate is to maintain and restore international peace and security, it should in the absence of proper action by the Moroccan state refer the situation of crimes against humanity committed on the territory of Western Sahara to the International Criminal Court (as of Article 13 (b) of the Rome Statute) as in the case of the Sudan.¹¹⁷ By not doing so there is a risk of the use of double standards undermining the possibility of the Security Council to refer cases to the International Criminal Court. Prosecutors in other countries than Morocco could prosecute their nationals who are fishing on Western Saharan waters, which is contrary to international law since the Saharawis do not enjoy the benefits from the fisheries and have not been consulted in the matter.¹¹⁸ The aforementioned prosecutors are also invited to use their national legislation in relation to universal jurisdiction so as to prosecute the crimes against humanity committed against the Saharawis. If and when Western Sahara proclaims its independence it should also accede to the Rome Statute.

To conclude, Morocco should come to realize the seriousness of its actions and revise its policy. The scenario that Moroccan officials could be put before domestic courts in other states or before the International Criminal Court should encourage the Moroccan government to bring its actions in compliance with international law.

¹¹⁶ The Constitutive Act adopted 11 July 2000, entered into force 26 May 2001, article 4 (h); African Union Non-Aggression and Common Defence Pact, adopted 31 January 2005, entered into force 18 December 2009, article 3 (d); African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted 23 October 2009, entered into force 2 February 2010, articles 4, 6 and 8.

¹¹⁷ United Nations Security Council resolution 1593(2005) adopted on March 31 2005.

¹¹⁸ 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.

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