

Western Sahara: the legal imperative of self-determination and lessons learnt from East Timor

By:

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A basic principle of law, common to both internal and international law, is the principle of non-discrimination. Rules of internal law must apply equally to all individuals; rules of international law must apply equally to all peoples and States. Identical situations must be treated by law in the same way.

Since the famous UN Resolution 1514 of 1960 the right to self-determination is recognized as a basic right of all peoples. The legally binding International Covenants on Human Rights (one on civil and political rights, the other on economic, social and cultural rights) are based on this fundamental right: the right to self-determination is regulated by art. 1 of both covenants. The right to self-determination is even considered by many authors as a case of *jus cogens*, a peremptory norm of general international law from which no derogation is permitted.

Such as every individual has the right to freedom, every people has the right to self-determination. The fight against colonialism mirrors the earlier begun struggle against slavery. But slavery is not entirely abolished. Similarly, “millions of people in various parts of the world still live under alien rule”, as the UN itself admits.

After the independence of Namibia in 1990, East Timor became the non-self-governing territory in the list of the UN Decolonization Committee with the largest population, Western Sahara the one with the biggest territory. The similarities between the two cases are astonishing. Prof. François Rigaux, in an article included in IPJET's book "International Law and the question of East Timor" (of 1995), lists the following analogies:

- the events are quasi-contemporary: the Moroccan King Hassan II gave orders to his army to invade Western Sahara (the infamous “Green March”) on 6 November 1975, East Timor was invaded by the Indonesian army thirty days later;
- both peoples were earlier submitted to an Iberian coloniser: Western Sahara was colonised by Spain, East Timor by Portugal;
- “in both cases the colonial power agreed with (...) decolonisation, but it was prevented from or did not comply with its duty to a peaceful transmission of power to the colonised people”;
- “a neighbouring state – Indonesia against East Timor, and Morocco against Western Sahara – put forward a territorial claim on the former colonial territory against which it launched an armed attack and which it occupied by force”;
- “both peoples were prevented through the use of military coercion from achieving their legitimate aims, the exercise of their right to self-determination”;
- the Permanent Peoples’ Tribunal (an NGO based on the former Bertrand Russell tribunals) delivered similar judgements condemning the occupation of Western Sahara and East Timor and the crimes against humanity committed there.

After the publication of Rigaux’s article many more analogies came to the light:

- One was the way the International Court of Justice referred to the right to self-determination of both peoples. In the Western Sahara advisory opinion of 1975 the Court had said:

“(...) the Court’s conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory”

In the East Timor case (Portugal vs. Australia), twenty years later, the Court declared:

"(...) the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory. The competent subsidiary organs of the General assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for 'the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)'"[paragraph 31]

- Another parallel: in both cases the occupying power tried to appease the subjugated peoples by offering them a certain degree of autonomy. King Hassan II had already proposed that in the eighties, President Habibie came up in 1998 with a similar proposal, included in a package deal: autonomy status for the territory and the liberation of Xanana Gusmão and other Timorese prisoners if Portugal and the United Nations did accept the Indonesian integration of East Timor.

- Finally, the similarity between the UN-OAU Peace Plan for Western Sahara of June 1990 and the New York agreements between Portugal, Indonesia and the UN of 5 May 1999. Due to international pressure Morocco and Indonesia were obliged to accept the holding of a referendum in the occupied territories. The UN established the instruments for the implementation of both agreements: MINURSO in the Western Sahara, UNAMET in East Timor. In both cases a date was fixed for the popular consultations, and in both cases the date was postponed. It is curious to see how similar the reaction of jurists to both agreements was. Prof. Claude Bontems, speaking in name of the International Committee of Jurists for Western Sahara before a Parliamentary Conference in May 1991 in Stockholm, criticized the Peace Plan for giving no guarantee to the security of the Sahrawis if 65,000 Moroccan military were allowed to remain in the territory. The International Platform of Jurists for East Timor expressed the same concerns about the stipulation of the New York agreements, which gave to the Indonesian the responsibility for security during the referendum.

But here the similarities come to an end. In East Timor the referendum did take place. As we expected, instead of guaranteeing security, the Indonesian forces and their militias killed hundreds of people and destroyed much of the infrastructure of East Timor. The international community was obliged to rectify the mistakes of the New York agreements by sending military to the territory, the INTERFET forces. But in the end the Indonesian withdrew, a UN Administration (UNTAET) took their place, free and fair elections for a Constitutive Assembly were held and on 20 May of next year East Timor will be the first new State of this Millennium.

The contrast with Western Sahara is enormous. It is true that the Sahrawi Arab Democratic Republic, proclaimed in 1976, and with its government-in-exile in Tindouf, Algeria, was meanwhile recognised by more than 70 countries and became a full member of the OAU as well. But the referendum envisaged by the Peace Plan did not take place, due to the obstruction of Morocco: Rabat insisted that MINURSO should register many thousands of transmigrants as voters and obviously the Sahrawis could not accept that. Difficulties over voter registration prevailed until 1997, when an agreement on the implementation of the Peace Plan was brokered by James Baker, the UN Secretary-General's personal envoy to Western Sahara, after talks in Houston. The referendum was scheduled for December 1998, but postponed once more because of further obstruction by Morocco. The UN mandate for MINURSO was extended several times,

increasing the cost of the mission and subsequently increasing pressure on the Secretary-General from UN member states to complete the referendum process successfully. In 1999 the mission in Western Sahara was strengthened with more personnel because of the huge number of appeals received by the UN during the registration process. In January 2000 MINURSO published the results of the voters' identification, accepting as Sahrawis 86,381 candidates of a total of 198,469, but meanwhile the number of appeals presented by Morocco grew to 130,000. The result of this manoeuvre is well-known: pessimistic about the chances to bring the process to a good end, the UN-Secretary General endorsed the proposal of his envoy James Baker of a so-called "Framework Agreement" in which the Moroccan offer of autonomy was resuscitated. The Security Council accepted the proposal to open conversations on the base of the "Framework Agreement", but did not abandon the Peace Plan, keeping the referendum as an option.

I have only time for a small comment on the "Framework Agreement" for Western Sahara. As said, President Habibie had already proposed autonomy as a way to solve the conflict of East Timor. The Timorese, Portugal and the UN rejected it, keeping firm on the application of the principle of self-determination. Therefore, the question put to the voters in the referendum was:

"Do you ACCEPT the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia?

OR

Do you REJECT the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia?"

The proposed autonomy was there, but as a conclusion of a process of free choice by the East Timorese, together with the other option, the independence. Contrarily, in the "Framework Agreement" for Western Sahara, autonomy is determined from the beginning; it is thus imposed on the Sahrawi people, before they have the chance to freely choose their status. This clearly contravenes Principle IX of Resolution 1541 (XV), which provides:

"The integration should be the result of the freely expressed wishes of the Territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes impartially conducted and based on universal adult suffrage".

In December 1991 I wrote an article on Western Sahara, published by a ONG in Coimbra, which ended with a message to the Portuguese Government: "In order to be coherent, Portugal cannot keep running away from the question of Western Sahara.(...) The constitutive conference of the International Platform of Jurists for East Timor underlined in its conclusions 'the need for the Portuguese State to assume before other international questions, and in particular the problem of the Western Sahara, a coherent position which takes into account the similarity of the situations'. The appeal of the Platform was not only made in name of legal principles or logical coherence.(...) the Portuguese support to the Sahrawi cause, besides being morally desirable, may have much influence in the development of the question of East Timor." Five years later Portugal lost its case against Australia in the ICJ. The Australian defence team had successfully pointed out before the Court that Portugal was dealing with Morocco in relation to the natural resources of Western Sahara exactly in the same way as it was accusing Australia of dealing with Indonesia in relation to the natural resources of East Timor.

If the UN decides to follow the path of the "Framework Agreement", violating thus the principle of non-discrimination and its own norms on self-determination, will certainly lose

much more than a legal case. It will lose credibility and weaken its ability to solve other conflicts through peaceful means. If the UN allows a state to illegally occupy another territory and get away with it, it will undermine the cornerstone of world peace, article 2, number 4, of its own Charter:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

In the end, we would all lose.