

Human Rights dimension in Western Sahara
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Panel on Right to Self-determination of the people of Western Sahara
Palais de Nations, Geneva, 21 September 2011

1.Introduction

The aim of this paper is to verify how to improve the protection of human rights in Western Sahara.

First of all, I have to say that my personal opinion is that the human rights dimension should be discussed by the parties involved in the conflict irrespective of the issue of self-determination.

This does not mean that the two aspects are not linked. On the contrary, as provided by international law, the respect for the principle of self-determination is at the foundation of the full respect of the human rights ¹.

It simply means that the human rights dimension should be discussed independently of the political conclusion of the self-determination process. In other words, the human rights issue remains an autonomous variable with no spill-over effect on the implementation of the principle of self-determination.

In order to properly examine the subject matter, two main questions should be addressed.

Firstly, who are the actors primarily responsible for the protection of human rights on the field.

And secondly, what type of mechanisms should be established for that purpose on the ground.

2.The actors

The actors involved or who could be involved are many. However, not all are in a good position to ensure a proper protection of human rights.

Morocco

Morocco is the power on the field. As such, Morocco is under a duty to ensure the full respect of all the international human rights law to which he is obliged in the Territories. In fact, the obligation to respect human rights concerns not only the metropolitan territory of the State, but also any other territory occupied or controlled by a State on its own motion and effectively. This is a well established principle in international law and recognized in many jurisdictions, such as the International Court of Justice ². As acknowledged by many instances, the need to fulfil for this obligation is without prejudice of the status of the territory concerned and of any discussion about its final status ³.

Morocco has taken important steps in the matter in the last years. For instance, it has established a National Council on Human Rights with a proposed component regarding Western

¹Cfr., UN Covenants which put the right to self-determination at the basis of all the other rights recognised.

²International Court of Justice (ICJ), 9 July 2004, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, par. 102 ff.; European Court of Human Rights (ECHR), 18 December 1996, *Loizidou v. Turkey*.

³See OHCHR, *Report of the OHCHR Mission to Western Sahara and the Refugee Camps in Tindouf - 15/23 May and 19 June 2006*, Geneva, 8 September 2006, par. 11: the assessment of violations on the basis of international law on human rights binding an occupying State should not be “interpreted as constituting a position vis-à-vis the status of the territory according to international law or attributing any legitimacy to claims of sovereignty, but rather constitutes an evaluation of the *de facto* enjoyment of human rights by the people” of the territory concerned.

Sahara and an Equity and Reconciliation Commission (IER) with the task to investigate on many important violations, including forced disappearance, to clarify certain historical events as well as to determine the responsibility of the State and even to take into account a right to compensation and to the truth of the victims. In the context of the s.c. Arab Spring, Morocco may even improve these engagements.

Morocco is also the only actor explicitly mentioned in the last resolution of the Security Council (SC) that for the first time deals with the human rights dimension in Western Sahara. In fact, the SC welcomes the steps and commitment undertaken by Morocco in the matter ⁴.

A totally different question is whether Morocco can indeed be considered the subject primarily responsible to the effect. However important the commitments assumed by Morocco may be, there are serious doubts that the latter is capable to comply with them. The problem does not relate to the effectiveness, seriousness, impartiality or implementation of the commitments assumed by Morocco; rather, it is a problem of trust. The question is simply that Saharawi people do not trust the above mentioned commitments because they do not recognize Moroccan institutions. As many events show (starting from the s.c. Arab springs), mechanisms and institutions which do not benefit from the legitimation and trust of the people concerned are not able to achieve their goal, whatever the intentions of the competent bodies.

Taking into account the past and present events, it is also very difficult to claim that the International Community has the right to ask Saharawi people to do so if they do not so wish.

So, the issue of protection of human rights cannot be left to Morocco alone.

Spain

Spain is an other important actor to consider.

Spain is still the Administering power in Western Sahara as was Portugal in Timor Leste ⁵.

As Administering power, Spain has a number of obligations provided by the Charter. It has the obligation to make regular reports about the situation in the Territories and, particularly important in this framework, the obligation to ensure, among other things, the just treatment and protection against abuses of the people living there, an obligation which, in the present language, may be interpreted as the obligation to ensure the promotion of the respect of the human rights ⁶.

There is no reason for the SC and even the General Assembly not to remind Spain to its obligation under the Charter. This should not taken by Morocco as an hostile act, but just as an act concerning the need to properly satisfy basic needs of the people concerned.

However, Spain does not seem particularly concerned about its obligations stemming from the Charter.

European Union

There are other important actors who should be taken into account, in particular those who have important relations with Morocco, such as the European Union (EU).

First of all, these actors should not breach the rights of the Saharawi people by entering in

⁴SC Resolution 1979 (2011): “*Welcoming* the establishment of a National Council on Human Rights in Morocco and the proposed component regarding Western Sahara, and the commitment of Morocco (...)”.

⁵See Res. 742 (VIII) on the Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full mesure of self-governement (27 November 1953); CIJ, 30 June 1995, *Portugal v. Australia, case concerning East Timor*.

⁶Art. 73 a of the Charter.

such relations. This is the well known problem raised, for instance, by the Fisheries Agreements concluded by the EU with Morocco.

However, these actors may also play a role in the assessment of the violations occurred on the field. This is possible because many of these agreements provided for the s.c. Human Rights and Democratic clause under which a one of the Parties may suspend or extinguish the above mentioned agreements if the other Party fails to respect human rights in relation to people falling under its jurisdiction. The Human Rights and Democratic clause is provided for a number of agreements concluded by the EU with Morocco.

However, while the EU does not seem particularly concerned with the application of the Fisheries Agreements to the Territories of Western Sahara, it seems to assess the respect of the Human and Democratic Rights clause without taking into account the situation in those Territories.

This is not only inconsistent in itself, but also in conflict with either international law or the latest SC resolution, that calls for all the parties to strictly respect “any relevant obligations under international law”.

All these considerations make the Western Sahara an area of Maghreb where the human rights issue remains chronic, becomes more and more urgent, and existing international human rights law does not provide for adequate protection.

For these reasons, the human rights dimension remains crucial and of primary concern for an actor such as the United Nations (UN). However, the engagement of the UN does not seem to offer an adequate response to the needs on the field.

3.The mechanisms

In order to assess what type of mechanisms could be established in Western Sahara, a distinction may be drawn between what can be done on the basis of the present legal situation and what should be done in order to respond to the needs on the field. This is reflected in the approach of the SC which in its last resolution calls for a full implementation of the actual obligation of the parties involved, included the international community as a whole, and to develop adequate means in order to ensure full respect of the human rights ⁷.

Strengthening the existing legal dimension

In its last resolution, the SC “welcomes the commitment of Morocco to ensure unqualified and unimpeded access to all Special Procedures of the United Nations Human Rights Council”.

The consequences are twofold.

On the one side, the sentence aims to guarantee to all people concerned the possibility to communicate freely with the Human Rights Council (HRC)’s independent experts appointed to study, monitor and report on thematic issues, such as the Special Representative (SR) for torture, etc. This gives the possibility to the people concerned to raise sensitive issues in the international arena concerning either a particular case or a broader situation. Morocco may also allow for a standing invitations for special procedure mandate-holders, a step which Morocco has not yet taken to my knowledge.

On the other, the sentence of the SC may imply that HRC Special Representatives decide to take into account on a regular basis the situation in Western Sahara to the extent that this situation

⁷SC Resolution 1979 (2011): “Stressing the importance of improving the human rights situation in Western Sahara and the Tindouf camps, and encouraging the parties to work with the international community to develop and implement independent and credible measures to ensure full respect for human rights, bearing in mind their relevant obligations under international law”.

falls in their mandate.

While remarkable, however, this commitment is far behind the obligations to which Morocco is bound to.

First of all, it is not very clear why this commitment should not be extended to the Universal Periodic Review in order to guarantee to all the civil society associations, especially those who are present on the field, the possibility to counter-report to the HRC in the framework of this procedure.

Secondly, a similar possibility should be extended to the access to the complaint procedures established by resolution 1503 which allow a person concerned to send a communication to the Working Group on Communications and the Working Group on Situations in order to raise a issue concerning a specific case or a broader situation.

Finally, it should be remembered that Morocco has accepted the individual complaints procedures for a number of treaties, such as the Convention against Torture and the Convention on the Elimination of All Forms of Racial Discrimination ⁸.

Hence, there is no reason to limit the commitment mentioned in the SC Resolution to access to Special Procedures only. On the contrary, that commitment should be extended to all the procedures established in the framework of the UN already available for individuals and associations.

In order to guarantee an effective access to these procedures, two other points should be taken into account.

First, people concerned on the field are normally not aware of the possibilities they have under the Charter and, in the case they are, they do not know how to take advantage of them. So, it is crucial to provide training for the civil society associations and presence on the field in order to promote the use of the international human rights protection mechanisms by rights-holders and civil society organizations.

Second, in order to ensure this possibility, it is important to guarantee access to the field to qualified Human Rights defenders, a guarantee which the SC resolution may also mention in its resolutions.

Towards an effective protection on the ground

The general policy of the UN now is to integrate a human rights approach in all aspects of UN work, especially in the humanitarian and peace-keeping missions. So, these mission are usually integrated by a OHCHR component or a staff members with a specific preparation in human rights that fulfils different tasks such as to provide training, report, monitor, mediate and protect civilians ⁹.

It is quite surprising that this general rule finds an exception for both UNHCR mission and peace-keeping mission of Minurso established in Western Sahara. This seems inconsistent with the whole policy of the United Nations on the matter without any apparent reason.

Thus, both missions should be entrusted with a mandate to ensure an effective international mechanism able to monitor and report in a regular and independent manner on the respect of human rights either in the Territories or in the refugee camps.

⁸Morocco seems more prudent in accepting the inter-State complaints procedure. Morocco has not accepted such a procedure under the International Covenant on Civil and Political Rights and the Convention against Torture.

⁹DPKO, DPA and OHCHR, *Policy directive Public Reporting by Human Rights Components in Peace Operations*, July 2008.