



Morocco v. Omar Radi II

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHORS

University of Southern California Gould School of Law International Human Rights Clinic (IHRC) was established in 2011 to teach U.S. law students how to use international law as a tool for social justice for serious human rights abuses in the U.S. and globally. The IHRC engages students in cases and projects that address: international criminal justice and accountability for atrocities (war crimes, crimes against humanity, genocide); refugee rights; fair trial rights; anti-human trafficking and racial justice. Since 2011, students have assisted international judges and legal officers on a number of international trials involving former heads of State and high-level military leaders allegedly responsible for war crimes, crimes against humanity, genocide and terrorism perpetrated against hundreds of thousands of victims in Cambodia, Democratic Republic of the Congo, Lebanon, and Rwanda. Moreover, the IHRC has focused on fair trial rights and the rule of law in Morocco and Kyrgyzstan, and leveraged international human rights sanctions regimes to hold perpetrators of serious human rights abuses accountable for serious human rights abuses in Africa. In the U.S., the Clinic has represented refugees and trafficked clients from countries including Cameroon, El Salvador, Ethiopia, Mexico, Syria, and Afghanistan with near 100 percent success rate, while addressing systemic racism in U.S. law enforcement anti-human trafficking operations and responses to anti-racism peaceful protests as well as sentencing of juveniles in the California criminal justice system.

Professor Hannah R. Garry is clinical professor of law and founding director of USC Gould School of Law's International Human Rights Clinic. Her areas of teaching and research include international human rights law, international criminal law, transitional justice and international courts and tribunals. In 2022, Professor Garry was a Fulbright research scholar at the University of Oslo Law's Centre for the Study of the Legitimate Roles of the Judiciary in the Global Public order (PluriCourts).

As for other experience, Professor Garry has filed a brief on behalf of *amici* torture survivors before the United States Supreme Court in *United States of America v. Husayn, et al.* and served as *amicus curiae* with former United Nations special rapporteurs in the Afghanistan investigation appeals hearing at the International Criminal Court. She was previously a senior legal adviser to the Supreme Court Chamber in two appeals judgments before the Extraordinary Chambers in the Courts of Cambodia; a visiting professional in the Presidency of the International Criminal Court; a legal officer in the Appeals Chamber for the International Criminal Tribunals for the former Yugoslavia & Rwanda and Deputy Chef de Cabinet in the Office of the President; and an associate in the international arbitration, dispute resolution and public international law groups at Freshfields, Bruckhaus, Deringer LLP. She has been invited to give statements as an expert before the United Nations Office of the High Commissioner for Human Rights, the Canadian Parliament and various task forces. She is regularly quoted as an expert and

has published OpEds with media outlets such as: the *New York Times*, *Newsweek*, *Washington Post*, *BBC*, *Reuters*, the *Los Angeles Times* and *The Hill*.

Prior to joining USC in 2010, Professor Garry was a visiting professor in international law at the University of Colorado School of Law for three years, where she supervised students on U.S. Alien Tort Statute litigation and representation of Guantanamo Bay detainees. During this time, she also served as an American Society of International Law Presidential Fellow. Professor Garry has been a research consultant with Oxford University, UK, and Makerere University in Uganda implementing a multi-year socio-legal field research project on protection of refugee rights in East Africa. She was also a visiting lecturer at Peking University Law School in Beijing; a visiting scholar at the European Court of Human Rights in Strasbourg, France; and a guest lecturer at the International Institute of Humanitarian Law in San Remo, Italy.

Professor Garry thanks the Clooney Foundation for Justice's TrialWatch Initiative for its collaboration in the monitoring of the trial at issue in this report and for final production of this report. She also thanks IHRC student attorneys Pablo Aabir Das, Celine Ang and Tomi Johnson, and supervising attorney Professor Henna Pithia for their monitoring and assistance with this report, as well as Ms. Kelsey McGregor and her team at WilmerHale who reviewed the report as *pro bono* counsel for the IHRC.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change.

The legal assessment and conclusions expressed in this report are those of the authors and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY

Professor Hannah R. Garry, member of the TrialWatch Experts Panel, assigned this trial a grade of “D”:

The proceedings against journalist Omar Radi involved serious violations of international fair trial standards. From the start of the investigation, Mr. Radi’s presumption of innocence was compromised as government-affiliated media outlets launched a smear campaign against him. During the ten months he awaited trial, Mr. Radi was arbitrarily detained as the court denied his requests for provisional release, despite the fact that there was little evidence that Mr. Radi posed a danger to the public, presented a flight risk, or would interfere with evidence. While in detention, Mr. Radi suffered from serious medical issues including diarrhea, vomiting, and weight loss. Once the trial began, the court failed to consider pertinent, exculpatory evidence [that Mr. Radi sought to introduce] and denied Mr. Radi the opportunity to cross-examine key prosecution witnesses or call a witness, who the defense asserted could provide testimony to exonerate him. Additionally, these defects were not remedied on appeal, as the appeals court dismissed Mr. Radi’s fair-trial complaints and upheld the conviction.

These violations evidently affected the fairness of the case; thus, the trial has been assigned a grade of “D” under the methodology set forth in the Annex to this report.

As part of the Clooney Foundation for Justice’s TrialWatch initiative, the USC Gould School of Law International Human Rights Clinic monitored the trial of Moroccan journalist Omar Radi, which concluded on July 19, 2021, as well as the subsequent appeal, which concluded on March 3, 2022.

Omar Radi is an investigative journalist who has reported on government corruption, including the financial holdings of the Moroccan monarchy, since 2008. As a result of his work, Mr. Radi has faced harassment by the authorities. For example, he was denied a press pass for 12 years, permitting the government to argue that he was precluded from legal protection under the Moroccan Press Code. More recently, in March 2020, Mr. Radi was convicted of insulting the Moroccan judiciary and given a suspended sentence due to a tweet in which he criticized a judicial decision upholding harsh sentences for protesters involved in the 2016 Hirak Rif movement.¹

In October 2019, Amnesty International released a report stating that the Moroccan government had used the notorious “Pegasus” spyware technology to target and surveil

¹ The USC Gould International Human Rights Clinic also monitored and reported on this trial as part of TrialWatch, finding it involved serious violations of international fair trial standards. See HANNAH GARRY, ET AL., MOROCCO v. OMAR RADI (TrialWatch, Sept. 2020), <https://cfj.org/wp-content/uploads/2020/09/Fairness-Report-on-the-Trial-of-Omar-Radi-in-Morocco.pdf>.

prominent Moroccan human rights defenders. When planted in a target's phone, Pegasus spyware allowed the government almost total control of the phone, including access to the owner's calls, messages, photos, and other data. In June 2020, Amnesty International released a second report specifically asserting that the authorities had used Pegasus to surveil Mr. Radi's phone.

On June 25, 2020, just a few days after the release of Amnesty International's second report, Moroccan authorities announced that they had opened an investigation into Mr. Radi for espionage and called him in for questioning.

During the month of July 2020, Mr. Radi was repeatedly brought in for questioning on various allegations of espionage, tax evasion, and rape. During this same time period, Mr. Radi and his colleague, Imad Stitou, were arrested for public drunkenness and later released.

Ultimately, on July 29, 2020, the government arrested Mr. Radi and charged him with four crimes: undermining the internal security of the State; undermining the external security of the State; indecent assault; and, rape.

The first set of charges alleged that Mr. Radi harmed both the internal and external security of the State due to his consulting work for two British multinational companies, his relationship with diplomats at the local Dutch Embassy, and his fellowship with an international social justice organization called the Bertha Foundation. The second set of charges alleged that Mr. Radi assaulted and raped a colleague in July 2020.

During trial, the court took a series of decisions that inhibited Mr. Radi's ability to defend himself. The espionage charges predominantly relied on allegedly illicit communications between Mr. Radi and a staff member of the Dutch Embassy. However, when this person offered to testify in Mr. Radi's defense, the judge refused to allow it, stating that it is within the court's discretion to determine whether a witness should or should not testify. Similarly, with respect to the rape charge, the prosecution relied heavily on testimony from the complainant's fiancé who was based in the United States. While the investigating judge permitted the prosecution to interview the fiancé and the trial judge considered statements from this pre-trial interview in the Judgment, Mr. Radi was denied the opportunity to cross-examine him. Additionally, a key witness the defense planned to offer—Mr. Stitou, who was partially present during the interactions between the complainant and Mr. Radi—was charged as a conspirator to the rape after he went on the record saying that the interactions were consensual.

On July 19, 2021, Mr. Radi was convicted on all counts and sentenced to six years in prison. He was also required to compensate the complainant 200,000 Moroccan Dirhams in damages.²

² Approximately 21,000 US dollars.

Shortly after the conviction, Mr. Radi appealed the decision. Although the appeal was scheduled to begin on November 4, 2021, it was postponed several times and began in January 2022. On March 3, 2022, the Court of Appeals affirmed Mr. Radi's conviction. During the appeal hearings, the court again denied Mr. Radi the opportunity to call his own exculpatory witness or cross-examine the key prosecution witness.

From Mr. Radi's pre-trial detention through the appeal process, the proceedings were riddled with violations of international fair trial standards.

First, what appears to have been a coordinated smear campaign raises issues regarding Mr. Radi's right to be presumed innocent as State-affiliated news outlets launched widespread and negative coverage of Mr. Radi beginning in June 2020.

Second, Mr. Radi was arbitrarily detained for nearly a year prior to and during trial. During this time, Mr. Radi filed for provisional release numerous times, and each time his request was denied without any substantiated finding that he was a flight risk, posed danger to the public, or would interfere with evidence. Adding to the harm, Mr. Radi was subjected to poor treatment and, at times, denied proper access to medical care. Mr. Radi suffered from preexisting health conditions, and his detention took a toll on his health, as he experienced vomiting, diarrhea, and internal bleeding. Between his arrest and the end of his trial, Mr. Radi was in detention for over 19 months.

Third, the proceedings violated Mr. Radi's rights to an impartial tribunal, to call and examine witnesses, and to adequate time and facilities to prepare a defense. Mr. Radi offered key witnesses in support of his defense; however, the court either refused to call these witnesses or to consider their testimony. For example, as to the rape allegation, the investigating judge authorized charges against an exonerating eyewitness, turning the witness into a co-defendant; the trial court then deemed the witness's statements unreliable because it believed that he had an interest in having the charges against him dropped. Also relating to the rape allegation, the court refused to allow Mr. Radi the opportunity to cross-examine a key prosecution witness, impeding Mr. Radi's ability to refute the charges. Additionally, the court rejected Mr. Radi's request to call another potentially exonerating witness on one of the espionage charges. Mr. Radi's right to adequate time and facilities to prepare a defense was also violated when the prosecution failed to disclose its intention to introduce a pertinent medical certificate until after trial began. Taken together, these repeated discretionary decisions—all to the disadvantage of Mr. Radi—give rise to objective concerns regarding the impartiality of the court.

Finally, the totality of the circumstances, including the constellation of disparate charges brought against Mr. Radi on the heels of another trial against him that violated fair trial standards but failed to silence him, and the widely-publicized reporting on surveillance of his phone, suggests an abuse of process.

BACKGROUND INFORMATION

A. POLITICAL & LEGAL CONTEXT

The Moroccan legal system is based on French and Islamic law and French legal procedure; it is a civil law system relying on codified law rather than common law or “judge-made” law.³ The Moroccan Penal Code details substantive law,⁴ and the Code of Criminal Procedure codifies procedure.⁵

While Morocco’s Constitution includes relatively robust protections for the right to a fair trial and the right to freedom of expression,⁶ the Brookings Institute has reported that “repression seems to have increased following the 2011 uprisings, including heightened judicial harassment of dissidents.”⁷ Further, Freedom House rated Morocco as “Partly Free” in its most recent *Freedom in the World* report, citing the surveillance and detention of several journalists, including Mr. Radi, as key issues in the country.⁸

Further, significant concerns have been raised regarding the independence of the judiciary, including the role of the King.⁹ Morocco is a constitutional monarchy ruled by

³ Summary: Political Structure, ECONOMIST INTEL. UNIT (Sept. 3, 2021), <http://country.eiu.com/article.aspx?articleid=41391987&Country=Morocco&topic=Summary&subtopic=Political+structure#>.

⁴ MORROCO CODE PÉNALÉ, ART. 1 (July 5, 2018) (English on file with author), https://www.onousc.ma/storage/code_penal.pdf [PENAL CODE].

⁵ MOROCCO CODE DE PROCEDURE PENALE, ART. 1 (Feb. 10, 1959), <https://www.refworld.org/publisher,NATLEGBO,,MAR,3ae6b5104,0.html> [CRIMINAL PROCEDURE CODE].

⁶ MOROCCO’S CONSTITUTION OF 2011, arts. 23, 120 (Jefri J. Ruchti trans., William S. Hein & Co., Inc., 2012), https://www.constituteproject.org/constitution/Morocco_2011.pdf [hereinafter CONSTITUTION (MOROCCO)]. Article 23 of the Moroccan Constitution prohibits arbitrary detention and provides for the right to be informed of the charges against you, the right to remain silent, the right against self-incrimination, and the right to receive judicial assistance and counsel. *Id.* at art. 23. Article 23 also guarantees the presumption of innocence at trial. *Id.* The Moroccan Constitution’s explicit guarantees of the right to freedom of expression include Article 25, which states that “[t]he freedoms of thought, of opinion and of expression under all their forms[,] are guaranteed.” *Id.* at art. 25. Furthermore, Article 28 states that “[t]he freedom of the press is guaranteed and may not be limited by any form of prior censure,” and “[a]ll have the right to express and to disseminate freely and within the sole limits expressly provided by the law, information, ideas and opinions.” *Id.* at art. 28.

⁷ Yasmina Abouzzohour, *Progress and Missed Opportunities: Morocco Enters Its Third Decade Under King Mohammed VI*, BROOKINGS INST. (July 29, 2020), <https://www.brookings.edu/research/progress-and-missed-opportunities-morocco-enters-its-third-decade-under-king-mohammed-vi>.

⁸ FREEDOM HOUSE, FREEDOM IN THE WORLD REPORT 2021 (2021), <https://freedomhouse.org/country/morocco/freedom-world/2021>.

⁹ See, e.g., SABINE DONNER, ET AL., BERTELSMANN STIFTUNG, BTI 2020 COUNTRY REPORT: MOROCCO 11 (2020), https://btiproject.org/content/en/downloads/reports/country_report_2020_MAR.pdf (describing how “[t]he lack of an institutionally based democratic context makes the judiciary largely dependent on the monarchy”). As mandated by Article 113 of the Moroccan Constitution, the Conseil Supérieur du Pouvoir Judiciaire (CSPJ) is a judicial council that governs the application of guarantees relating to independence, appointment, promotion, retirement, and discipline of judges, and under Article 116 of the Moroccan Constitution, the CSPJ maintains administrative and financial autonomy. See CONSTITUTION (MOROCCO), *supra* note 6, at arts. 113, 116. However, under Article 115 of the Moroccan Constitution, the King presides over the CSPJ and appoints its members. See *id.* at art. 115. As described by Abdelilah Benabdessalam of the Moroccan Association of Human Rights, there is no “real independence of the judiciary when the king appoints the [] official[s] of . . . the Supreme Council of the Judiciary.” Smail

King Mohammed VI with a Parliament led by a Prime Minister.¹⁰ There are three separate branches of government: the executive branch (the Prime Minister, Ministers, and Secretaries of State),¹¹ the legislative branch (Parliament),¹² and the judicial branch.¹³ However, under the current Constitution, adopted in 2011, the King occupies a supreme position, and Parliament operates under his oversight.¹⁴

Though the Moroccan Constitution establishes the judiciary as independent from the legislative and executive powers, and forbids intervention in and pressure on judicial matters, the Constitution also provides, “[t]he King is the guarantor of the independence of the judicial power.”¹⁵ In Morocco, the judiciary is “known to deliver rulings that are desired by the regime.”¹⁶ In fact, the U.S. Department of State reports that “outcomes of trials in which the government had a strong interest . . . sometimes appeared predetermined” and that “extrajudicial influence” contributed to weakening judicial impartiality.¹⁷

International and Regional Framework

The Moroccan Constitution expresses its commitment to “international conventions and pacts duly ratified by Morocco . . . with respect for the provisions of the Constitution . . . [and] of the laws of the kingdom.”¹⁸

In particular, Morocco is party to the International Covenant on Civil and Political Rights (ICCPR),¹⁹ Article 14 of which provides for the right to a fair trial, allows all persons accused of a crime to call and examine relevant witnesses “under the same conditions as witnesses against [them],” and requires that individuals be presumed innocent until

Bellaoualli & Paul Schemm, *Morocco Outlines Ambitious Judicial Reform Plan*, DAILY NEWS (Sept. 13, 2013, 5:11 AM), <https://www.nydailynews.com/sdut-morocco-outlines-ambitious-judicial-reform-plan-2013sep13-story.html>; see also U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Morocco (2018), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/morocco> [hereinafter Country Reports on Human Rights Practices: Morocco (2018)] (“While the government stated the aim of creating the council was to improve judicial independence, its effect on judicial independence was not clear. According to media reports and human rights activists, outcomes of trials in which the government had a strong interest, such as those touching on Islam as it related to political life and national security, the legitimacy of the monarchy, and Western Sahara, sometimes appeared predetermined.”).

¹⁰ CONSTITUTION (MOROCCO), *supra* note 6, at art. 1.

¹¹ See *id.* at tit. V.

¹² See *id.* at tit. IV.

¹³ See *id.* at tit. VII.

¹⁴ Mohamed Madani, et. al., *The 2011 Moroccan Constitution: A Critical Analysis*, INT’L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE 18, 21 (2012), <https://www.idea.int/sites/default/files/publications/the-2011-moroccan-constitution-critical-analysis.pdf>.

¹⁵ CONSTITUTION (MOROCCO), *supra* note 6, at arts. 107, 109.

¹⁶ SABINE DONNER, ET AL., *supra* note 9.

¹⁷ U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Morocco (2020), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/morocco> [hereinafter Country Reports on Human Rights Practices: Morocco (2020)].

¹⁸ CONSTITUTION (MOROCCO), *supra* note 6, at art. 19; Madani, et. al., *supra* note 14.

¹⁹ List of ICCPR Signatories, U.N. TREATY COLLECTION,

https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND (last accessed Mar. 9, 2022).

proven guilty.²⁰

Morocco is also a member of the League of Arab States, which has adopted the Arab Charter on Human Rights.²¹ Article 3 of the Charter requires States to ensure that the individuals within their territories enjoy all the rights and freedoms recognized in the Charter “without distinction on grounds of,” among other things, “opinion.”²² While Article 4 allows for limitations of these rights and freedoms where prescribed by law or considered necessary to protect the nation, such limitations should not preclude “judicial guarantees.”²³ Further, Article 16 requires that the accused be presumed innocent “until proved guilty by a final judgment rendered according to law,”²⁴ and Article 14 states that anyone “arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”²⁵ Article 16 also details the accused’s minimum guarantees during an investigation and trial, including the “right to examine or have his lawyer examine the prosecution witnesses and to summon defence according to the conditions applied to the prosecution witnesses.”²⁶

Current State of Affairs in Morocco

According to Sarah Leah Whitson, then Middle East and North Africa director at Human Rights Watch, “If you express your dissatisfaction of the government on YouTube, Facebook or Twitter, you risk jail in Morocco. Not great for a country that still postures as a ‘liberal exception’ in the Arab world.”²⁷ Some of this repression manifests through legal provisions restricting freedom of expression in a manner contrary to international standards; in other cases, the authorities use facially-neutral laws, including “morality” laws, to target those who speak out. Further, the government’s alleged use of the Pegasus spyware to monitor and track activists, including Mr. Radi, raises significant privacy and surveillance concerns.

Legal Restrictions on Freedom of Expression

In its Concluding Observations on Morocco’s sixth periodic report in 2016, the UN Human

²⁰ International Covenant on Civil and Political Rights, art. 14(1), (2), (3(e)), Dec. 16, 1966, S. Treaty Doc. No. 95- 20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter ICCPR].

²¹ See Arab Charter on Human Rights, 2004, <https://digitallibrary.un.org/record/551368?ln=en> (last accessed Apr. 21, 2022). Notably, the Charter “does not create any legally binding obligation in regard of international law of Member States,” but this provides a sense of regional commitments made by Morocco. *League of Arab States*, ORG. AM. STATES, http://www.oas.org/en/ser/dia/institutional_relations/Documents/Profiles/League_of_Arab_States.pdf (last accessed Apr. 21, 2022).

²² Arab Charter on Human Rights, *supra* note 21, at art. 3.

²³ *Id.* at art. 4.

²⁴ *Id.* at art. 16.

²⁵ *Id.* at art. 14.

²⁶ *Id.* at art. 16.

²⁷ Sharif Paget, *Moroccan Journalist Faces a Year in Prison Over Tweet About Judge*, CNN (Dec. 29, 2019, 10:09 AM), <https://www.cnn.com/2019/12/29/africa/morocco-journalist-detention-intl/index.html>.

Rights Committee said it was “concerned by reports that the activities of human rights defenders are subject to disproportionate, unjustified restrictions and that human rights defenders’ freedom of movement is limited.”²⁸ Further, regarding the right to freedom of opinion and expression, the Committee expressed concern about provisions in the Criminal Code that allow for imprisonment for “acts perceived as being offensive to . . . the monarchy or . . . to the country’s territorial integrity.”²⁹

While Morocco adopted its first ever Press Code in 2016,³⁰ wariness remains about the Moroccan government’s continued use of the Penal Code, instead of the Press Code, to prosecute journalists.³¹ The Committee noted that while the aforementioned Press Code no longer subjects press-related offenses to custodial penalties, “the concurrent introduction of new provisions in the Criminal Code that establish terms of imprisonment as penalties” vitiates some of this protection.³² The Committee called on Morocco to “revise all provisions in its Criminal Code . . . to align them with [A]rticle 19 of the [ICCPR] and ensure that any restrictions on the exercise of the right to freedom of expression and association do not exceed the strictly defined limitations set out in [A]rticle 19.”³³

Targeting

According to *The New York Times*, Moroccan authorities have “accused [journalists] of sex crimes and other acts deemed illegal in Morocco,” with rights groups claiming that it is an effort to “silence the country’s small cadre of independent journalists with false and politically motivated accusations.”³⁴ In addition, authorities appear to be using other facially-neutral laws, such as espionage or tax evasion, against journalists and human rights activists investigating the government.

For instance, Soulaiman Raissouni—editor-in-chief of the independent news outlet *Akhbar al-Youm*—who criticized the authorities’ response to the COVID-19 pandemic,³⁵ was arrested in May 2020 on suspicion of sexual assault, held in detention for the

²⁸ See generally Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Morocco, U.N. Doc. CCPR/C/MAR/CO/6, at ¶ 41 (Dec. 1, 2016) [hereinafter Concluding Observations], <https://undocs.org/CCPR/C/MAR/CO/6>.

²⁹ *Id.* at ¶ 43.

³⁰ MOROCCAN LAW ON PRESS AND PUBLISHING, art. 16, <https://www.wipo.int/edocs/lexdocs/laws/fr/ma/ma069fr.pdf>.

³¹ Red Lines Stay Red, HUM. RTS. WATCH (May 4, 2017), <https://www.hrw.org/report/2017/05/04/red-lines-stay-red/moroccos-reforms-its-speech-laws>; Mission Journal: Morocco’s New Press Law Undermined by Draft Penal Code, COMM. TO PROTECT JOURNALISTS (July 29, 2016, 1:20 PM), <https://cpj.org/2016/07/mission-journal-moroccos-new-press-law-undermined/>; see generally HANNAH GARRY, ET AL., *supra* note 1.

³² Concluding Observations, *supra* note 28, at ¶ 43.

³³ *Id.* at ¶ 44.

³⁴ Nicholas Casey & Aida Alami, *Journalist’s Monthslong Hunger Strike Points to Perils of Reporting in Morocco*, N.Y. TIMES (July 3, 2021), <https://www.nytimes.com/2021/07/03/world/africa/morocco-journalists-jailings.html>.

³⁵ *Id.*

remainder of the year, and convicted and sentenced to five years in prison.³⁶ Journalist Taoufik Bouachrine, editor-in-chief of *Akhbar al-Youm*, was arrested in 2018, only days after publishing an op-ed criticizing the Moroccan Prime Minister, and initially sentenced to twelve years in prison and a fine of 200,000 Moroccan Dirhams³⁷ on charges of sexual assault, rape, and human trafficking.³⁸ Mohammed Sekkaki, a popular YouTuber known as Moul Kaskita, was charged with insulting the public, obscene behavior, and drug possession, as well as illegally taking money from foreign sources to attack the State, after posting a video criticizing the government; he was ultimately convicted and sentenced to four years in prison.³⁹ Finally, Maati Monjib, an academic, contributor to *Al-Quds al-Arabi*, and critic of the government, was convicted of fraud and undermining internal State security and sentenced to one year in prison plus a fine of 15,000 Moroccan Dirhams⁴⁰ in a case based on receipt of foreign funds; he now also faces additional money laundering charges in a case that is also being monitored by the USC Gould International Human Rights Clinic as part of TrialWatch.⁴¹

Observers note that these kinds of charges are generally accompanied by smear campaigns in media outlets close to the government.⁴² The Brookings Institute, for example, explains that “the regime has refined its tactics of controlling the media and its image,” using “business figures close to the palace” who “control various media outlets” to “spread pro-regime propaganda.”⁴³

In particular, as described by journalist Hajar Raissouni, sex crime charges act as “symbolic murder because they involve a loss of reputation.”⁴⁴ Ms. Raissouni, who was herself prosecuted for alleged abortion and sex outside of marriage, stated that “[t]he [S]tate wants to give the world the impression that the journalists are being punished for breaking the law and that it has nothing to do with their work.”⁴⁵ (TrialWatch also

³⁶ FREEDOM HOUSE, *supra* note 8; *Denied Due Process, Moroccan Editor Sentenced to Five Years in Prison*, REPS. WITHOUT BORDERS (July 12, 2021), <https://rsf.org/en/news/denied-due-process-moroccan-editor-sentenced-five-years-prison>.

³⁷ Approximately 21,000 US dollars.

³⁸ *Taoufik Bouachrine*, COMM. TO PROTECT JOURNALISTS, <https://cpj.org/data/people/taoufik-bouachrine> (last visited Mar. 9, 2022); ElHaies, *Morocco’s New Tactic to Punish Journalists: Charge Them with Sex Crimes*, COMM. TO PROTECT JOURNALISTS (Mar. 18, 2021, 5:18 PM), <https://cpj.org/2021/03/moroccos-new-tactic-punish-journalists-charge-sex-crimes/> [hereinafter ElHaies, *Morocco’s New Tactic*].

³⁹ Sebastian Bouknight, *Moroccan YouTubers Forced to Silence*, AL-MONITOR (Dec. 19, 2019), <https://www.al-monitor.com/originals/2019/12/moroccon-youtubers-forced-to-silence.html>; *Morocco: Crackdown on Social Media Critics*, HUM. RTS. WATCH (Feb. 5, 2020, 12:00 AM), <https://www.hrw.org/news/2020/02/05/morocco-crackdown-social-media-critics>.

⁴⁰ Approximately 1,500 US dollars.

⁴¹ FREEDOM HOUSE, *supra* note 8; *Morocco’s Maati Monjib Back in Court Tomorrow*, REPS. WITHOUT BORDERS (Sept. 29, 2021), <https://rsf.org/en/news/moroccos-maati-monjib-back-court-tomorrow>; *Academic Arbitrarily Detained*, AMNESTY INT’L (Jan. 5, 2021), <https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE2934812021ENGLISH.pdf>.

⁴² *Morocco: RSF Appeals Urgently to UN to Condemn Use of Trumped-Up Sex Charges Against Journalists*, REPS. WITHOUT BORDERS (Sept. 23, 2020), <https://rsf.org/en/news/morocco-rsf-appeals-urgently-un-condemn-use-trumped-sex-charges-against-journalists>.

⁴³ Abouzzohour, *supra* note 7.

⁴⁴ Heba Saleh, *Moroccan Sex Crime Trials Fuel Fears of Crackdown on Dissent*, FINANCIAL TIMES (Oct. 16, 2020), <https://www.ft.com/content/fae850a4-9fe2-4473-8931-bae05f33c2f3>.

⁴⁵ *Id.*

monitored Ms. Raissouni's case and found that the proceedings violated her rights.⁴⁶ Given the seriousness of sex crimes allegations, Reporters Without Borders sent an urgent appeal to the UN Special Rapporteur on Violence Against Women, asking for a public condemnation of the misuse of sex charges against Moroccan journalists who criticize the authorities.⁴⁷ Feminist collective and nongovernmental organization Khmissa described this trend as "the Moroccan state's ongoing instrumentalization of women in legal cases against independent journalists."⁴⁸

Detention

There are also reports that activists in Morocco are detained without bail, have their trials delayed, and are denied access to their case files and their lawyers.⁴⁹ Pre-trial detention in these cases can last for as long as one year, and reports show that the authorities regularly hold individuals for longer.⁵⁰ In December 2013, the UN Working Group on Arbitrary Detention conducted an official visit to Morocco at the invitation of the Moroccan government and noted that "the use of detention as a means of punishment still seems to be the rule rather than the exception."⁵¹

In detention, some journalists have resorted to hunger strikes. For instance, Soulaiman Raissouni launched a nearly four-month long hunger strike in April 2021 in protest of his continued pre-trial detention.⁵² Maati Monjib undertook a hunger strike of more than 18 days in protest of the government's failure to notify him of a trial date in the separate, older case of allegedly undermining internal security; the hearing was held in his absence, and he was ultimately convicted *in absentia*.⁵³ According to Souhaieb Khayati, then head of Reporters Without Borders's North Africa desk, "[i]t is unacceptable that journalists end up putting their lives in danger to make their demands for justice heard and to recover the

⁴⁶ See generally HELENA KENNEDY, MOROCCO V. HAJAR RAISOUNI, ET AL., THE CLOONEY FOUNDATION FOR JUSTICE (Aug. 2020), <https://cfj.org/wp-content/uploads/2020/08/Fairness-Report-on-the-Trail-of-Morocco-v.-Hajar-Raissouni.pdf>.

⁴⁷ *Morocco: RSF Appeals Urgently to UN to Condemn Use of Trumped-Up Sex Charges Against Journalists*, *supra* note 42.

⁴⁸ @Khmissa, TWITTER (Sept. 2, 2020, 12:52 PM), <https://twitter.com/khmissa5/status/1301246528498135043>.

⁴⁹ *Morocco's King Asked to Intercede on Behalf of Two Imprisoned Journalists Whose Lives Are in Danger*, REPS. WITHOUT BORDERS (June 1, 2021), <https://rsf.org/en/news/moroccos-king-asked-intercede-behalf-two-imprisoned-journalists-whose-lives-are-danger>.

⁵⁰ Country Reports on Human Rights Practices: Morocco (2020), *supra* note 17; U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Country Reports on Human Rights Practices: Morocco (2019), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/morocco>; Country Reports on Human Rights Practices: Morocco (2018), *supra* note 9.

⁵¹ Human Rights Council, Working Group on Arbitrary Detention, Report of the Working Group on Arbitrary Detention Addendum, A/HRC /27/48/Add.5, at 11 (Aug. 4, 2014), <https://undocs.org/A/HRC/27/48/Add.5>.

⁵² *Jailed Moroccan Editor Requests Hospitalisation After Ending Hunger Strike*, REPS. WITHOUT BORDERS (Aug. 5, 2021), <https://rsf.org/en/news/jailed-moroccan-editor-requests-hospitalisation-after-ending-hunger-strike>; Casey & Alami, *supra* note 34.

⁵³ *Open Judicial Season on Moroccan Journalists*, REPS. WITHOUT BORDERS (Apr. 5, 2021), <https://rsf.org/en/news/open-judicial-season-moroccan-journalists>; *Morocco Court Delays Appeal Hearing of Dissident Historian*, BARRON'S (Sept. 30, 2021), <https://www.barrons.com/news/morocco-court-delays-appeal-hearing-of-dissident-historian-01633015807>.

freedom they should never have lost.”⁵⁴

B. CASE HISTORY

Pre-Trial Timeline

Omar Radi is an award-winning Moroccan investigative journalist. In 2015, Mr. Radi co-founded *Le Desk*, an independent online news publication known for its reporting on the Moroccan government.⁵⁵ Through his work at *Le Desk* and other outlets, Mr. Radi published investigative articles on alleged financial corruption in Morocco, particularly as it related to the Moroccan monarchy’s financial activities.⁵⁶

Over the past two years, Mr. Radi has been in frequent conflict with the authorities. On March 17, 2020, Mr. Radi was convicted of insulting the Moroccan judiciary after he wrote a tweet criticizing a Moroccan court’s decision to uphold severe sentences for the leaders of the Hirak Rif protests.⁵⁷ The court handed Mr. Radi a four-month suspended sentence and a 500 Moroccan Dirham⁵⁸ fine.⁵⁹ His suspended sentence meant that he did not have to serve any jail time upon conviction, but was effectively on a five-year probationary period.

The USC Gould International Human Rights Clinic monitored Mr. Radi’s March 2020 trial as part of TrialWatch. The Fairness Report on the case concluded that the trial “did not meet basic international human rights standards for assuring a fair trial,” violating Mr. Radi’s right to be tried by an independent and impartial tribunal, his right to the presumption of innocence, and his right to freedom of expression.⁶⁰ Other human rights organizations also criticized the trial.⁶¹

On June 22, 2020, Amnesty International published a report finding that the Moroccan

⁵⁴ Hunger Strike Is Last Resort for Some Imprisoned Moroccan Journalists, REPS. WITHOUT BORDERS (Apr. 15, 2021), <https://rsf.org/en/news/hunger-strike-last-resort-some-imprisoned-moroccan-journalists>.

⁵⁵ Omar Radi, LE DESK, <https://ledesk.ma/author/omarradi> (last visited Mar. 9, 2022); *Le Desk Takes a Gamble on Investigative Journalism in Morocco*, CFI (June 11, 2018), <https://cfi.fr/en/news/le-desk-takes-gamble-investigative-journalism-morocco>.

⁵⁶ Samia Errazzouki, *A Crackdown on the Press is Demolishing What’s Left of Morocco’s Liberal Reputation*, WASH. POST (Dec. 30, 2019), <https://www.washingtonpost.com/opinions/2019/12/30/crackdown-press-is-demolishing-whats-left-moroccos-liberal-reputation>; Mehdi Mahmoud, *Who is Omar Radi, the Journalist and Activist Imprisoned for a Tweet?*, TELQUEL (Dec. 30, 2019), https://telquel.ma/2019/12/30/qui-est-omar-radi-le-journaliste-et-militant-incarcere-pour-un-tweet%E2%80%89_1662764.

⁵⁷ The Hirak Rif movement was a series of protests between October 2016 and June 2017 that occurred in the Rif region of Morocco. The protests demanded social and economic reforms in the Rif region. As a result of the protests, a number of activists were arrested and imprisoned. See *Morocco: Prison Sentences Upheld Against Hirak El-Rif Protesters in Flawed Appeal Trial in Casablanca*, AMNESTY INT’L (Apr. 26, 2019), <https://www.amnesty.org/en/documents/mde29/0267/2019/en>.

⁵⁸ Approximately 50 US dollars.

⁵⁹ *Morocco/Western Sahara: Court Hands Journalist Four Month Suspended Sentence and Fine for a Tweet*, *supra* note 57.

⁶⁰ HANNAH GARRY, ET AL., *supra* note 1.

⁶¹ *Id.*; *Morocco/Western Sahara: Court Hands Journalist Four Month Suspended Sentence and Fine for a Tweet*, *supra* note 57.

government used spyware to monitor the activities of Mr. Radi and other Moroccan journalists.⁶² Three days later, on June 25, 2020, the Prosecutor General of the Casablanca Court of First Instance opened an investigation into Mr. Radi, this time based on allegations that Mr. Radi obtained illicit funds from foreign intelligence organizations in return for espionage services.⁶³ That day, Mr. Radi was summoned to the National Brigade of Judicial Police (BNPJ) headquarters in Casablanca and questioned for almost six hours.⁶⁴ Over the course of the next month, he was brought in for questioning six more times.⁶⁵ Mr. Radi has said that he believed that the interrogations were related to the publication of the Amnesty International report.⁶⁶

⁶² *Moroccan Journalist Targeted with Network Injection Attacks Using NSO Group’s Tools*, AMNESTY INT’L (June 22, 2020), <https://www.amnesty.org/en/latest/research/2020/06/moroccan-journalist-targeted-with-network-injection-attacks-using-nso-groups-tools>.

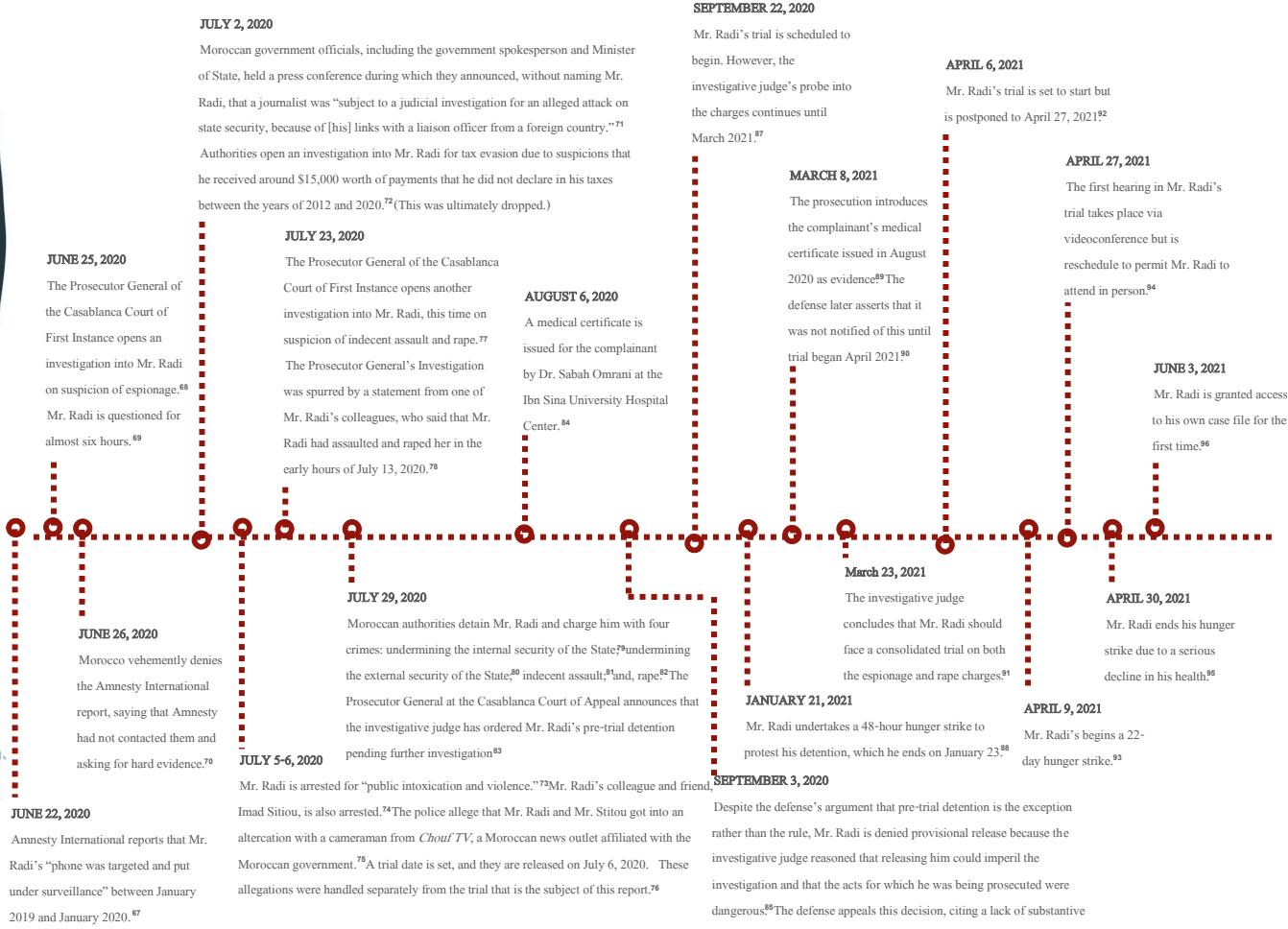
⁶³ *Timeline of the Omar Radi Case*, FREEOMARRADI.COM, <https://freeomarradi.com/actualites> (last visited Mar. 9, 2022); Dana Priest, *Moroccan Journalist and Government Critic Called in for Questioning*, WASH. POST (June 25, 2021), https://www.washingtonpost.com/world/moroccan-journalist-and-government-critic-called-in-for-questioning/2020/06/25/3cdb6f66-b6f6-11ea-9a1d-d3db1cbe07ce_story.html.

⁶⁴ Priest, *supra* note 63.

⁶⁵ On July 2, 9, 13, 17, 20, and 25, Moroccan authorities brought Mr. Radi in for questioning. *Timeline of the Omar Radi Case*, *supra* note 63; URGENT ACTION: DETAINED JOURNALIST FACING TRIAL, AMNESTY INT’L (Apr. 6, 2021), <https://www.amnestyusa.org/wp-content/uploads/2021/04/uaa13620.pdf>.

⁶⁶ *Le Journaliste Marocain Omar Radi, qui a Révélé être Espionné par le Pouvoir, Convoqué par la Police*, FRANCE INTER (June 25, 2020, 10:27 AM), <https://www.franceinter.fr/justice/le-journaliste-marocain-omar-radi-qui-a-revele-etre-espionne-par-le-pouvoir-convoque-par-la-police>; Phineas Ruecker & Cécile Schilis-Gallego, *Hacked: The Story Behind the Israeli Spyware Targeting Moroccan Journalist*, FORBIDDEN STORIES (June 22, 2020), <https://forbiddenstories.org/the-story-behind-the-israeli-spyware-targeting-moroccan-journalists>.

Timeline of Events Leading up to Trial



⁶⁷ *Moroccan Journalist Targeted With Network Injection Attacks Using NSO Group's Tools*, *supra* note 62.

⁶⁸ Priest, *supra* note 63.

⁶⁹ *Id.*

⁷⁰ *Morocco Rejects Amnesty's Allegations on Spying on Journalist*, REUTERS (June 26, 2020, 5:00 PM), <https://www.reuters.com/article/us-morocco-human-rights/morocco-rejects-amnestys-allegations-on-spying-on-journalist-idUSKBN23X2SZ>; *Morocco Rejects Amnesty's Allegations on Spying on Journalists*, MIDDLE EAST MONITOR (June 28, 2020, 1:30 PM), <https://www.middleeastmonitor.com/20200628-morocco-rejects-amnestys-allegations-on-spying-on-journalist>

⁷¹ La Rédaction, *Le Journaliste Omar Radi Reagit aux Déclarations du Gouvernement*, LE DESK (Apr. 7, 2020), <https://ledesk.ma/encontinu/le-journaliste-omar-radi-reagit-aux-declarations-du-gouvernement>; AEH, *Amnesty International: The Kingdom Raises its Voice*, MEDIAS24 (July 3, 2020, 3:32 PM), <https://medias24.com/2020/07/03/amnesty-international-le-royaume-hausse-le-ton>.

⁷² *Morocco: Espionage Case Against Outspoken Journalist*, HUM. RTS. WATCH (Sep. 21, 2020, 10:30 AM), <https://www.hrw.org/news/2020/09/21/morocco-espionage-case-against-outspoken-journalist>.

⁷³ *Morocco Arrests Journalist for 'Public Drunkenness, Violence'*, MIDDLE EAST ONLINE (July 6, 2020), <https://middle-east-online.com/en/morocco-arrests-journalist-%E2%80%98public-drunkenness-violence%E2%80%99>.

⁷⁴ *Journalists Omar Radi and Imad Stitou Detained Overnight in Morocco*, COMM. TO PROTECT JOURNALISTS (July 6, 2020 2:40 PM), <https://cpj.org/2020/07/journalists-omar-radi-and-imad-stitou-detained-overnight-in-morocco>.

⁷⁵ *Id.; Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72

⁷⁶ *Journalists Omar Radi and Imad Stitou Detained Overnight in Morocco*, *supra* note 74.

⁷⁷ *Timeline of the Omar Radi Case*, *supra* note 63.

⁷⁸ Case file, "Rape Charges."

⁷⁹ *PENAL CODE*, *supra* note 4, at art. 206.

Multiple requests were made throughout the pre-trial process and during trial for Mr. Radi's release, all of which were denied.⁹⁷

Espionage Charge

As to the espionage allegations, Mr. Radi was charged with violating Articles 191 and 206 of the Moroccan Penal Code. Article 191 criminalizes "endangering the external security of the State" by maintaining ties "with agents of a foreign authority for the purpose of or having had the effect of adversely affecting the military situation or diplomatic of Morocco."⁹⁸ Article 206 criminalizes "endangering the internal security of the State" by "directly or indirectly receiv[ing] from a foreign person or of a organization and in any form

⁸⁰ *Id.* at art. 191.

⁸¹ *Id.* at art. 485.

⁸² *Id.* at art. 486; *Journalist Omar Radi Arrested, Charged in Morocco*, COMM. TO PROTECT JOURNALISTS (July 29, 2020 4:19 PM), <https://cpj.org/2020/07/journalist-omar-radi-arrested-charged-in-morocco>; *Morocco Arrests Omar Radi for Violent Rape, Receiving Funds from Foreign Agents*, MOROCCO WORLD NEWS (July 29, 2020 4:04 PM), <https://www.moroccoworldnews.com/2020/07/312968/morocco-arrests-omar-radi-for-violent-rape-receiving-funds-from-foreign-agent>.

⁸³ *Omar Radi Remanded in Police Custody (Public Prosecutor at Casablanca Court of Appeal)*, AGENCIE MAROCAINE DE PRESSE (July 29, 2020), <https://www.mapnews.ma/en/actualites/general/omar-radi-remanded-police-custody-public-prosecutor-casablanca-court-appeal>; *Morocco: Authorities Must Ensure Prominent Journalist Omar Radi a Fair Trial and Release Him Pending the Outcome of His Appeals*, PEN INT'L (Nov. 26, 2021, 11:34 am), <https://pen-international.org/news/morocco-authorities-must-ensure-prominent-journalist-omar-radi-a-fair-trial-en>.

⁸⁴ Judgment, "After Deliberations."

⁸⁵ *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72.

⁸⁶ *Id.*

⁸⁷ *Morocco: Release Omar Radi and Guarantee Fair Trial Proceedings*, HUM. RTS. WATCH (Apr. 6, 2021, 11:00 AM), <https://www.hrw.org/news/2021/04/06/morocco-release-omar-radi-and-guarantee-fair-trial-proceedings>.

⁸⁸ Letter from United Nations Special Rapporteurs to Kingdom of Morocco (July 26, 2021), <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26551>.

⁸⁹ Case file, "Witnesses."

⁹⁰ Judgement, "After Deliberations" ("[T]he CCP does not obligate [the investigating judge] to communicate all documents provided to him."). At a June 1, 2021, hearing, the defense complained that the prosecution introduced the document, which had not been in the case file "since the beginning of the case," "without [its] knowledge." *Trial Monitor Notes* (June 1, 2021) (on file with authors).

⁹¹ *Morocco: Release Omar Radi and Guarantee Fair Trial Proceedings*, *supra* note 87.

⁹² *Timeline of the Omar Radi Case*, *supra* note 63.

⁹³ *Id.*; *Moroccan Journalist Omar Radi Breaks Hunger Strike Due to Ill Health*, FRANCE 24 (Apr. 30, 2021, 9:33 PM), <https://www.france24.com/en/africa/20210430-moroccan-journalist-omar-radi-breaks-hunger-strike-due-to-ill-health>.

⁹⁴ *Timeline of the Omar Radi Case*, *supra* note 63; see *infra* note 164

⁹⁵ *Timeline of the Omar Radi Case*, *supra* note 63.

⁹⁶ *Morocco: Journalist in Prison After Unfair Trial*, HUM. RTS. WATCH (Nov. 25, 2021), <https://www.hrw.org/news/2021/11/25/morocco-journalist-prison-after-unfair-trial>.

⁹⁷ On September 3, 2020, Mr. Radi was denied provisional release because the judge reasoned that releasing Radi could imperil the investigative period. See *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72. Again, on April 8, 2021 and May 5, 2021, the judge denied Mr. Radi provisional release because Radi was stated to be a threat and danger to the public. Aziz El Yaakoubi (@Elyaakoubi), TWITTER (Apr. 8, 2021, 2:08 AM), <https://twitter.com/Elyaakoubi/status/1380085187879575552>; Aziz El Yaakoubi (@Elyaakoubi), TWITTER (May 5, 2021, 7:38 AM), <https://twitter.com/Elyaakoubi/status/138995254124546457>; *Timeline of the Omar Radi Case*, *supra* note 63; Radi Driss, FACEBOOK (Apr. 30, 2021), https://www.facebook.com/radi.driss.7/posts/3820422554674281?_rdc=1&_rdr.

⁹⁸ PENAL CODE, *supra* note 4, at art. 191.

whatsoever, gifts, presents, loans or other benefits intended or used in all or in part to carry out or remunerate in Morocco an activity or a propaganda likely to affect integrity, sovereignty, or to the independence of the Kingdom, or to shake the loyalty that citizens owe to the State and to the institutions of the Moroccan people.”⁹⁹ Each charge carries up to five years in prison and up to 10,000 Moroccan Dirhams¹⁰⁰ in penalties.¹⁰¹

Both charges were predicated upon different relationships Mr. Radi allegedly had with foreign entities or persons. In accusing Mr. Radi of undermining the external security of the State, the government alleged that Mr. Radi maintained improper contacts with Dutch diplomats in Rabat and fed them information about the political situation in Morocco in order to destabilize the Dutch-Moroccan relationship.¹⁰² The Judgment concluded that Mr. Radi’s time in the Rif region between 2016 and 2018, which coincided with and continued after the Hirak movement, was “not linked to any journalism work, but rather to the action of gathering intelligence about the events for the Dutch Embassy.”¹⁰³

In alleging that Mr. Radi had undermined the internal security of the State, the government stated that Mr. Radi received funds from two British organizations, as well as an international social justice organization called the Bertha Foundation, in return for espionage activities conducted between 2012 and 2020.¹⁰⁴ The Judgment pointed to unspecified “internet leaks” of documents and “open sources” identifying these organizations as intelligence services, as well as to what it deemed a fact—that the Bertha Foundation was “known for its hostility towards the territorial integrity of the country.”¹⁰⁵

Relations with the Dutch Embassy

As to the allegation that Mr. Radi provided information to Dutch diplomats with the intention of undermining the Dutch diplomatic relationship with Morocco,¹⁰⁶ at trial, the prosecution scrutinized Mr. Radi’s relationship with four individuals: Frank Huisin gh, Arnaud Simons, Matthijs Schroeder, and an unnamed communications staffer at the Dutch Embassy.¹⁰⁷ The prosecution ultimately honed in on Mr. Radi’s relationships with Mr. Huisin gh and Mr. Simons, who were political liaisons in the Embassy from 2016 until 2018, and from 2012 until 2015, respectively.¹⁰⁸ According to the prosecution, there was

⁹⁹ *Id.* at art. 206.

¹⁰⁰ Approximately 1,030 US dollars.

¹⁰¹ PENAL CODE, *supra* note 4, at arts. 191, 206.

¹⁰² Case file, “Espionage Charges”; *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72.

¹⁰³ Judgment, “After Deliberations.”

¹⁰⁴ *Id.*; Case file, “Espionage Charges”; *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72.

¹⁰⁵ Judgment, “After Deliberations.”

¹⁰⁶ Case file, “Espionage Charges.”

¹⁰⁷ Judgment, “After Deliberations”; Arnaud Simons, *Open Letter in the Context of the Trial of Journalist Omar Radi*, ARNAUDSIMONS.COM (Jan. 8, 2021), <https://arnaudsimons.medium.com/lettre-ouverte-dans-le-cadre-du-proc%C3%A8s-du-journaliste-omar-radi-8dfddc167fbe>.

¹⁰⁸ *Frank Huisin gh*, LINKEDIN,

https://www.linkedin.com/in/frankhuisin gh?original_referer=https%3A%2F%2Fwww.google.com%2F (last accessed Jul. 19, 2022); *Arnaud Simons*, LINKEDIN,

evidence that Mr. Radi had meetings with both men and also exchanged emails and texts with them in 2018,¹⁰⁹ despite the fact that Mr. Simons had left Morocco by that point.¹¹⁰ The prosecution suggested that these interactions served to provide non-journalistic services and information, and that the messages indicated “intelligence work [was conducted] between them . . . [on] the activities in the Rif region” during the Hirak Rif protests.¹¹¹

In its Judgment, the court concluded that the messages between Mr. Radi and Mr. Huisingsh “prove[d] that the two men had already met in person several times . . . [and] that Omar Radi granted suspicious intelligence services on behalf of the Dutch official, especially since their communications coincided with the visits paid by the accused Omar Radi to Rif region after the events of Al Hoceima,”¹¹² which spanned 2016 and 2017.¹¹³ Additionally, per the Judgment, Mr. Huisingsh asking Mr. Radi if he would like to meet the new secretary of the Dutch Embassy was, by itself, indicative of “an agent . . . passing on his informant to another agent as he is near of completing his duties.”¹¹⁴ Further, the Judgment frames Mr. Radi’s use of text messages as a method of communication as evidence that Mr. Radi “was aware of the danger that accompanie[d] his role as well as the nature of the suspicious tasks assigned to him.”¹¹⁵ Mr. Radi admitted that meetings indeed took place but were nothing more than customary conversations about political developments in Morocco and involved no illegal conduct.¹¹⁶

In relation to Arnaud Simons, Mr. Radi provided the authorities with the correct spelling of Mr. Simons’ name so that they could run his name through the government database and confirm any connection to the Dutch Embassy.¹¹⁷ The authorities nevertheless misspelled Mr. Simons’ name when searching the database and concluded that nobody by the name of “Arnauld Simon”¹¹⁸ existed.¹¹⁹ In the case file, the investigation by the BNPJ concluded “there was no one of this identity” and that “[t]his demonstrates that there was an individual in the Dutch embassy using an alias.”¹²⁰ As stated in the Judgment, the Moroccan Ministry of Foreign Affairs “affirmed that no information about the designated

<https://www.linkedin.com/in/arnaudsimons/details/experience> (last accessed Mar. 14, 2022). Notably, the case file states that Mr. Simons worked in the Dutch embassy in Morocco from 2009 to 2013. Case file, “Espionage Charge.”

¹⁰⁹ Case file, “Espionage Charges”; Judgment, “After Deliberations.”

¹¹⁰ Simons, *supra* note 107.

¹¹¹ Case file, “Espionage Charges”; Judgment, “Closed Hearings.”

¹¹² Judgment, “After Deliberations.”

¹¹³ Aida Alami, *Morocco’s Stability Is Roiled by Monthslong Protests Over Fishmonger’s Death*, N.Y. TIMES (Aug. 26, 2017), <https://www.nytimes.com/2017/08/26/world/africa/morocco-berber-rif-nasser-zefzafi.html>; *Morocco’s Refusal to Listen*, N.Y. TIMES (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/opinion/morocco-protests.html>.

¹¹⁴ Judgment, “After Deliberations.”

¹¹⁵ *Id.*

¹¹⁶ Judgment, “Preparatory Investigation.”

¹¹⁷ *Trial Monitor Notes* (July 6, 2021) (on file with authors).

¹¹⁸ Case file, “Espionage Charges”; Judgment, “Preparatory Investigation.”

¹¹⁹ *Trial Monitor Notes* (July 6, 2021) (on file with authors).

¹²⁰ Case file, “Espionage Charges.”

person was available.”¹²¹ Despite the prosecution’s assertion that Mr. Simons did not exist, Mr. Simons published an open letter denying the allegations of espionage and even offered to serve as a witness at trial.¹²² The Dutch Ministry of Foreign Affairs also went on the record denying the charges.¹²³ As discussed in greater detail below, despite these statements and Mr. Simons’ offer to testify, the court described Mr. Simons as “inaccessible” and refused to allow him to testify, claiming it would have delayed the proceedings.¹²⁴

Consulting Work

The prosecution also alleged that Mr. Radi committed espionage on behalf of two British multinational companies: Good Governance Group (G3) in 2018 and K2 Intelligence Limited (K2) in 2019.¹²⁵ Specifically, the government accessed Mr. Radi’s bank accounts and determined that G3 and K2 sent Mr. Radi more than a dozen payments for his services exceeding 300,000 Moroccan Dirhams in total.¹²⁶ The authorities also entered contracts Mr. Radi signed with both groups into the case file.¹²⁷

During a December 24, 2020, interrogation, Mr. Radi conceded that he had worked with both G3 and K2, but asserted that he was solely providing consultancy services to each.¹²⁸ Mr. Radi explained that he functioned as an advisor for G3, providing guidance on whether a Moroccan company, Cash Plus, was financially and economically qualified for outside investment.¹²⁹ Mr. Radi explained that his work for K2 focused primarily on providing advice on the Moroccan agriculture sector.¹³⁰ While the government produced bank records showing the transfer of money from both G3 and K2 to Mr. Radi, the case file does not include any other evidence supporting the espionage charge. Moreover, at all times, Mr. Radi stated that these contracts had nothing to do with intelligence gathering or spying.¹³¹

The prosecution also asserted that Mr. Radi’s fellowship with the Bertha Foundation, an international non-governmental organization, constituted “undermining the internal security of the [S]tate through receiving funds from foreign groups in order to fund activities” that “affect the integrity of the Kingdom of Morocco and its sovereignty.”¹³² In June 2019, the Bertha Foundation awarded Mr. Radi and the Alternative Forum of Morocco, a domestic human rights organization, a grant to research State-sponsored land

¹²¹ Judgment, “After Deliberations.”

¹²² Simons, *supra* note 107.

¹²³ *Minister Knapen: Moroccan Journalist Did Not Spy for the Netherlands*, PAUDAL (Oct. 14, 2021), <https://www.paudal.com/2021/10/14/minister-knapen-moroccan-journalist-did-not-spy-for-the-netherlands>; Simons, *supra* note 107.

¹²⁴ Judgment, “After Deliberations.”

¹²⁵ Case file “Espionage Charges.”

¹²⁶ *Id.*

¹²⁷ *Id.*; Judgment, “After Deliberations”; *Trial Monitor Notes*, July 6, 2021 (on file with authors).

¹²⁸ Judgment, “Preparatory Investigation.”

¹²⁹ Judgment, “Preparatory Investigation.”

¹³⁰ Case file, “Espionage Charges.”

¹³¹ *Id.*

¹³² Judgment, “After Deliberations.”

expropriation in Morocco.¹³³ Mr. Radi admitted that he did not complete the research for the Bertha Foundation, but denied using the funds from the Bertha Foundation for espionage.¹³⁴

Beyond bank transfers and contractual information regarding the Bertha Foundation grant, the government also relied on interviews with individuals knowledgeable about Mr. Radi's fellowship to substantiate the allegation.¹³⁵ The individuals interviewed explained that when Mr. Radi received a grant from the Bertha Foundation, he had "to find a statutorily recognized association, because [the] Bertha Foundation [did not] work with individual persons," hence the grant being administered through the Alternative Forum of Morocco.¹³⁶ The interviewees furthermore stated that Mr. Radi received payments "for the purpose of an investigation about land expropriation and tribal land," that Mr. Radi's contract was for work "research[ing] databases and information about land expropriation and analysis of agriculture in Morocco," and that Mr. Radi's "project was supposed to be a documentary about expropriation and tribal land on the outskirts of Kenitra, as well as tin-roof huts in Oulad Bessita, Rabat, and Ain Sebaa."¹³⁷ Again, the case file contained no evidence showing that Mr. Radi did anything other than conduct journalistic work as part of the fellowship.¹³⁸

Rape Charge

Mr. Radi was also charged with "indecent assault" under Article 485 of the Moroccan Penal Code and "rape" under Article 486.¹³⁹ Article 485 criminalizes violent, indecent assault against any person, while Article 486 criminalizes rape, defined as "the act by which a man has sex with a woman against her will."¹⁴⁰ Each crime carries a sentence of five to ten years in prison.¹⁴¹

The government alleged that Mr. Radi raped one of his *Le Desk* colleagues on July 13, 2020.¹⁴² The complainant told investigators that she, Mr. Radi, and his colleague Imad Stitou, had stayed overnight at another colleague's home after an event on July 12, 2020,¹⁴³ and that around 2 AM the following morning, Mr. Radi came to the sofa where

¹³³ *Omar Radi: Morocco*, BERTHA FOUND., <https://berthafoundation.org/story/bertha-challenge-fellow-omar-radi> (last visited Mar. 10, 2022); *Explore Past Projects: Bertha Challenge 2020*, BERTHA FOUND., <https://berthafoundation.org/story/bertha-challenge-2020-fellows/#group-section-Omar-Radi-Gh5TtbWoRb> (last visited Mar. 10, 2022); M. ElHaies, *Bertha Foundation: Omar Radi's Arrest Blocked Moroccan Land Rights Exposé*, COMM. TO PROTECT JOURNALISTS (Sept. 21, 2020), <https://cpj.org/2020/09/bertha-foundation-omar-radis-arrest-blocked-moroccan-land-rights-expose> [hereinafter ElHaies, *Bertha Foundation*].

¹³⁴ Judgment, "After Deliberations."

¹³⁵ *Id.*

¹³⁶ Case file, "Espionage Charge."

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ PENAL CODE, *supra* note 4, at arts. 485-86.

¹⁴⁰ *Id.* at arts. 485-86.

¹⁴¹ *Id.* at arts. 485-86.

¹⁴² Case file, "Rape Charges."

¹⁴³ *Id.*

she was sleeping and raped her.¹⁴⁴

The complainant said that, prior to the rape, she was on a video call with her fiancé, Hassan Ait Braim, who was based in San Francisco, California, at the time.¹⁴⁵ In August 2020, while Morocco was under a strict, government-imposed lockdown due to COVID-19, Mr. Ait Braim was able to fly from San Francisco to Casablanca and meet with the prosecutor to provide testimony.¹⁴⁶ Mr. Ait Braim told the prosecutor that, during the video call with the complainant, prior to the rape, he saw a man behind the complainant wearing only underwear.¹⁴⁷ He also stated that, after the incident, she told him over the phone that she had been raped.¹⁴⁸ As discussed below, the judge refused to call Mr. Ait Braim to testify during the trial, and thus, the defense was not able to cross-examine him.¹⁴⁹

While Mr. Radi conceded that a sexual encounter took place, he maintained that it was consensual.¹⁵⁰ Mr. Radi produced text messages between himself and the complainant from the early hours of July 13, 2020, showing laughing and heart-shaped emoticons—all of which Mr. Radi's defense counsel said showed that the encounter was pre-planned.¹⁵¹ Additionally, after the complainant came forward, Mr. Stitou stated that he was present during the sexual encounter and that he observed that it was entirely consensual.¹⁵² Shortly thereafter, in October 2020, the prosecutor opened an investigation into Mr. Stitou, accusing him of being complicit in the crime despite not initially being involved in the complainant's allegations.¹⁵³ During a preliminary interrogation on November 25, 2020, Mr. Stitou stated that "he didn't hear any screaming or call for help" and that he was "certain that both parties agreed on having sexual intercourse."¹⁵⁴ In the Judgment, the court specifically did not take this testimony into consideration.¹⁵⁵ Instead, the court addressed the issue by noting that "the statement of the accused Imad Stitou" on "the fact that the sexual intercourse was consensual" is "unreliable because he is co-accused and he has [an] interest" in "hav[ing] the charges against him dropped."¹⁵⁶

The prosecution and the court relied predominantly on the testimony of the complainant

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at "Witnesses."

¹⁴⁹ Judgment, "After Deliberations."

¹⁵⁰ Case file, "Rape Charges."

¹⁵¹ *Id.* at "Rape Charges"; Judgment, "After Deliberations."

¹⁵² *Open Judicial Season on Moroccan Journalists*, *supra* note 53; Case file, "Rape Charges." Mr. Stitou made a statement about the incident as part of the Judicial Police report, which Mr. Radi "entirely confirmed." Judgment, "Preparatory Investigation."

¹⁵³ *Open Judicial Season on Moroccan Journalists*, *supra* note 53; AMNESTY INT'L, MOROCCO, SUBMISSION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (2016) (on file with author), <https://www.amnesty.org/download/Documents/MDE2948582016ENGLISH.PDF>; *Timeline of the Omar Radi Case*, *supra* note 63.

¹⁵⁴ Judgment, "Preparatory Investigations."

¹⁵⁵ Judgment, "After Deliberations."

¹⁵⁶ *Id.*

and Mr. Ait Braim in assessing the merits of these charges, and there was little other evidence implicating Mr. Radi.¹⁵⁷ Neither the owner of the villa where the alleged rape took place, nor his wife, testified to any awareness of the alleged rape.¹⁵⁸

Trial

Although the rape and espionage charges were distinct charges stemming from separate fact patterns, the judge combined the two charges into one single trial.¹⁵⁹ Mr. Radi's trial was scheduled to begin on April 6, 2021, at the Casablanca Court of First Instance, but was then postponed to April 27, 2021.¹⁶⁰ The tax evasion charge was ultimately dropped.

On April 9, 2021, Mr. Radi began a second hunger strike in protest of his detention.¹⁶¹ Mr. Radi's hunger strike lasted for over three weeks and took a serious toll on his health.¹⁶² During this period, his father described chronic diseases that Mr. Radi suffered from, including Crohn's disease and asthma, as necessitating continuous treatment to prevent progression to "a point [at which] they cannot be treated."¹⁶³

The first hearing, on April 27, 2021, lasted only several minutes because the government sought to bring Mr. Radi in via videoconference rather than in person.¹⁶⁴ The prosecution pointed to COVID-19 precautions as its justification, but Mr. Radi refused to attend the trial virtually, so the judge rescheduled the hearing to May 18, 2021, when Mr. Radi could physically attend.¹⁶⁵

Between April 27 and May 18, Mr. Radi's health deteriorated even further. Mr. Radi's preexisting conditions caused vomiting, diarrhea, and internal bleeding in prison.¹⁶⁶ Although Mr. Radi visited the hospital a few times in May 2021, the defense claimed that he did not receive rapid medical care when requested and that, when he did see a doctor, security guards were present in the room.¹⁶⁷ On May 18, 2021, and June 1, 2021, Mr.

¹⁵⁷ Case file, "Rape Charges"; Judgment, "After Deliberations."

¹⁵⁸ Case file, "Rape Charges."

¹⁵⁹ Morocco: Further Information: Detained Journalist Facing Trial: Omar Radi, AMNESTY INT'L (Apr. 6, 2021), <https://www.amnesty.org/en/documents/mde29/3945/2021/en/>.

¹⁶⁰ *Id.*; M. ElHaies, CPJ Joins Calls for Moroccan Authorities to Release Journalist Omar Radi, Ensure Fair Trial, COMM. TO PROTECT JOURNALISTS (Apr. 6, 2021, 4:18 PM), <https://cpj.org/2021/04/cpj-joins-call-for-moroccan-authorities-to-release-journalist-omar-radi-ensure-fair-trial>.

¹⁶¹ Frédéric Bobin, Au Maroc Le Climat Répressif se Durcit Contre la Presse, LE MONDE (Apr. 16, 2021, 11:07 AM), https://www.lemonde.fr/afrique/article/2021/04/16/au-maroc-le-climat-repressif-se-durcit-contre-la-presse_6077002_3212.html.

¹⁶² Moroccan Journalist Omar Radi Breaks Hunger Strike Due to Ill Health, *supra* note 93.

¹⁶³ Morocco: Concern Over the Health of Detained Journalists on Hunger Strike, EURO-MED HUM. RTS. MONITOR (Apr. 15, 2021), <https://euromedmonitor.org/en/article/4326/Morocco:-Concern-over-the-health-of-detained-journalists-on-hunger-strike>.

¹⁶⁴ Trial Monitor Notes (Apr. 27, 2021) (on file with authors).

¹⁶⁵ *Id.*

¹⁶⁶ See Trial Monitor Notes, May 18, 2021 (on file with author); Hunger Strike Is Last Resort for Some Imprisoned Moroccan Journalists, *supra* note 54 (describing Mr. Radi's symptoms, including diarrhea and vomiting).

¹⁶⁷ Morocco: Concern Over the Health of Detained Journalists on Hunger Strike, *supra* note 163; Trial Monitor Notes (May 18, 2021) (on file with authors); Trial Monitor Notes (June 1, 2021) (on file with authors).

Radi's attorney raised the issue of inadequate medical care with the trial judge, noting that Mr. Radi had been transferred to the hospital three times for internal bleeding but did not feel comfortable being examined in the presence of security guards.¹⁶⁸ Ultimately, however, because his health was so dire, he agreed to be treated by medical staff while prison guards stood with him in the room.¹⁶⁹ Mr. Radi attended the hearing on May 18, 2021, but the hearing was, once again, cut short due to concerns over his health.¹⁷⁰

On June 1, 2021, the first substantive hearing took place, and the defense had the opportunity to raise a number of procedural and fair trial concerns, including Mr. Radi's medical treatment and the defense's lack of opportunity to call witnesses.¹⁷¹ Specifically, the defense questioned the court's calling of the complainant's fiancé as a witness during a time when all flights were suspended due to the pandemic.¹⁷² The defense raised its suspicion that this witness, in fact, did not exist.¹⁷³ Further, the defense argued that "[a]ll people involved in [the case] . . . should be brought to the court" to testify, including Arnaud Simons who was willing to attend.¹⁷⁴

Subsequent public hearings took place on June 8, June 15, June 22, June 29, July 6, and July 19, 2021.¹⁷⁵ Two closed hearings also took place on July 9 and July 13, 2021, during which the court heard the testimony of the complainant on the rape charge.¹⁷⁶

During these hearings, witness issues were repeatedly discussed. At the hearing on June 8, the defense again questioned the investigating judge's willingness and ability to fly in a witness from the United States "in the same day and during [the] Coronavirus" pandemic, particularly given the trial judge's unwillingness to call him back to be cross-

¹⁶⁸ *Trial Monitor Notes* (May 18, 2021) (on file with authors); *Trial Monitor Notes* (June 1, 2021) (on file with authors).

¹⁶⁹ *Trial Monitor Notes* (June 1, 2021) (on file with authors).

¹⁷⁰ *Trial Monitor Notes* (May 18, 2021) (on file with authors).

¹⁷¹ *Trial Monitor Notes* (June 1, 2021) (on file with authors). The defense also raised concerns about the prosecution's introduction, "without [the defense's] knowledge," of medical certificates that had not been in the case file "since the beginning of the case." *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Trial Monitor Notes* (June 8, 2021) (on file with authors); *Trial Monitor Notes* (June 15, 2021) (on file with authors); *Trial Monitor Notes* (June 22, 2021) (on file with authors); *Trial Monitor Notes* (June 29, 2021) (on file with authors); *Trial Monitor Notes* (July 6, 2021) (on file with authors); *Trial Monitor Notes* (July 19, 2021) (on file with authors).

¹⁷⁶ Judgment, "Closed Hearings"; *Morocco Tries Journalist Omar Radi in Closed Session*, MIDDLE EAST MONITOR (July 14, 2021, 12:13 PM), <https://www.middleeastmonitor.com/20210714-morocco-tries-journalist-omar-radi-in-closed-session>; *Omar Radi's Support Committee Castigates the Holding of the Trial Behind Closed Doors*, MOROCCO LATEST NEWS (July 13, 2021), <https://moroccolatestnews.com/omar-radis-support-committee-castigates-the-holding-of-the-trial-behind-closed-doors>; *Omar Radi's Trial Postponed After Long Pleadings by his Lawyers*, MOROCCO LATEST NEWS (July 17, 2021), <https://moroccolatestnews.com/omar-radis-trial-postponed-after-long-pleadings-by-his-lawyers>. The ICCPR allows for closed hearings in limited circumstances, including when there are reasons of "morals," "public order," or "national security," or "when the interest of the private lives of the parties so requires." ICCPR, *supra* note 20, at art. 14(1). Although it appears that the court is relying on this exception, international standards require the court to explain itself, which it has not done so far. See International Criminal Court Regulations of the Court, Reg. 20(2).

examined.¹⁷⁷ At the hearing on June 15, the prosecution argued that the court had no need to bring witnesses to appear before the court as “we already have documents that prove the crime,”¹⁷⁸ and that “bringing a witness to the court would not benefit us of anything,” since “listening to the witness by the inspector is a real testimony itself.”¹⁷⁹ This was an important issue because the investigating judge heard Mr. Ait Braim’s statements without the presence of the accused. At the hearing on June 29, Mr. Radi stated that he “had offered... to bring [Mr. Simons] to give testimony,” citing Mr. Simons’ letter expressing his willingness to appear in court.¹⁸⁰

Despite Mr. Ait Braim’s critical testimony, as discussed above, the judge refused to summon Mr. Ait Braim from the United States to allow the defense to cross-examine him.¹⁸¹ Instead, the court reasoned that, since the investigating judge believed Mr. Ait Braim’s initial testimony, there was no need to allow the defense to question him.¹⁸² As stated in the Judgment, “the law does not stipulate a specific number of witnesses for the judge to hear, . . . the judge’s reassurance is what matters, and . . . the judge has the right not to call all declarants as long as the witness testimonies heard are believed to be honest, true, and conform to the circumstances of the incident.”¹⁸³ Further, the defense requested that the court allow Arnaud Simons to testify as a witness on the espionage charges, but the court did not address this during the trial.¹⁸⁴ In the Judgment, the court stated that it was unnecessary to call Mr. Simons because the “evidence [did] not depend on [him].”¹⁸⁵ However, this statement was seemingly contradicted by the court’s consideration of Mr. Radi’s communications with Mr. Simons as a meaningful part of his alleged espionage services to the Dutch Embassy.¹⁸⁶ Perhaps even more puzzling, although Mr. Simons publicly offered to testify, the court seemed to entertain the notion that Mr. Simons did not exist or was “using a code name.”¹⁸⁷ Ultimately, the court excluded, or did not credit, the potentially exculpatory testimony of Mr. Simons—much as it did that of Mr. Stitou—while permitting the testimony of Mr. Ait Braim without contest.

On July 19, 2021, a final hearing was held, during which the parties made closing arguments.¹⁸⁸ During this hearing, Mr. Radi’s lawyers argued that the entire trial was politically motivated, that the court had excluded key evidence, and that Mr. Radi had been held arbitrarily.¹⁸⁹ Mr. Radi also provided a closing statement in which he contested

¹⁷⁷ *Trial Monitor Notes* (June 8, 2021) (on file with authors).

¹⁷⁸ *Trial Monitor Notes* (June 15, 2021) (on file with authors).

¹⁷⁹ *Id.*

¹⁸⁰ *Trial Monitor Notes* (June 29, 2021) (on file with authors).

¹⁸¹ Judgment, “After Deliberations.”

¹⁸² Judgment, “Closed Hearings;” *id.*, “After Deliberations.”

¹⁸³ Judgment, “After Deliberations.”

¹⁸⁴ *Trial Monitor Notes* (July 19, 2021) (on file with authors).

¹⁸⁵ Judgment, “After Deliberations.”

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Trial Monitor Notes* (July 19, 2021) (on file with authors).

¹⁸⁹ *Id.*

the legitimacy of the charges, calling them “fiction.”¹⁹⁰

At the same hearing, the court rendered its decision, convicting Mr. Radi of the charges against him and sentencing him to six years in prison and payment of 200,000 Moroccan Dirhams¹⁹¹ in damages to the complainant.¹⁹²

Judgment

The text messages that Mr. Radi exchanged with Dutch diplomats served as the primary evidentiary basis for his conviction under Moroccan Penal Code Article 191.¹⁹³ As previously noted, the Judgment alleges that text messages from Mr. Huisingh to Mr. Radi asking Mr. Radi if he wanted to meet the new secretary of the Dutch Embassy were, on their own, indication of “an agent . . . passing on his informant to another agent as he is near of completing his duties.”¹⁹⁴ Additional statements from the Judgment frame Mr. Radi’s use of text messages to communicate as evidence of espionage.¹⁹⁵ Overall, the Judgment fails to point to any evidence showing that Mr. Radi “shar[ed] intelligence” with the diplomats, instead assuming that he engaged in “espionage activities” by merely having these relationships.¹⁹⁶

As to the allegations of harming Morocco’s internal security through foreign consulting, the Judgment relies heavily on records of bank transfers and speculative reasoning to convict Mr. Radi of espionage under Moroccan Penal Code Article 206.¹⁹⁷ For example, despite Mr. Radi’s testimony that he was an economic consultant for K2, the Judgment summarily concludes that Mr. Radi must have engaged in suspicious activities with K2 because “checking the internet and receiving an answer from a specialized website [would be] enough to do without [Mr. Radi]’s services.”¹⁹⁸ The Judgment goes on to assess Mr. Radi’s bank statements, but provides no explanation as to why the bank statements justify espionage charges.¹⁹⁹

The Judgment also relies on speculative reasoning to convict Mr. Radi of espionage as it relates to his interactions with G3. The Judgment draws heavily, again, on payments made from G3 to Mr. Radi, but fails to explain how these transfers amount to espionage. The Judgment also alleges that the founder of G3, Clive Newell, has ties to MI6 in the UK. Although Mr. Radi denied knowledge of these ties and worked with Mr. Newell after

¹⁹⁰ *Id.*; *Timeline of the Omar Radi Case*, *supra* note 63.

¹⁹¹ Approximately 21,000 US dollars.

¹⁹² *Moroccan Journalist Convicted After Court Excludes Evidence*, CLOONEY FOUND. FOR JUST. (July 19, 2021), https://cfj.org/news_posts/moroccan-journalist-convicted-after-court-excludes-evidence; *Morocco: Convictions and Deteriorating Health of Detained Journalists Omar Radi and Soulaiman Raissouni*, FIDH (July 27, 2021), <https://www.fidh.org/en/issues/human-rights-defenders/morocco-convictions-and-deteriorating-health-of-detained-journalists>.

¹⁹³ Judgment, “After Deliberations.”

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Judgment, “Closed Hearings”; *id.* at “After Deliberations.”

¹⁹⁷ Judgment, “After Deliberations.”

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

his alleged time with MI6, the Judgment concludes that the limited evidence “proves [that] the goal of [G3] wasn’t a consultancy service” simply because Mr. Radi “is only a newspaper editor who sometimes writes about economic or financial topics, and who has no professional expertise in the private and public economic and financial sectors.”²⁰⁰

As to the Bertha Foundation, the Judgment states that Mr. Radi’s conduct was aimed at “undermining the citizens’ loyalty towards Morocco . . . through inciting feelings of hate, jeopardizing the diplomatic situation in Morocco, and divulging information obtained without legal justification . . . in order to taint Morocco’s image inside the country and outside of it.”²⁰¹ The court did not provide any justification for this other than alleging that Mr. Radi did not complete the work required by the Bertha Foundation. Although the court heard testimony from several individuals involved in the Bertha Foundation’s work in Morocco, none of this testimony connected Mr. Radi to any sort of espionage activities.

Post-Trial

Following his conviction, Mr. Radi’s lawyers promptly filed an appeal.²⁰² Mr. Radi was denied release pending the appeal.²⁰³ An appeal hearing was originally scheduled for November 4, 2021, but postponed eight times until February 15, 2022.²⁰⁴ On March 3, 2022, the Appeals Court in Casablanca upheld the first instance conviction of Mr. Radi, confirming his six-year sentence for espionage and rape.²⁰⁵

Additionally, separate from the espionage and rape case, in August 2021, Mr. Radi and Mr. Stitou were convicted and given three-month suspended sentences for public drunkenness relating to their July 2020 encounter with the *Chouf TV* cameraman.²⁰⁶

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96.

²⁰³ The Criminal Procedure Code states that “[p]rovisional release may [] be requested in any case by any indicted, accused, or charged defendant and at any time during the proceedings.” CRIMINAL PROCEDURE CODE, *supra* note 5, at art. 157. “In the event of an appeal and until the judgment of the Supreme Court, the decision on the application for provisional release is decided by the court which last heard the case on the merits,” and “[i]f the appeal has been lodged against a judgment of the criminal court, the detention is decided by the indictment division.” *Id.*; see also INT’L COMM’N OF JURISTS, REFORM THE CRIMINAL JUSTICE SYSTEM IN MOROCCO 9 (2017), <https://www.icj.org/wp-content/uploads/2017/04/Morocco-Reform-Crim-Justice-System-Advocacy-Anaylsis-Brief-2017-ENG.pdf> (“Arrest or detention that is permitted under domestic law may still be arbitrary under international standards, for instance, when the law includes vague and expansive concepts such as ‘public security’ without precise definitions.”).

²⁰⁴ *Trial Monitor Notes* (Nov. 4, 2021) (on file with authors); *Trial Monitor Notes* (Nov. 25, 2021) (on file with authors); *Trial Monitor Notes* (Dec. 9, 2021) (on file with authors); *Trial Monitor Notes* (Jan. 6, 2022) (on file with authors).

²⁰⁵ *Morocco: Authorities Must Ensure Omar Radi’s Fair Trial Rights*, AMNESTY INT’L (Mar. 3, 2022), <https://www.amnesty.org/en/latest/news/2022/03/morocco-authorities-must-ensure-omar-radi-fair-trial-rights>.

²⁰⁶ *Morocco: Jailed Journalist Omar Radi Sentenced for ‘Public Drunkenness’*, MIDDLE EAST EYE (Aug. 6, 2021), <https://www.middleeasteye.net/news/morocco-omar-radi-journalist-jailed-sentenced-public-drunkenness>; ElHaies, *Bertha Foundation*, *supra* note 133.

METHODOLOGY



A. THE MONITORING PHASE

To assess the trial's fairness and assign it a grade, Professor Hannah R. Garry, a member of the TrialWatch Expert Panel, reviewed the trial monitor notes, the Judgment, and other materials with the assistance of Clinic supervising attorney Professor Henna Pithia and student attorneys.

First, Professor Garry found that the prosecution, trial, and conviction of Mr. Radi violated his right to the presumption of innocence. Mr. Radi was the target of a virulent and widespread media campaign by media outlets affiliated with the Moroccan government. These stories undermined Mr. Radi's presumption of innocence.

Second, Professor Garry concluded that Mr. Radi had been arbitrarily detained prior to and during trial, during which period he faced serious medical issues and experienced inhumane treatment.

Third, Professor Garry determined that there were objective grounds for finding a lack of impartiality by the court, including the court's treatment of a number of evidentiary issues and its failure to secure or allow the testimony of key witnesses.

Finally, Professor Garry found that the proceedings met the standards for finding an abuse of process.

ANALYSIS



A. APPLICABLE LAW

This report draws on the ICCPR²⁰⁷ and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),²⁰⁸ which Morocco ratified in 1979 and 1993, respectively.²⁰⁹ The report also draws on jurisprudence from the UN Human Rights Committee (HRC), tasked with monitoring implementation of the ICCPR; widely accepted guidelines that establish best practices in the fields of prosecutorial ethics and human rights;²¹⁰ and the aforementioned provisions of the Moroccan Constitution governing Moroccan citizens' fundamental freedoms and their right to a fair trial.²¹¹ Based on these international and domestic standards, the report identifies a number of violations at various stages of the proceedings against Mr. Radi.

B. PRE-TRIAL VIOLATIONS

Presumption of Innocence

Article 14 of the ICCPR provides that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”²¹² The right to the presumption of innocence has been described by the HRC as “fundamental to the protection of human rights.”²¹³ The right “guarantees that no guilt can be presumed [of the accused] until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.”²¹⁴ Otherwise stated, “[a]t its core, the right to be presumed innocent prohibits convictions that are predetermined or based on flimsy grounds” and forbids the presentation or description of the accused as a criminal before he has been proved one.²¹⁵ This right is absolute; it is not subject to exceptions

²⁰⁷ ICCPR, *supra* note 20, at art. 14(1).

²⁰⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter “CAT”].

²⁰⁹ See UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER, UN TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx (last visited Jan. 18, 2022).

²¹⁰ This includes the Universal Declaration of Human Rights (UDHR), G.A. Res. 217 (III) A (1948), in particular, Articles 8-12; the UN Guidelines on the Role of Prosecutors, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.144/28/Rev.1 (1990); and other tenets of customary international law.

²¹¹ See CONSTITUTION (MOROCCO), *supra* note 6, at arts. 23, 25, 28, 109, 117-128. Note, nevertheless, that, per the HRC, “Article 14 [of the ICCPR] contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law.” Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2007, ¶ 4 [hereinafter HRC, General Comment No. 32].

²¹² ICCPR, *supra* note 20, at art. 14(2). The UDHR similarly provides, “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” *Id.* at art. 11(1).

²¹³ HRC, General Comment No. 32, *supra* note 211, at ¶ 30.

²¹⁴ *Id.*

²¹⁵ AMAL CLOONEY & PHILIPPA WEBB, THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW 199 (2020).

and cannot be restricted.²¹⁶ In fact, per the HRC, “[d]eviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.”²¹⁷

There are many indications that Mr. Radi’s right to be presumed innocent was impinged upon in the present case. Specifically, Mr. Radi was the victim of what has been described as a public campaign of “defamation, insults and calumny” driven by State-supported media.²¹⁸

While media coverage will not often give rise to a breach of the presumption of innocence, it may do so where it is essentially a vehicle for the authorities to suggest guilt before trial.²¹⁹ International bodies have found, for instance, that, “in certain situations[,] a virulent media campaign can . . . adversely affect the fairness of a trial and involve the State’s responsibility’ to guarantee both an impartial court and the presumption of innocence at trial.”²²⁰

Beginning in early 2020, Mr. Radi became the subject of a persistent smear campaign by media outlets known to be close to the Moroccan government. Per Human Rights Watch, “[m]edia close to the security services that specialize in maligning critics published numerous articles insulting Radi, his parents, friends, and supporters; disclosing alleged details of his private life[.]”²²¹ By one count, between June 7 and September 15 of 2020 alone, “at least 136 articles attacking Radi, his family, and supporters” were published in Moroccan news websites, including *Chouf TV*, *Barlamane.com*, and *Le360*, in both Arabic and French.²²² A collective of 110 Moroccan journalists decried these entities as the “Slander Media” and described their “editorial line [as consisting] in attacking voices that bother those in power.”²²³ Though other Moroccan journalists and activists who have

²¹⁶ *Id.*

²¹⁷ HRC, General Comment No. 32, *supra* note 211, at ¶ 6. See also *id.* ¶ 19 (“The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.”); Human Rights Committee, *González del Río v. Peru*, U.N. Doc. CCPR/C/46/D/263/1987, Oct. 28, 1992, ¶ 5.2.

²¹⁸ *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72.

²¹⁹ In general, “[t]he media should avoid news coverage undermining the presumption of innocence,” respect for which demands “[discretion and restraint]” in coverage of pending and ongoing proceedings. HRC, General Comment No. 32, *supra* note 211, at ¶ 30; European Court of Human Rights, *Konstas v. Greece*, App. No. 53466/07, May 24, 2011, ¶ 34. See Human Rights Committee, *Pinchuk v. Belarus*, U.N. Doc. CCPR/C/112/D/2165/2012, Oct. 24, 2014, ¶ 8.3 (dissemination by State-owned newspapers and television channels of reports proclaiming an accused’s guilt before a verdict had finalized constituted a violation of his presumption of innocence); Human Rights Committee, *Kovaleva and Kozyar v. Belarus*, U.N. Doc. CCPR/C/106/D/2120/2011, Oct. 29, 2012, ¶ 11.4; Human Rights Committee, *Mwamba v. Zambia*, U.N. Doc. CCPR/C/98/D/1520/2006, Oct. 3, 2010, ¶ 6.5; Human Rights Committee, *Chadee et al. v. Trinidad and Tobago*, U.N. Doc. CCPR/C/63/D/813/1998, July 29, 1998, ¶ 10.1 (dealing with the impact of adverse pre-trial publicity on the right to be tried by an impartial tribunal).

²²⁰ *CLOONEY & WEBB*, *supra* note 215, at 223.

²²¹ *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72. For an example of the negative coverage of Mr. Radi, see *Omar Radi, au cœur de la tempête*, BARLAMANE.COM (Aug. 3, 2020, 3:17 PM), https://www.hrw.org/sites/default/files/media_2020/09/Morocco-article-FR.pdf (accessed via HUM. RTS. WATCH).

²²² *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72.

²²³ *Id.*

criticized the government in the past were likewise subject to similar media coverage,²²⁴ Mr. Radi's father, Driss Radi, reported that the "fierce defamation campaign" mounted against Mr. Radi was so severe that it was "akin to 'psychological torture'" for the journalist.²²⁵ One site in particular, *Chouf TV*, not only published Mr. Radi's bank details and the identity of his roommate, but also published "a large number of articles" accusing Mr. Radi of rape, theft, and not paying his water and electricity bills, in addition to generally presenting him as "irresponsible" and an "alcoholic."²²⁶ Similarly, the "French language site *Le360* speculated that [Mr.] Radi had ties to MI6, the UK's intelligence agency."²²⁷ At one point, while Mr. Radi reportedly did not have access to own his case file, the site *Barlamane.com* published an analysis of the case that "was clearly informed by extensive access to the case file, and strongly suggested that [Mr.] Radi was guilty as charged."²²⁸ Given the stage of the proceedings at the time of publication, the article's level of detail concerning the charges and alleged evidence against Mr. Radi points to collaboration with government officials in its drafting.²²⁹

In fact, the Moroccan media's treatment of Mr. Radi resembles media coverage found to violate the presumption of innocence in *Kulov v. Kyrgyzstan*. In that case, the HRC found the State's use of national media to portray the accused as a criminal—including allowing a group of journalists to study the criminal case file and allegedly use information to prepare critical articles against the accused—entailed a violation of the individual's right to be presumed innocent.²³⁰ Similarly, in *Mwamba v. Zambia*, officers investigating the accused asserted his guilt in the media before the issue had been adjudicated, which the HRC found "eroded" his presumption of innocence.²³¹ The widespread assertions of Mr.

²²⁴ Such articles often included "vulgar insults . . . banking and property records, screenshots of private electronic conversations, allegations about sexual relationships (or oblique threats to expose them), identities of roommates, and biographical details, sometimes as far back as their childhood, complete with information on the parents of the targeted individuals." *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72.

²²⁵ *Id.* The elder Mr. Radi noted that the defamation campaign so affected his son's mental health that he required a monthlong leave of absence from work.

²²⁶ Phineas Ruecker & Cécile Schilis-Gallego, *Journalist Spied on in Morocco: Omar Radi's "Descent Into Hell,"* FORBIDDEN STORIES (July 7, 2020, 10:57 PM), <https://forbiddenstories.org/journalist-spied-on-in-morocco-omar-radis-descent-into-hell/> [hereinafter Ruecker & Schilis-Gallego, *Journalist Spied on in Morocco*]. *Chouf TV* is widely known (or at least suspected) to have strong ties to the Moroccan government. Bilal Mousjid, *Chouf TV: le buzz et l'argent du buzz*, MEDIAS24 (Apr. 23, 2021, 9:58 PM), <https://www.mediast24.com/2019/10/23/chouf-tv-le-buzz-et-largent-du-buzz/>.

²²⁷ Ruecker & Schilis-Gallego, *Journalist Spied on in Morocco*, *supra* note 226.

²²⁸ *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96. Per HRW, "authorities denied [Mr.] Radi access to his own case file for 10 months." Though not discussed extensively in this report, the HRC has said that, where a court "acted in a biased manner" by not permitting "[an accused's] lawyer to [access] the case file prior to the beginning of the court trial," it has breached "the basic guarantees of a fair trial, [namely the rights to] equality before the law and a fair hearing by an impartial tribunal." Human Rights Committee, *Khostikoev v. Tajikistan*, U.N. Doc. No. CCPR/C/97/D/1519/2006, Dec. 3, 2009, ¶¶ 7.2-7.3.

²²⁹ The authors refer so thoroughly to "staggering" conclusions from the preliminary investigation that the "sources" they cite could only come from within the BNPJ or the Office of the Prosecutor. *Omar Radi, au cœur de la tempête*, *supra* note 221; see *Trial Monitor Notes* (June 1, 2021) (on file with authors).

²³⁰ Human Rights Committee, *Kulov v. Kyrgyzstan*, U.N. Doc. CCPR/C/99/D/1369/2005, July 26, 2010, ¶¶ 3.7, 8.7.

²³¹ Human Rights Committee, *Mwamba v. Zambia*, U.N. Doc. CCPR/C/98/D/1520/2006, Oct. 3, 2010, ¶ 6.5.

Radi's guilt by pro-government media had a similar effect on his fair trial rights.

Arbitrary Detention

Per Article 9(3) of the ICCPR, “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge . . . and shall be entitled to trial within a reasonable time or to release.”²³² Furthermore, the ICCPR provides that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody[.]”²³³ In this regard, the HRC has made clear that pre-trial detention should be the exception, rather than the rule.²³⁴ That is, courts are expected to provide an evidence-based rationale as to why pre-trial detention is necessary, such as to prevent flight, interference with evidence, or the recurrence of serious crime.²³⁵

In Mr. Radi's case, the investigating judge justified initial pre-trial detention in light of “the dangerous nature of criminal acts, breach of public order and the presence of evidence.”²³⁶ This reliance on the ostensible seriousness of the crimes charged, as well as alleged evidence of guilt, is inconsistent with international standards. In fact, the UN Working Group on Arbitrary Detention has previously held that suspicion or seriousness of the charges, alone, cannot justify pre-trial detention.²³⁷

On multiple subsequent occasions, the court either overlooked or explicitly rejected Mr. Radi's requests for provisional release.²³⁸ For example, in response to a September 3,

²³² ICCPR, *supra* note 20, at art. 9(3).

²³³ *Id.*; see, e.g., Human Rights Committee, Cagas et al. v. Philippines, U.N. Doc. CCPR/C/73/D/788/1997, Oct. 23, 2001, ¶¶ 7.3-7.4.

²³⁴ See Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, Dec. 16, 2014, ¶ 8 [hereinafter HRC, General Comment No. 35].

²³⁵ See Human Rights Committee, Cedeno v. Bolivarian Republic of Venezuela, U.N. Doc. CCPR/C/106/D/1940/2010, Dec. 4, 2012, ¶ 7.10; Human Rights Committee, Marinich v. Belarus, U.N. Doc. CCPR/C/99/D/1502/2006, July 16, 2010, ¶ 10.4.

²³⁶ *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72. See Judgment, “After Deliberations” (“[T]he Misdemeanors Chamber in the Court of Appeal in Casablanca mentioned . . . the actions which the defendant Omar Radi is charged with are considered very dangerous and can affect the security and the public order.”). This characterization also permitted the court to bypass the normal temporal limitations on detention in Mr. Radi's case. Normally, a “defendant may be placed under judicial supervision during any time of the investigation for a period of two months, which may be renewable five times in order to guarantee the defendant's presence,” but this “is only applicable if the defendant isn't required to be provisionally arrested in order to investigate or maintain the security of people or the public order.” *Id.*

²³⁷ HRC, General Comment No. 35, *supra* note 234, at ¶ 38 (stating that pre-trial detention “must be based on an individualized determination that it is reasonable and necessary” accounting for relevant factors specified in law, which should not include “vague and expansive standards” like “public security”); Working Group on Arbitrary Detention, Opinion No. 43/20 Concerning Serikzhan Bilash (Kazakhstan), U.N. Doc. A/HRC/WGAD/2020/43, Dec. 14, 2020, ¶¶ 4, 6-7, 11, 15, 64. Significantly, the Court did not provide any specific basis, such as a flight risk, to justify the need for continued detention. *Id.* at ¶ 15. The Working Group noted “that pretrial detention should be the exception rather than the rule” when it found that an accused's pretrial detention “lacked a legal basis” and that their detention and “the repeated extension” thereof were “not based on an individualized determination that they were reasonable and necessary . . . to prevent flight, interference with evidence, or the recurrence of crime,” and were ordered without “consideration of alternatives, such as bail, electronic bracelets or other conditions.” *Id.* at ¶ 64.

²³⁸ See *Timeline of the Omar Radi Case*, *supra* note 63 (noting Mr. Radi's release request was rejected on April 8, 2021). The defense made several subsequent unsuccessful requests for release. See, e.g.,

2020, request, the court noted that the “acts [for which Mr. Radi is [being] prosecuted] are dangerous, the investigation is still [in its early stages],” and freeing Mr. Radi could imperil the investigative period,²³⁹ but neglected to explain how it thought he might interfere with evidence. When subsequent requests were made the following year, the court similarly rejected provisional release because Mr. Radi was a “threat” or “danger” to the public, but offered no further justification for the decision.²⁴⁰ This lack of individualized reasoning is also inconsistent with international standards.²⁴¹

Inhumane Treatment

ICCPR Article 10 provides that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”²⁴² CAT Article 16 prohibits intentionally inflicting pain on persons by “acts of cruel, inhuman or degrading treatment or punishment [that] do not amount to” the Article 1 definition of torture.²⁴³

The HRC maintains that the ICCPR Article 10 obligation to treat detained individuals with respect for their inherent dignity encompasses the provision of adequate medical care during detention.²⁴⁴ For example, in *Sendic Antonaccio v. Uruguay*, the HRC found that the accused’s Article 10 rights had been violated when guards denied him medical attention after ill-treatment in prison, as this constituted a failure to treat him with humanity and with respect for his inherent dignity during his detention.²⁴⁵

The Committee Against Torture has found CAT violations where an individual is “subjected to solitary confinement for a prolonged and indefinite period, without being provided with the rationale behind it and without reassessment of his situation at regular

Trial Monitor Notes (May 18, 2021) (on file with authors); *Trial Monitor Notes* (June 1, 2021) (on file with authors); *Trial Monitor Notes* (June 8, 2021) (on file with authors); *Trial Monitor Notes* (June 15, 2021) (on file with authors); *Trial Monitor Notes* (June 22, 2021) (on file with authors); *Trial Monitor Notes* (July 19, 2021) (on file with authors). Per Human Rights Watch, between the investigative and trial judges, Mr. Radi was denied provisional release at least a dozen times. At no point did either judge “ever provid[e] individualized and substantive reasons, as international human rights standards require.” *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96.

²³⁹ *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72.

²⁴⁰ Judgment, “After Deliberations”; see e.g. *La justice marocaine rejette la demande de liberté provisoire du journaliste Omar Radi*, LE MONDE (Apr. 8, 2021), https://www.lemonde.fr/afrique/article/2021/04/08/la-justice-marocaine-rejette-la-demande-de-liberte-provisoire-du-journaliste-omar-radi_6076038_3212.html.

²⁴¹ See European Court of Human Rights (Grand Chamber), *Bykov v. Russia*, App. No. 4378/02, Mar. 10, 2009, ¶ 65. In *Bykov*, defendant spent one year, eight months, and fifteen days in detention between his arrest and the criminal trial, and local courts rejected his petitions for release at least ten times, invoking the gravity of the charge and the general “likelihood of his fleeing, obstructing the course of justice and exerting pressure on witnesses” without providing “relevant and sufficient reasons.” The European Court found that this was a violation of Article 5(3) of the European Convention on Human Rights, which entitles defendants to trial within a reasonable time or provisional release when continued detention is no longer reasonable. *Id.* at ¶¶ 61, 67-68.

²⁴² ICCPR, *supra* note 20, at art. 10.

²⁴³ CAT, *supra* note 208, at art. 16.

²⁴⁴ See Human Rights Committee, *Pinto v. Trinidad and Tobago*, U.N. Doc. CCPR/C/39/D/232/1987, July 20, 1990, ¶ 12.7.

²⁴⁵ Human Rights Committee, *Sendic Antonaccio v. Uruguay*, U.N. Doc. CCPR/C/14/D/63/1979, Oct. 28, 1981, ¶¶ 19-20.

intervals, in accordance with his procedural rights” and where “his contacts with his family are restricted, he has limited access to a doctor in prison and he has not been allowed the opportunity to be examined by an independent doctor[.]”²⁴⁶ In that case, *Ali Aarrass v. Morocco*, Morocco’s conduct lacked “certain basic guarantees that must be applied to all persons deprived of their liberty in order to prevent them from being subjected to torture or ill-treatment[,]” and the conditions of detention imposed “were not proportional to the [State’s] alleged disciplinary objective.”²⁴⁷ Further, the Committee Against Torture has reiterated that “solitary confinement and seclusion should be used as measures of last resort, for as short a time as possible, under strict supervision and with the possibility of judicial review.”²⁴⁸

Here, Mr. Radi was detained for nearly a year before his conviction, primarily in solitary confinement. His isolation was widely reported by multiple online accounts.²⁴⁹ Additionally, Mr. Radi suffered significant medical issues. For instance, Mr. Radi endured a number of inflammatory outbreaks of his Crohn’s disease, which resulted, among other things, in “bleeding”²⁵⁰ and rapid weight loss.²⁵¹ Mr. Radi received insufficient medical care during this period, such that his preexisting conditions approached a “dangerous level of infection.”²⁵² Further, on multiple occasions, Mr. Radi was examined by a doctor while in handcuffs or under the supervision of security guards.²⁵³ Mr. Radi’s defense counsel raised his health condition during the hearing on June 1, 2021, and the judge authorized Mr. Radi to make a statement.²⁵⁴ Mr. Radi revealed that he had “refused to undergo treatment because he was” to be treated in a hall while “security guards were present alongside the doctor,” and that “the prison director promised [him] that he would be treated in a room on his own.”²⁵⁵ However, as stated by Mr. Radi during this hearing, despite the prison director’s promise, he was not treated in his own room and was forced

²⁴⁶ Committee Against Torture, *Ali Aarrass v. Morocco*, U.N. Doc. CAT/C/68/D/817/2017, Nov. 25, 2019, ¶ 8.2.

²⁴⁷ *Id.* at ¶ 8.5 (pointing specifically to “the complainant’s solitary confinement and its duration, which were aggravated by the lack of periodic monitoring of this regime, his limited contact with his family and his irregular access to health care”).

²⁴⁸ *Id.*

²⁴⁹ See, e.g., Amnesty MENA (@AmnestyMENA), TWITTER (Nov. 25, 2021, 5:11 AM), <https://twitter.com/AmnestyMENA/status/1463857826166620164>; Committee to Protect Journalists (@pressfreedom), TWITTER (Nov. 2, 2021, 12:46 PM), <https://twitter.com/pressfreedom/status/1455622272849485824>; Allison L. McManus (@AllisonLMcManus), TWITTER (July 6, 2021, 8:16 AM), <https://twitter.com/AllisonLMcManus/status/1412430133684809738>; Ahmed Benchemsi (@AhmedBenchemsi), TWITTER (Dec. 24, 2020, 4:18 AM), <https://twitter.com/AhmedBenchemsi/status/1342082279968043008>.

²⁵⁰ *Trial Monitor Notes*, May 18, 2021 (on file with authors).

²⁵¹ Radi lost over 15 kg during this hunger strike and suspended it due to health issues. *Le journaliste marocain Omar Radi suspend sa grève de la faim*, FRANCE 24 (Apr. 30, 2021, 9:34 PM), <https://www.france24.com/fr/afrique/20210430-le-journaliste-marocain-omar-radi-suspend-sa-gr%C3%A8ve-de-la-faim>; *Hunger Strike Is Last Resort for Some Imprisoned Moroccan Journalists*, *supra* note 54 (describing Mr. Radi’s symptoms, including diarrhea and vomiting).

²⁵² *Morocco: Concern Over the Health of Detained Journalists on Hunger Strike*, *supra* note 163.

²⁵³ *Trial Monitor Notes*, May 18, 2021 (on file with authors).

²⁵⁴ *Trial Monitor Notes*, June 1, 2021 (on file with authors).

²⁵⁵ *Id.*

to seek treatment in front of the guards due to the severity of his physical pain.²⁵⁶ Further, Mr. Radi described that “[a] prison guard record[ed] everything he sa[id]” when he was on calls with his family.²⁵⁷

Similar to the complainants in *Sendic Antonaccio* and *Ali Aarass*, Mr. Radi was denied medical treatment in disregard of his humanity and without respect for his inherent dignity, and his detention and confinement were prolonged, indefinite, and lacked basic guarantees, such that he was subjected to inhumane treatment in violation of Article 16 of the CAT and Article 10 of the ICCPR.²⁵⁸

C. VIOLATIONS AT TRIAL

Right to Call and Confront Witnesses

The ICCPR protects an accused’s right “to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”²⁵⁹ Though the right to call witnesses is not unlimited, an accused should be permitted to call and have admitted any witnesses that are “relevant for the defence” where he requests them in compliance with court procedures.²⁶⁰ A violation of the accused’s rights under 14(3)(e) has been found where “the majority of the witnesses whose questioning was requested by the [accused] and his counsel were not questioned at the hearings” and the court “did not provide any reasons for not allowing those witnesses to be questioned.”²⁶¹

The HRC has further explained that this right includes affording the accused a “proper opportunity to question and challenge witnesses against them at some stage of the proceedings.”²⁶² The accused ought to have “the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.”²⁶³

In Mr. Radi’s case, on several occasions, the court violated this right.²⁶⁴

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Sendic Antonaccio*, U.N. Doc. CCPR/C/14/D/63/1979, at ¶ 20; *Ali Aarrass*, U.N. Doc. CAT/C/68/D/817/2017, at ¶¶ 8.2, 8.5; see Human Rights Committee, *Sannikov v. Belarus*, U.N. Doc. CCPR/C/122/D/2212/2012, Apr. 6, 2018, ¶ 6.2.

²⁵⁹ ICCPR, *supra* note 20, at art. 14(3)(e).

²⁶⁰ Human Rights Committee, *Allaberdiев v. Uzbekistan*, U.N. Doc. CCPR/C/119/D/2555/2015, May 18, 2017, ¶¶ 8.7-8.9; *Saidov v. Tajikistan*, U.N. Doc. CCPR/C/122/D/2680/2015, Sept. 20, 2018, ¶ 9.6 (accused unable to call more than 11 witnesses in his defense).

²⁶¹ *Allaberdiев*, U.N. Doc. CCPR/C/119/D/2555/2015, at ¶¶ 8.8, 8.9; *Saidov*, U.N. Doc. CCPR/C/122/D/2680/2015, at ¶ 9.6.

²⁶² HRC, General Comment No. 32, *supra* note 211, at ¶ 39.

²⁶³ *Bondar v. Uzbekistan*, U.N. Doc. CCPR/C/101/D/1769/2008, Apr. 28, 2011, ¶ 7.5.

²⁶⁴ On multiple occasions, Mr. Radi’s attorneys reminded the court of its obligation to hear from witnesses, including those heard at the investigative stage, but the court declined to call the requested individuals. See, e.g., *Trial Monitor Notes* (June 8, 2021) (on file with authors); *Trial Monitor Notes* (June 15, 2021) (on file with authors); *Trial Monitor Notes* (June 22, 2021) (on file with authors); *Trial Monitor Notes* (June 29, 2021) (on file with authors).

As a preliminary example, the defense sought to call Arnaud Simons, Mr. Radi's alleged Dutch "handler."²⁶⁵ His testimony would have been directly relevant to the charge of "harming external security" against Mr. Radi.²⁶⁶ Indeed, the prosecution alleged that Mr. Radi provided Mr. Simons with information about the Rif unrest for Dutch officials to use in public statements aimed at harming Morocco's foreign relations; Mr. Simons, however, has publicly denied the prosecution's allegations.²⁶⁷ Had he been permitted to testify in court, he could have put such denials on the record.

Nonetheless, the court did not permit Mr. Radi to call Mr. Simons as a key witness in his defense. Despite Mr. Simons' provision of documents verifying his identity, the court declined to consider his availability to testify on Mr. Radi's behalf or address inconsistencies in the court's treatment of the facts.²⁶⁸ At the time, the court offered no explanation for its decision. Later, in the Judgment, the court explained that it had employed its "discretionary powers" and determined that calling foreign individuals to testify "would be futile[,] since the evidence present in the case file, including the witness statements as heard by the investigating judge[,] [made] it unnecessary to resort to that procedure."²⁶⁹ The court applied similarly spurious reasoning in excluding testimony from witnesses at the Bertha Foundation, claiming that "dealing with these organisations is criminal, as they have ties with intelligence, and their testimonies will not be impartial as they have a vested interest in the case."²⁷⁰ This violated Mr. Radi's right to call relevant witnesses in his defense.

The court also did not permit Mr. Radi's defense counsel to examine Hassan Ait Braim, the fiancé to whom the complainant claimed she reported the incident.²⁷¹ The

²⁶⁵ See, e.g., *Trial Monitor Notes* (June 1, 2021) (on file with authors).

²⁶⁶ Brought under the aforementioned Article 191 of the Moroccan Penal Code, the charge revolves primarily around texts Mr. Radi exchanged with a Dutch contact.

²⁶⁷ Simons, *supra* note 107; Arnaud Simons (@Arnaud_Simons), TWITTER (July 6, 2021, 4:41 AM), https://twitter.com/Arnaud_Simons/status/1412346046315962374. Mr. Simons has denied any past or present involvement in espionage, noting that he and Mr. Radi met during a *Belgian* ministerial visit in 2012 and developed a friendly relationship thereafter.

²⁶⁸ Arnaud Simons, *Emission de la "Radio 1" aux Pays-Bas sur l'affaire Omar Radi*, MEDIUM: ARNAUD SIMONS (July 13, 2021), <https://arnaudsimons.medium.com/emission-de-la-radio-1-aux-pays-bas-sur-laffaire-omar-radi-f29b986330e4>; Arnaud Simons, *Informations complémentaires relatives au procès du journaliste Omar Radi*, MEDIUM: ARNAUD SIMONS (July 6, 2021), <https://arnaudsimons.medium.com/informations-compl%C3%A9mentaires-relatives-au-proc%C3%A8s-du-journaliste-omar-radi-suite-au-refus-de-mon-f25f1771f7f0>; *Morocco: Ensure Fair Appeal Trial to Journalist Omar Radi*, AMNESTY INT'L (Mar. 2, 2022), <https://www.amnesty.org/en/documents/mde29/5292/2022/en/>.

²⁶⁹ Judgment, "After Deliberations." Per the court, "the judge has the right not to call all declarants as long as the witness testimonies who have been heard are believed to be honest, true and conform to the circumstances of the incident," and "trial judges are not obliged to hear witnesses if they don't have to, as long as the evidence does not depend on them[.]" *Id.* The court also claimed that calling the additional witnesses would "delay the trial" in contravention of international standards requiring promptness as an element of a fair trial. See also *id.* ("[W]hat matters however is what the judge sees fit, and that he may rely on the statement of the victim as long as he is convinced of its truthfulness and that it is conform to the circumstances of the incident."). Though it is the court's prerogative to accept and dismiss certain evidence, here, it elected to favor spurious and circumstantial evidence over the possibility of direct evidence from relevant sources.

²⁷⁰ *Morocco: Ensure Fair Appeal Trial to Journalist Omar Radi*, *supra* note 268.

²⁷¹ Judgment, "After Deliberations"; *Trial Monitor Notes* (Feb. 10-11, 2022) (on file with authors).

investigating judge apparently summoned the fiancé in August 2020 amid border closures,²⁷² and during a period of judicial recess, to take his testimony. Though the court arranged for Mr. Ait Braim to provide testimony within two days of the complainant's request that he be heard as a witness, at no point was Mr. Radi's team given the opportunity to question or cross-examine him.²⁷³ In fact, Mr. Radi's team was not made aware that Mr. Ait Braim had given testimony until several months afterward.²⁷⁴ Mr. Radi's defense team was also not permitted access to key information surrounding his identity until after the trial began, leading them to suspect that he did not in fact exist.²⁷⁵

The fiancé's account of his calls with the complainant played a significant role in the court's consideration of the rape charge.²⁷⁶ Mr. Radi's inability to cross-examine him—either during the investigation or at trial—violated his right to “examine” the witnesses against him and interrogate the accuracy of their testimony.

Right to an Impartial Tribunal

The ICCPR provides that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”²⁷⁷ As the International Commission of Jurists has observed, “[t]he right to be tried by an independent and impartial court is a sine qua non to ensuring a fair trial.”²⁷⁸ The Human Rights Committee has identified two components critical to the impartiality of the tribunal. “First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.”²⁷⁹ Second, judges “must also appear to a reasonable observer to be impartial.”²⁸⁰ These priorities are also reflected in the Moroccan Constitution, which emphasizes each person’s “right to an equitable process,” the judiciary’s “duties of independence and of

²⁷² *Trial Monitor Notes* (Jan. 27, 2022) (on file with authors); *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96.

²⁷³ See Judgment, “After Deliberations.”

²⁷⁴ *Id.*; *Trial Monitor Notes* (June 8, 2021) (on file with authors); *Trial Monitor Notes* (Jan. 27, 2022) (on file with authors); *Trial Monitor Notes* (Feb. 3, 2022) (on file with authors).

²⁷⁵ See *Trial Monitor Notes* (June 1, 2021) (on file with authors); *Trial Monitor Notes* (June 8, 2021) (on file with authors); Judgment, “After Deliberations.”

²⁷⁶ See Judgment, “After Deliberations.” Notably, in a letter submitted to the court as part of the request to testify, Mr. Ait Braim apparently admitted that he “[did] not know the truth of what happened” following the abrupt end of his video call with the complainant, raising questions about the court’s high appraisal of his testimony. *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96. However, when he later testified in the investigative stage, he stated he “was looking at [the complainant] as she was lying on her back when he suddenly witnessed a man passing behind her in his boxers and the call ended.” Judgment, “Witnesses.”

²⁷⁷ ICCPR, *supra* note 20, at art. 14(1).

²⁷⁸ INT'L COMM'N OF JURISTS, REFORMING THE JUDICIARY IN MOROCCO 66 (2013), <https://www.refworld.org/pdfid/530f06dc4.pdf>.

²⁷⁹ HRC, General Comment No. 32, *supra* note 211, at ¶ 21; see also Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, Nov. 5, 1992, ¶ 7.2.

²⁸⁰ HRC, General Comment No. 32, *supra* note 211, at ¶ 21; see also *Karttunen*, U.N. Doc. CCPR/C/46/D/387/1989, at ¶ 7.2.

impartiality,” and the primacy of the “establishment of the truth.”²⁸¹

The Committee has said that where a court has “failed to ensure the presence and the questioning of important witnesses” and “several of the lawyers’ requests were not given due consideration[,]” a violation of the accused’s rights under Art. 14(1), as well as Art. 14(3), has occurred.²⁸² In general, to observe the requisite impartiality in a case, “the parties in the proceedings have to be heard and their objections properly addressed[,]” particularly when raising concerns about the reliability of or discrepancies in evidence presented against the accused.²⁸³ The HRC has previously found that where a trial judge declines to “show sufficient latitude in permitting the defendant to prove [his] defence,” a fair trial violation has occurred.²⁸⁴

Here, not only did the court reject requests to summon or cross-examine witnesses, it also confined its analysis in the Judgment to conclusory statements about the “suspicious” nature of Mr. Radi’s conduct and dismissed evidence to the contrary, rather than assessing the evidence thoroughly and impartially.²⁸⁵ For example, the Judgment points to the fact that Mr. Radi’s communications with the Dutch Embassy diplomat took place “exclusively via text messages” as evidence that Mr. Radi was aware of the “suspicious nature of the activities” and took security precautions in interacting with the diplomat.²⁸⁶ However, as Human Rights Watch highlights, “[t]he fact that a person relies on text messages as a primary channel of communication does not appear to be evidence of any secret activity or evidence of guilt.”²⁸⁷ In addition, the Judgment reasons that “the fact that [Mr. Radi] never published any article or other journalistic work” relating to his contacts with the Dutch Embassy demonstrates that these contacts were with “secret agents from the Dutch Embassy in Morocco [and] had no relation with his journalistic work.”²⁸⁸ Again, the court reached these conclusions without full consideration of the

²⁸¹ CONSTITUTION (MOROCCO), *supra* note 6, at arts. 109, 120, 128. Notably, there are significant systemic concerns related to the independence of the tribunal. The HRC has said that “[a] situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.” HRC, General Comment No. 32, *supra* note 211, at ¶ 19. “The requirements of independence and impartiality mean that members of the Court need to be free from both political and private influences.” INT’L COMM’N OF JURISTS, *supra* note 278, at 72. Though the judiciary is formally independent of the legislative and executive powers, “the King is the guarantor of the independence of the judicial power.” CONSTITUTION (MOROCCO), *supra* note 6, at art. 107. In the past, “outcomes of trials in which the government had a strong interest . . . appeared predetermined[,]” and the judiciary served as an instrument to “selectively target, prosecute, jail, and harass critics” like Mr. Radi, raising questions about the court’s impartiality. Country Reports on Human Rights Practices: Morocco (2018), *supra* note 9; *Morocco/Western Sahara – Events of 2019*, HUM. RTS. WATCH (2019), <https://www.hrw.org/world-report/2020/country-chapters/morocco/western-sahara>. As discussed above, the nature of Mr. Radi’s prosecution and conviction suggests this trend has not yet abated.

²⁸² Human Rights Committee, *Toshev v. Tajikistan*, U.N. Doc. CCPR/C/101/D/1499/2006, Mar. 30, 2011, ¶ 6.6.

²⁸³ European Court of Human Rights, *Adjarić v. Croatia*, App. No. 20883/09, Dec. 13, 2011, ¶¶ 46, 51.

²⁸⁴ Human Rights Committee, *Larrañaga v. Philippines*, U.N. Doc. CCPR/C/87/D/1421/2005, July 24, 2006, ¶ 7.4.

²⁸⁵ Judgment, “After Deliberations”; *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96.

²⁸⁶ *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96

²⁸⁷ *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96.

²⁸⁸ *Id.*

available evidence, which “give[s] rise to reasonable doubt about the propriety of [a defendant’s] conviction.”²⁸⁹ The judge made inferential leaps and treated them as dispositive of the issues raised in the case.²⁹⁰ Where there were “serious doubts about the reliability and accuracy” of “decisive evidence” against the accused, such that a domestic court’s conviction was “manifestly unreasonable,” and where a court “attached probative value only to the evidence that could convict [a defendant]” while “disregard[ing] any and all evidence that could support the [defendant’s] version of the events,” international bodies have found violations of fair trial standards.²⁹¹

The court also arbitrarily discounted testimony from Imad Stitou as to the sexual assault charge against Mr. Radi. During the preliminary investigation, Mr. Stitou, as the sole witness to the incident, provided testimony to the court that corroborated Mr. Radi’s description of the event as a consensual encounter.²⁹² Shortly thereafter, the prosecutor opened an investigation into Mr. Stitou, accusing him of being “complicit” in Mr. Radi’s alleged conduct and charging him with “participation in rape” and “participation in the indecent assault of a woman with violence.”²⁹³ The court then declined to take Mr. Stitou’s potentially exculpatory testimony into consideration, stating in the Judgment that his testimony about the encounter being consensual is “unreliable because he is co-accused, and he has interest to have the charges against him dropped.”²⁹⁴ Then, in the Judgment, the court accorded greater attention to the description by the owners of the villa in which the encounter took place as to the complainant and her character rather than the testimony of an individual present in the area where the encounter occurred.²⁹⁵ As noted previously, the court did so even though the owners of the villa never testified as to any awareness of the alleged rape.

²⁸⁹ CLOONEY & WEBB, *supra* note 215, at 236; Human Rights Committee, Ashurov v. Tajikistan, U.N. Doc. CCPR/C/89/D/1348/2005, Mar. 20, 2007, ¶ 6.7. Such exclusion, per the HRC, constitutes “manifest arbitrariness” and a “denial of justice.” Similarly, a conviction based on the testimony of an individual of dubious credibility has been found indicative of a violation. CLOONEY & WEBB, *supra* note 215, at 237.

²⁹⁰ Judgment, “After Deliberations.”

²⁹¹ CLOONEY & WEBB, *supra* note 215, 239, 242.

²⁹² Case file, “Rape Charges.” See Aida Alami (@AidaAlami), TWITTER (July 19, 2021, 12:15 PM), <https://twitter.com/AidaAlami/status/1417171321629421574>.

²⁹³ Morocco: Release Omar Radi and Guarantee Fair Trial Proceedings, *supra* note 87; Mehdi Mahmoud & Houssam Hatim, Justice: Omar Radi condamné à six ans de prison ferme, TELQUEL (July 19, 2021), https://telquel.ma/2021/07/19/justice-omar-radi-condamne-a-six-ans-de-prison-ferme-un-an-avec-six-mois-de-sursis-pour-imad-stitou_1729576. Mr. Stitou was ultimately convicted of “failure to report a crime.” “Disgraceful” Prison Sentences Passed on Two Moroccan Journalists, REPS. WITHOUT BORDERS (July 20, 2021), <https://rsf.org/en/news/disgraceful-prison-sentences-passed-two-moroccan-journalists>.

²⁹⁴ Judgment, “After Deliberations” (“[T]he statement of the accused Imad Stitou relating to the fact that the sexual intercourse was consensual, is unreliable because he is co-accused, and he has interest to have the charges against him dropped.”). See Morocco: Ensure Fair Appeal Trial to Journalist Omar Radi, *supra* note 268 (describing the court’s argument against proper consideration of the testimony of a defense witness as “circular” and its treatment of Mr. Stitou as “an abuse of process . . . show[ing] bias and the absence of an objective assessment of both defence and prosecution evidence without a prior assumption about the case”).

²⁹⁵ See, e.g., Judgment, “After Deliberations” (referring to the testimony of Ali Amar and his wife Fatima Zahra as to what the complainant *would do* as probative against Mr. Radi’s account while dismissing Mr. Stitou’s eyewitness account summarily, as described above); see also *id.* at “Witnesses.”

D. ABUSE OF PROCESS

Per the ICCPR, no one shall be subject to “unlawful attacks on his honour and reputation.”²⁹⁶ Further, no one shall be subject to abuse of process.²⁹⁷

While the HRC has yet to establish clear criteria for assessing such situations, jurisprudence from the European Court of Human Rights (ECtHR) is instructive in evaluating whether a legal proceeding has been driven by improper motives. Among factors considered are: whether the ultimate decision was well-reasoned and based on law;²⁹⁸ the political context in which the prosecution was brought;²⁹⁹ and the broader context, including any pattern of politicized arrests and prosecution.³⁰⁰

The ECHR has also made clear that though a legal proceeding may have both proper and improper motives, it will nevertheless find a violation where the improper motives “predominated.”³⁰¹ Further, acknowledging that it is very often difficult to adduce direct evidence of a State’s bad faith, the European Court has held that proof of an illegitimate purpose may be shown by way of circumstantial evidence leading to inferences about primary facts.³⁰² In past cases, the ECtHR has relied on the following elements as circumstantial evidence of a State’s bad faith: the fact that the acts giving rise to the defendant’s arrest and detention are protected under human rights law;³⁰³ the behavior of prosecuting authorities, including delays between the arrest and the laying of

²⁹⁶ ICCPR, *supra* note 20, at art. 17.

²⁹⁷ These priorities are also reflected in the ICCPR, though the doctrine of abuse of process was primarily developed in the European Court of Human Rights.

²⁹⁸ European Court of Human Rights, *Nastase v. Romania*, App. No. 80563/12, Dec. 11, 2014, ¶ 107. This factor also coincides with consideration of the fairness of the process. See European Court of Human Rights (Grand Chamber), *Navalny v. Russia*, App. No. 29580/12, Nov. 15, 2018, ¶ 171; European Court of Human Rights, “Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights,” Dec. 31, 2021, ¶¶ 101-13.

²⁹⁹ European Court of Human Rights, “Guide on Article 18 of the European Convention of Human Rights, Limitations on Use of Restrictions and Rights,” Aug. 31, 2018, ¶ 57 (citing European Court of Human Rights, *Merabishvili v. Georgia*, App. No. 72508/13, Nov. 28, 2017, ¶ 322; European Court of Human Rights, *Khodorkovskiy v. Russia*, App. No. 5829/04, May 31, 2011, ¶ 257; European Court of Human Rights, *Khodorkovskiy and Lebedev v. Russia*, App. Nos. 11082/06 & 13772/05, July 25, 2013, ¶ 901; *Nastase*, App. No. 80563/12, at ¶ 107; European Court of Human Rights, *Rasul Jafarov v. Azerbaijan*, App. No. 69981/14, Mar. 17, 2016, ¶¶ 159-161; European Court of Human Rights, *Mammadli v. Azerbaijan*, App. No. 47145/14, Apr. 19, 2018, ¶ 103; and European Court of Human Rights, *Rashad Hasanov and Others v. Azerbaijan*, App. No. 148653/13, June 7, 2018, ¶ 124).

³⁰⁰ European Court of Human Rights, *Mammadov v. Azerbaijan* (Grand Chamber), App. No. 15172/13, May 29, 2019, ¶¶ 187-89.

³⁰¹ *Merabishvili*, App. No. 72508/13, at ¶ 305. That restrictions to protected rights fit into a pattern of arbitrary arrest and detention can both serve as circumstantial evidence of an illegitimate purpose and signal a broader context inimical to the fundamental ideals and values of international human rights treaties like the ICCPR and European Convention on Human Rights (ECHR). European Court of Human Rights, *Ibrahimov and Mammadov v. Azerbaijan*, App. No. 63571/16, Feb. 13, 2020, ¶ 151; European Court of Human Rights, *Aliyev v. Azerbaijan*, App. Nos. 68762/14 & 71200/14, Sept. 20, 2018, ¶ 223.

³⁰² *Merabishvili*, App. No. 72508/13, at ¶¶ 316-17; European Court of Human Rights, *Ibrahimov & Mammadov*, App. No. 63571/16, at ¶ 147.

³⁰³ See European Court of Human Rights, *Kavala v. Turkey*, App. No. 28749/18, Dec. 10, 2019, ¶¶ 223-24.

charges;³⁰⁴ and appearances of political interference in the case, especially when there appears to be a correlation between hostile statements by public officials³⁰⁵ and the timing or wording of criminal charges against the applicant.³⁰⁶

Abuse of process may be demonstrated where there is a “coexistence of sufficiently strong, clear and concordant inferences” suggesting that an unlawful purpose “predominated” the proceedings.³⁰⁷ The proceedings against Mr. Radi meet the standards for finding an abuse of process, principally due to the political context, the flawed process through which he was convicted, and the leaps of logic in the Judgment.

As previously mentioned, Mr. Radi’s prosecution is illustrative of a broader, emerging trend in Morocco’s political environment. Here, Mr. Radi, who had a history of speaking out against the Moroccan government,³⁰⁸ was charged with crimes following years of reported surveillance by the State. Beyond the problematic surveillance, as detailed below, the bases of the charges themselves are questionable.³⁰⁹ For example, the espionage charges stem primarily from Mr. Radi’s interactions with a Dutch contact. It is well understood that “[d]eveloping journalistic contacts or collecting and sharing non-classified information are protected activities under international law.”³¹⁰ In the absence of evidence that Mr. Radi “did anything except carry out ordinary journalistic or corporate due diligence work and maintain contact with diplomats, as many journalists and researchers do routinely[,]” or that he obtained, possessed, or provided to anyone classified information, he should not be prosecuted for such protected activities.³¹¹ Additionally, after the three primary charges were brought, seemingly unrelated charges of public intoxication and tax evasion were added to paint a picture of Mr. Radi as “immoral” and “shameful.”³¹² Per Human Rights Watch, adding a “cascade” of “bogus” supplemental charges involving notions of decency has now proven to “clearly [be] part

³⁰⁴ See *id.* at ¶¶ 225-28 (finding relevant the four-year time lapse between the alleged and events and the criminal prosecution when most evidence procured early in the investigation and the authorities failed to provide any justification for the delay); European Court of Human Rights, *Demirtas v. Turkey* (No. 2), App. No. 14305/17, Nov. 20, 2018, ¶¶ 271-73 (authorities “pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate” in detaining the accused).

³⁰⁵ See *Kavala*, App. No. 28749/18, at ¶¶ 229-30 (finding significant that authorities brought charges shortly after speeches by the President of Turkey naming the applicant); European Court of Human Rights, *Ismayilova v. Azerbaijan* (No. 2), App. No. 30778/15, Feb. 27, 2020, ¶ 117 (finding relevant the ‘stigmatising’ statements of officials at time of arrest of the accused).

³⁰⁶ See *Ismayilova*, App. No. 30778/15, at ¶¶ 114-20 (finding a violation of ECHR Art. 18 where the accused was initially charged on a false claim of coercion and arrested and charged in a way similar to other human rights defenders).

³⁰⁷ *Merabishvili*, App. No. 72508/13, at ¶ 314; European Court of Human Rights, *Aliyev v. Azerbaijan*, App. Nos. 68762/14 & 71200/14, Sept. 20, 2018, ¶ 200.

³⁰⁸ See *Investigations of Omar Radi*, FREEOMARRADI.COM, <https://freeomarradi.com/les-enquetes-de-omar-radi/> (last visited Jul. 19, 2022).

³⁰⁹ Amnesty International has referred to the espionage claims as “trumped up charges[,] as they are related to research grants in the context of a journalism fellowship and freelance consultancies, both protected by his right to freedom of expression.” *Morocco: Ensure Fair Appeal Trial to Journalist Omar Radi*, *supra* note 268.

³¹⁰ *Morocco: Journalist in Prison After Unfair Trial*, *supra* note 96.

³¹¹ *Id.*

³¹² Notably, the Court did not hear from Mr. Radi before the sentencing for his public intoxication charge. *Morocco: Jailed Journalist Omar Radi Sentenced for ‘Public Drunkenness,’* *supra* note 206.

of the Moroccan government's playbook for stifling dissent.”³¹³ According to Mr. Radi’s colleague, Imad Stitou, when a journalist is accused of such “shameful crimes . . . , it is guaranteed that public opinion will perceive them as unethical[.]”³¹⁴ The concoction of politically motivated charges stemming from long-past activities and the combination of seemingly unrelated charges into a single trial suggest abuse of process.³¹⁵

Further, as described above, the proceedings were marred by fair trial violations and the Judgment piled unreasonable inference on top of unreasonable inference. Mr. Radi was denied the presumption of innocence, as well as fundamental trial rights like the ability to call witnesses on his behalf and confront the witnesses against him. In both the investigative and trial phases, the court disregarded evidence that supported Mr. Radi’s version of events and made assumptions in the prosecution’s favor, all under the guise of judicial discretion.³¹⁶ For example, in dismissing the notion that Mr. Radi communicated with Dutch nationals in Morocco for journalistic reasons, the trial court determined that “[t]hese claims are disproved by the communications exchanged between the concerned parties since the accused and the diplomat address each other by name.”³¹⁷ The court also decided that because the exchanged messages indicated that Mr. Radi and a Dutch official “had already met in person several times, . . . [and] if this proves anything, it proves that Omar Radi granted suspicious intelligence services on behalf of the Dutch official,

³¹³ *Morocco: Espionage Case Against Outspoken Journalist*, *supra* note 72; see Editorial Board, *Opinion: Morocco’s Jailed Journalists Deserve the Biden Administration’s Attention*, WASH. POST (Apr. 30, 2021, 4:23 PM), https://www.washingtonpost.com/opinions/global-opinions/moroccos-jailed-journalists-deserve-the-biden-administrations-attention/2021/04/30/fa3459cc-a905-11eb-8c1a-56f0cb4ff3b5_story.html. The government has been said to have had similar reasons in electing to pursue espionage charges against dissidents. Per one journalist, “The authorities prefer to use this accusation since they know that the public will never support foreign ‘agents’ and traitors[.]” Ruecker & Schilis-Gallego, *Journalist Spied on in Morocco*, *supra* note 226. Officially, “[t]he law [in Morocco] does not define or recognize the concept of a political prisoner.” Per the most recent Country Report on Human Rights Practices for Morocco, although “[t]he [Moroccan] government stated it had charged or convicted all individuals in prison under criminal law[,] [c]riminal law covers nonviolent advocacy and dissent, such as insulting police in songs or ‘defaming Morocco’s sacred values’ by denouncing the king and regime during a public demonstration. NGOs, including the Moroccan Association for Human Rights (AMDH), Amnesty International, and Sahrawi organizations, asserted the government imprisoned persons for political activities or beliefs under the cover of criminal charges.” Country Reports on Human Rights Practices: Morocco (2020), *supra* note 17.

³¹⁴ ElHaies, *Morocco’s New Tactic*, *supra* note 38.

³¹⁵ After the verdict was delivered in Mr. Radi’s trial, attendees erupted in a chant that loosely translates to, “This is a verdict from instructions.” The problematic nature of this scenario also disregards the UN Guidelines on the Role of Prosecutors, under which “[p]rosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.” UN Guidelines on the Role of Prosecutors, art. 14 (1990).

³¹⁶ See Judgment, “After Deliberations.” The court wrote, “[E]valuating the evidence presented before the Court falls under the Court’s discretionary power, and . . . the Court has the right to admit any of it at any stage of the proceedings as long as it is satisfied by it, and . . . the law does not stipulate specific means of evidence, and . . . in that respect what is being argued [regarding the failure to hear certain witnesses during the trial phase] is a mere discussion of the value of arguments presented to the judges within their discretionary powers.” Similarly, the trial court said that it “has an absolute discretionary power when it comes to the testimony, it can decide whether it is false and to accept the witness testimony at the preliminary examination and not their testimony during the hearing or vice versa. It can also admit the witness testimony regardless of the challenges to its veracity which do not in themselves indicate any lies.” *Id.*

³¹⁷ Judgment, “After Deliberations.”

especially since their communications coincided with the visits paid by the accused Omar Radi to [the] Rif region after the events of Al Hoceima.”³¹⁸ However, these facts—addressing a contact by name and meeting in person several times—could be equally probative of Mr. Radi’s account of his friendly working relationship with Mr. Simons—a possibility that the court summarily discounted. Similarly, when addressing Mr. Radi’s consultancy with K2, the court concluded that the arrangement was “suspicious” simply because “checking the internet and receiving an answer from a specialized website is enough [for K2] to do without [Mr. Radi]’s services.”³¹⁹ On this matter, according to the court, “what proves [Mr. Radi]’s claim is wrong[] is his unwillingness to provide evidence of the correspondences between him and the company, claiming that he deletes his electronic correspondences.”³²⁰ To conclude that one’s email retention practices are, on their own, probative of espionage is an insupportable logical leap. Examples of similarly conclusory, thinly supported reasoning abound in the Judgment, demonstrating the dearth of justification for Mr. Radi’s conviction and supporting a finding of abuse of process.

E. OTHER FAIRNESS CONCERNS

In addition to the fair trial violations discussed above, there are other substantial issues bearing on the fairness of Mr. Radi’s case. Notably, the prosecution violated Mr. Radi’s right to adequate time and facilities to prepare a defense when it withheld key evidence from the defense until trial began. Additionally, the Moroccan government placed Mr. Radi under data surveillance, which violated his right to privacy.

Right to Adequate Time and Facilities to Prepare a Defense

The ICCPR requires that defendants be given adequate time and facilities for the preparation of their defense.³²¹ To have “adequate facilitates,” a defendant must have access to all evidence, including “all materials that the prosecution plans to offer in court against the accused.”³²² This evidence “must always be provided in sufficient time to allow effective exercise of the right to prepare a defense.”³²³

In the matter of the rape charge, the complainant received a medical certificate in August 2020, documenting the results of a physical examination conducted after her sexual encounter with Mr. Radi.³²⁴ The prosecution introduced this certificate into evidence in March 2021, but the defense was not notified of its existence until the trial began in April.³²⁵ In fact, while this type of evidence is typically included in the case file, the version

³¹⁸ *Id.* Mr. Radi maintains he was conducting research as a freelance journalist during these time periods. See *Morocco: Ensure Fair Appeal Trial to Journalist Omar Radi*, *supra* note 268.

³¹⁹ Judgment, “After Deliberations.”

³²⁰ *Id.*

³²¹ ICCPR, *supra* note 20, at art. 14(3)(b).

³²² HRC, General Comment No. 32, *supra* note 211, at ¶ 33.

³²³ CLOONEY & WEBB, *supra* note 215, at 288.

³²⁴ Judgment, “After Deliberations”; Case file, “Witnesses.”

³²⁵ *Trial Monitor Notes* (June 1, 2021) (on file with authors).

of the case file that the defense received prior to trial made no mention of the medical certificate.³²⁶ Thus, until trial began, Mr. Radi had no way to prepare for or rebut the findings in the medical certificate, and his right to adequate time and facilities was violated.

Right to Privacy

Also of concern is the alleged use of spyware in investigating Mr. Radi, a violation of his right to privacy. Per the ICCPR, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”³²⁷ Any interference with this right must be in accordance with a law that is (i) “sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances”; and (ii) necessary for, and proportionate to, a legitimate aim.³²⁸ The alleged surveillance of Mr. Radi using the Pegasus spyware, as described by Amnesty International,³²⁹ does not accord with these standards.

Though Mr. Radi had long suspected he was under surveillance by the State and the Judgment maintains the appropriateness of various surveillance methods as a tool of crime prevention,³³⁰ the alleged surveillance through Pegasus, which allows the monitoring and manipulation of a target’s internet traffic without the target’s knowledge or consent,³³¹ raises questions as to whether any of the evidence used against Mr. Radi in this case was improperly obtained and, therefore, improperly admitted, in violation of his right to privacy.

³²⁶ *Id.*

³²⁷ ICCPR, *supra* note 20, at art. 17.

³²⁸ See Human Rights Committee, General Comment No. 16, Apr. 8, 1988, ¶¶ 3-4, 7-8; U.N. High Commissioner for Human Rights, *The Right to Privacy in the Digital Age*, U.N. Doc. A/HRC/27/37, June 30, 2014, ¶ 23.

³²⁹ *Moroccan Journalist Targeted With Network Injection Attacks Using NSO Group’s Tools*, *supra* note 62; Simon Speakman Cordall, *Amnesty Claims Jailed Moroccan Journalist Was Targeted by Rabat Using Pegasus Spyware Before Being Arrested*, INDEPENDENT (July 21, 2021, 7:48 AM), <https://www.independent.co.uk/news/world/middle-east/morocco-pegasus-spyware-b1887455.html>; Stephanie Kirchgaessner, *Israeli Spyware Used to Target Moroccan Journalist, Amnesty Claims*, GUARDIAN (June 21, 2020, 6:00 PM), <https://www.theguardian.com/technology/2020/jun/21/journalist-says-he-was-targeted-by-spyware-from-firm-despite-its-human-rights-policy>.

³³⁰ Though Radi’s attorneys only made mention of eight months of surveillance at trial, see *Trial Monitor Notes* (June 8, 2021) (on file with authors), *Trial Monitor Notes* (June 22, 2021) (on file with authors), and *Trial Monitor Notes* (July 19, 2021) (on file with authors), per the March 2021 indictment, Moroccan authorities first put Mr. Radi under surveillance in December of 2017. *Morocco: Journalist Harassed by Authorities Must Be Granted Fair Re-Trial*, AMNESTY INT’L (July 19, 2021, 5:00 PM), <https://www.amnesty.org/en/latest/press-release/2021/07/morocco-journalist-harassed-by-authorities-must-be-granted-fair-re-trial>; Errazzouki, *supra* note 56; Judgment, “After Deliberations.”

³³¹ *Moroccan Journalist Targeted With Network Injection Attacks Using NSO Group’s Tools*, *supra* note 62.

CONCLUSION AND GRADE



In sum, the treatment of and proceedings against Mr. Radi entailed violations of his right to the presumption of innocence, right not to be arbitrarily detained or subjected to inhumane treatment, right to call and examine witnesses, and right to an impartial tribunal.

Furthermore, this case is situated within the context of Morocco's ongoing pattern of using a wide variety of laws, including sex-related crimes, to tar the reputation of journalists and dissidents. Speaking out against the Palace, such as by exposing alleged corruption as relates to the monarchy's financial holdings, appears to have dire consequences. For these reasons, this report finds that the proceedings against Mr. Radi constituted an abuse of process.

GRADE:

D

ANNEX

GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹ ICCPR, Article 26.