THE HUMAN RIGHTS SITUATION IN OCCUPIED TERRITORIES OF WESTERN SAHARA

Responsibilities of Morocco, responsibilities of the international community and corporate responsibilities

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Association of Friends of the SADR of Alava
Arabako SEADen Lagunen Elkartea

"We wish to reaffirm our commitment to human rights and the values of liberty and equality, for we are firmly convinced that respect for human rights is not a luxury or a fashion to which one conforms, but a necessity dictated by the imperatives of construction and development.… For our part, we believe that there is no opposition between the imperatives of development and respect for human rights, just as there is no antagonism between Islam, thanks to which human dignity is firmly rooted, and human rights. That is why we consider that, if human rights are not respected in the future, there will be no future."

Message of King Mohamed VI on the occasion of the 51st anniversary of the Universal Declaration of Human Rights[1]

[1] Words taken from the fifth periodic report submitted by Morocco in March, 2004 to the United Nations Human Rights Committee under Article 40 of the International Covenant on Civil and Political Rights, index UNO: CCPR/MAR/2004/5, page 9, paragraph 44.

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INTRODUCTION

The Western Sahara conflict appears to be forgotten. In fact, after more than thirty two years since Spain's withdrawal from the territory, it seems to have officially become a conflict that is off the agenda. One too many. Of no interest.

This, though, apparently contradicts the intense labour of investigators from all over the world who have spent many years analysing the sociological and political-legal reality of Western Sahara territories, not only those currently under Moroccan jurisdiction but also those directly controlled by the Saharawi Arab Democratic Republic[2] as well as the Tindouf refugee camps.

It is common among these authors and in certain areas of political debate to hear talk of the Saharawi "conflict" or "problem", questions which are quickly deemed to be the right to self-determination by some and the territorial issue by others. This would seem to be the crux of the argument. Nevertheless, going beyond the self-determination of the Saharawi people and their relationship with the Moroccan State, what is certain is that we cannot hide the fact that the human rights situation of the population which resides in Western Sahara territories is a long way from that shown in international standards of protection of those rights.

It is safe to say that, just as stated in the "Mission Report of the United Nations High Commissioner for Human Rights in Western Sahara and the Tindouf refugee camps" after the visit to the region in May and June, 2006, (a document which for some strange reason has still not been made public by the Organization although its content is hardly unknown today to anyone who has studied the subject),[3] "almost all human rights violations to the people of Western Sahara, under the de facto authority of the Moroccan

[2] The Saharawi Arab Democratic Republic (SADR) proclaimed as such on February 27, 1976 has been a member state of the Organisation of African Unity since February, 1982 and is currently a founding member of the African Union. 61 nations have, to date, recognised the SADR. The official list of these states can be found at the following link: http://www.rasd-state.ws/reconocimientos_rasd.htm.

[3] The fourth recommendation of the report states that "this is not a public document. It is shared in exclusivity with Algeria, Morocco and the POLISARIO front, all actors previously consulted and also consulted during the Mission of the United Nations High Commissioner for Human Rights in Western Sahara and the TIndouf refugee camps in order to ensure the continuity of efforts towards the consolidation of this productive agreement." The Spanish version used for the elaboration of this report is the unofficial translation made for Um Draiga, Friends of the Saharawi People of Aragón.

Government or the POLISARIO Front,[4] stem from the non realization of this fundamental human right", referring to the right to self-determination..

However, beyond this understanding, the investigation at hand has no other purpose than that of analysing, in the most comprehensive way possible, the human rights situation in Occupied Territories of Western Sahara. The clear perpetrators of the abuse are evidenced here in the corresponding section and the quest for justice for the victims and the fight against impunity of those responsible must go beyond the underlying judicial and political problem. Ultimately, the aim of this report is to bring to light the crude reality of the level of development of human rights in the country which is far removed from the pompous public declarations of the Moroccan government, and to reveal those responsible of human rights violations in the Territory and their collaborators. As a result, the grave human rights situation goes much further than the dilemma between the free determination of the Saharawi people and the territorial integrity of the Moroccan State.

Anyone can see, then, that a detailed analysis of the human rights framework requires an initial overview, albeit cursory, of the political context in which Western Sahara currently moves, a task to which the first chapter of this investigation is destined. Without going further, this report uses expressions such as "Occupied Territories of Western Sahara" repeatedly and there is also talk of Spain's responsibility as the Territory's "administrative power". The use of these expressions should be

[4] The question of the legal condition of the POLISARIO Front is difficult to classify concretely. Although its condition as a national liberation movement and sole and legitimate representative of the population of Western Sahara has been clearly established by countless resolutions of different United Nations organisms, the same has not happened in regard to its status as observer.
Aside from these considerations, according to the ultimate meaning of General Assembly Resolution 3280 (XXIX), and to the extent that the POLISARIO Front has been recognised by the United Nations as the sole and legitimate representative of the Saharawi People, logically, all benefits that the international ruling attributes to national liberation movements are applicable (Juan Soroeta, *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional*, pages 84-86, and the bibliography compiled there).
It should be taken into account that armed conflicts in which national liberation movements recognised by the United Nations are implicated will be considered international armed conflicts, in application of Article 1.4 of Protocol I of 1977 of the Geneva Convention. International Law recognises their limited subjectivity being able to send and receive diplomatic representatives, participate in international conferences and meetings (including those on human rights) and enter into international agreements. Finally, International Law does not expressly recognise their right to use armed force, but neither does it prohibit it, since numerous resolutions of the United Nations General Assembly have reiterated the legitimacy of the use of armed force by national liberation movements (Carlos Villán Durán, *Curso de Derecho Internacional de los Derechos Humanos*, Editorial Trotta, 2002, page 123).

explained, thus this section is dedicated to the judicial and political situation of Western Sahara. This quick overview is formulated from a historical perspective and international law. These elements are fundamental to understanding what feeds the prominence of countries like Spain, France, Algeria, Mauritania and the United States around this conflict whose military front was wide open for the fifteen years up to 1991 and which since then appears lethargic, while the political solutions being proposed shed no light anywhere.

The delimitation of responsibilities for human rights abuse committed in Occupied Saharawi Territory deserves a special clarification at this point. It is evident that a strict interpretation of the provisions of international law provides that the State with jurisdiction over a territory is under direct obligation to respect, protect and uphold the said rights in that territory. However, in today's world, newly found power relations pose new questions in relation to the role frontiers play in human rights aggressions. To go on believing today that a country's government is the only party responsible for the human rights situation within the limits drawn by its contours is the equivalent of denying a forced reality that in most cases is heart wrenching at best and defies logic. Especially severe in the case of Western Sahara, where the strategic interests of many different countries have been, and are, on the table, particularly in relation to the plundering of natural resources, it is an obligation to openly denounce the ambiguous or even blatantly contrary attitude flaunted by the governments of Spain, France and the United States along with the rest of the European Union to the international guidelines for the protection of human rights.

It is no less true that in today's world it is increasingly more evident that the authors of the most common patterns of abuse are no longer state agents at all. Within the globalization framework, one private sector is gaining ground fast and there seem to be no bounds to the potential reach of its tentacles: business, more specifically transnational business. Thus, the attention to corporate responsibility inspires the task of public denouncement addressed here, whose main observation, once again, regards the Territory's natural resources.

The elaboration of this investigation has coincided with two events which give us strategic opportunities and cannot go unmentioned. Firstly, during 2007, in the

second half of which the bulk of this investigation has developed, direct negotiations between the government of Morocco and the POLISARIO Front have been reopened. True, there have been many obstacles and, as the majority of analysts who have closely followed the steps to bringing the two together (albeit physically) point out, initial postures on both sides do not appear to have changed a bit since the "conflict resolution plans" which Morocco and the POLISARIO made public in April, apparently separately. Probably, then, the real gain from the reopening of talks is precisely the contact it has produced. It does not seem much, but it is altogether more than could have been said a year ago. The fundamental question now lies in not forgetting that an eventual political negotiation cannot overlook the human rights issues which devastate the territory's population. In Western Sahara, as in other places on the planet, there can be no peace or viable political accord without attending to human rights and reparation for the victims.

The second essential factor to bear in mind is the fact that Morocco was a member of the United Nations Human Rights Council from the time this organization came into being until mid-June, 2007, that is, during the first eleven months of its existence. In its Resolution 60/251 of March 15, 2006, through which the United Nations General Assembly constituted the Human Rights Council, with the clear aim of not repeating the mistakes (basically those derived from its excessive partisan politicization and criticized partiality) of the replaced Human Rights Commission, the member states of the organization reaffirmed "the purposes and principles contained in the Charter of the United Nations, including developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all". In the month of April, 2006, Morocco presented its credentials for becoming a member of the new Council and was accepted in the election process carried out some months later. This document will raise in practical, comparable terms the uncertainty as to whether the level of respect for human rights that the Alawi Kingdom claims has, in fact, been reached, or whether it is no more than an elaborate showcase assembled with the assistance of leading world powers.

It would be unfair to end this brief introduction without recognising that were it not for the financial assistance of the Basque Government this investigation would still be the dream it started out as. Equally, a special mention is due to all those people who consciously or unconsciously have made this venture, which barely a year ago seemed remote, into a report which aims to place a framework of absolutely intolerable human rights abuse humbly on the table. Our most sincere acknowledgement goes to those who for many years have worked ceaselessly for the defence of human rights and justice in the Western Sahara territories.

Vitoria – Gasteiz, January, 2008

HISTORICAL-POLITICAL BACKGROUND TO THE SITUATION IN WESTERN SAHARA

This paper does not seek to centre its analysis in the dialectics of the conflict surrounding the right to free determination of the Saharawi people and the ways it is practiced. To be exact, the frequently mentioned universality principle of human rights implies that the defence of these must transcend the political sensibilities and identities of each side.

It is not about how the right to free determination does not constitute a fundamental human right since this discussion was dealt with successfully long ago. To take the obvious example, the second paragraph of article 1 of the International Covenants of 1966 of Civil and Political Rights and Economic, Social and Cultural Rights (Morocco is party to both of these international treaties), is emphatic in that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence"; and in the third paragraph states "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations".

Respect for the right to self-determination is considered a prior condition for the existence and enjoyment of the rest of the fundamental human rights, and it should be stressed that there is a notorious tendency within the United Nations to identify the

phenomenon of colonialism with that of *apartheid*, as it does with all racial discrimination practices, an example, this, of flagrant violation of human rights.[5]

Be that as it may, however, the hub of this investigation is the abuse committed on the human rights of the Saharawi people to the extent that it is a coexisting community, independently of whether it is considered or not a people with the right of free determination. Thus, attention is given later on to arbitrations exerted over rights traditionally included within the framework of civil or political rights, as well as over economic, social and cultural rights and the right to development.

At this point it is appropriate to give a general overview of the evolution which the Western Sahara people have been object of and subject to from the beginning of the Spanish colonization to the present day in order to better contextualize the phenomenon, the population and the territory under analysis.

THE SPANISH COLONISATION YEARS

In the years when the majority of the European States were wrapped up in the colonialist adventure, Spain sought and found its own African space in the territory that until 1975 was called "Spanish Sahara". The causes of the expansionism in the zone are varied and have been studied at length through historiography.[6]

The Spanish intervention in the north of Morocco began around 1859 and was pushed southwards by pressure from certain investors, first through the Canarian African Fisheries Society (Sociedad de Pesquerías Canario-Africana) constituted in 1876, and later by the Spanish Society of Africanists and Colonists (SEAC), born in

[5] All doubts about the significance of the right to self-determination within the international legal system dissipated with the classification of colonialism as an international crime, effected by Resolution 1514 (XV) of the United Nations General Assembly, and its inclusion among the structural principles of said system by Resolution 2625 (XXV) of the same organisation. By way of example, the General Assembly, in its Resolution 2105 (XX), declares itself "fully aware that the continuation of colonial rule and the practice of *apartheid* as well as all forms of racial discrimination threaten international peace and security and constitute a crime against humanity".

[6] See in this respect Ali Yara, O., *La question sahraouie et la mutation stratégique du Maghreb*, Doctoral Thesis defended in April, 1991, University of Paris X-Nanterre, Faculty of Law, Paris, 1997, page 96 et seq., and Criado, R., *Sahara: Pasión y muerte de un sueño colonial*, Ruedo Ibérico, Paris, 1977, page 9 et seq., both cited by Juan Soroeta Liceras in his book *El conflicto del Sahara Occidental, reflejo de las*

1883. Despite the indecisive attitude of the Spanish government in those early days, on November 28, 1884, the SEAC and representatives of the Saharawi population entered into an agreement of "trade, mutual protection and friendship" in the city of Dakhla (which during the time of the colonization was baptised with the name of Villa Cisneros). In actual fact the agreement was intended to constitute the lease of the territory to the SEAC. France's colonising advance northward from Senegal at that time certainly influenced the Saharawis' confidence in an agreement of this nature, accompanied as it was by some important commercial benefits.

In light of the impending Berlin Conference, the Spanish government decided to intervene in the matter, communicating to the other authorities its intention of assuming protection of the territories mentioned in the Dakhla agreement. Finally, by Royal Decree on December 26, 1884, after a series of agreements entered into with local tribal leaders, Spain "took under its protection the territorial stretch between Cape Blanco and Cape Bojador," thus legitimizing the colonization.[7]

What made the "Spanish Sahara" case exceptional in comparison with other territories under colonial rule was the doubtful attitude of the metropolis, in this case, Spain. The colonization did not really come into effect in the case of Sahara until well into the fifties, a time when the rest of the continent was experiencing quite the opposite. Thus, in contrast to what had happened in earlier colonial campaigns with other European states holding the reins (and in which they had enjoyed absolute freedom), the Spanish authorities of the time would have to have faced the head-on opposition of the United Nations. From the moment of Spain's ingression in 1955, the United Nations had exerted great pressure for the territories to be included among those listed in Resolution 66 (I) of the General Assembly as non-self-governing, and thereby requiring the submission of information according to article 73.e) of the United Nations Charter.[8]

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contradicciones y carencias del Derecho Internacional, page 32. The work of Juan Soroeta was a principle source of reference in the writing of this chapter.

[7] The Advisory Opinion of the International Court of Justice of October, 1975 on Western Sahara put the beginning of Spanish colonisation in 1884, "year in which Spain proclaimed its protectorate over Rio de Oro", thereby considering that the advisory opinion must analyse the judicial statute and judicial ties of the territory "as they existed in the period beginning in 1884" (page 38, paragraph 77).

[8] Said rule requires the administrative authorities of colonial territories "to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional

The attitude of the Spanish government was faltering and decidedly clumsy from that moment until its definitive withdrawal from the Territory in February, 1976. The Secretary General had addressed the Spanish government for the first time on the matter in February, 1956, but did not receive a response until November, 1958 when it claimed not to possess any non-self-governing territory and stated that all its "possessions" in Africa were "Spanish provinces".

In 1956 Morocco gained its independence. Immediately on acquiring its new, independent state, the country made its intentions towards the Saharawi territory perfectly clear. The first occasion on which Morocco claimed its ambitions before the international community came on October 14, 1957 during the UN General Assembly Fourth Committee debates on decolonisation. On that date, the Moroccan representative expressed before the Committee the radical opposition of his government to the proposal that, in addition to Mauritania and Ifni, the Western Sahara territory be included in the list of non-self-governing territories, since all three "constitute an integral part of Moroccan territory". [9]

Not until 1960 did the Spanish delegation's representative declare before the United Nations the Spanish government's decision "to transmit information to the Secretary-General relating to the territories referred to in Chapter XI of the Charter", which was clearly supposed to recognise that Spain administered non-self-governing territories. Once again, the Moroccan delegation opposed the inclusion of the Western Sahara territory in the list of non-self-governing territories.

After several years of political games and pompous statements from both the Spanish and Moroccan governments, the adoption of Resolution 2229 (XXI) of December 20, 1966, brought in its wake endless proclamations from the General Assembly that Western Sahara is a territory which must be decolonised by way of a

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considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible".

[9] Since the sixties, various resolutions have addressed Ifni and the Sahara. Morocco intended for both territories to be analysed together. Nevertheless, in 1966 the United Nations granted them distinct judicial regimens: Ifni was considered to be a colony that affected the territorial integrity of Morocco and whose decolonisation called for the retrocession to Morocco. The Sahara, in contrast, was considered a

referendum of self-determination, hence, it does not form part of the "territorial integrity" of Morocco. The said resolution invites Spain "to determine, at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the governments of Morocco and Mauritania and any other interested party" (in clear reference to Algeria), "the procedures for the holding of a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination".

It was in 1974 when Spain announced its intention to carry out the long-awaited referendum. Even so, the year 1970 had produced an important landmark which is worth emphasizing. On December 14 of that year the United Nations General Assembly passed Resolution 2711 (XXV) which invited Spain to respect the resolutions of the General Assembly on the activities of foreign economic interests operating in "Spanish Sahara", and the rest of the States to abstain from making investments in the Territory in order to speed the process of self-determination. The importance of this resolution in the context of the decolonisation of Western Sahara should not go unmentioned. This was the first occasion on which the General Assembly expressly vindicated the necessity to safeguard the natural resources of the Saharawi territory, against the traditional attitude of abandonment of this issue by the Organization; an attitude to which it would return after the division of the territory between Morocco and Mauritania. Thus, Resolution 2711 (XXV) will be constructed on one of the first concrete contributions by the General Assembly in defence of the right to self-determination of the Western Sahara people, situating it furthermore, in the geopolitical context of the Maghreb, declaring that "the persistence of a colonial situation in the Territory delays the achievement of stability and harmony in the northeast region of Africa".[10]

As already mentioned, in August, 1974 Spain declared its intention to organise a referendum. A census was held that, even today, constitutes the fundamental basis for a solution to the political problem and the main bone of contention between Morocco and the POLISARIO Front.

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colonial problem that did not affect the territorial integrity of any State and whose decolonisation would necessitate a referendum of self-determination.

Morocco's answer was to move for a consultation before the International Court of Justice. According to Moroccan minister Slaui's declaration in New York on November 25, 1974 Spain had distorted the resolutions of the United Nations to obtain the "artificial" creation in "its" territory of a new State, whose nominal independence would do no more that conceal the perpetuation of the colonial regime. It had thus arrived at a "new situation" that imposed the suspension of the referendum requested by the United Nations and, therefore, the revision of the guidelines and criteria held within the resolutions of the UN General Assembly.

Resolution 3292 (XXIX), of December 13, 1974 set the Advisory Opinion of the International Court of Justice in motion, by requesting "without prejudice to the application of the principles embodied in General Assembly Resolution 151 (XV), to give an advisory opinion at an early date on the following questions:

I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?

   If the answer to the first question is in the negative,

II. What were the legal ties between this Territory and the Kingdom of Morocco and the Mauritanian entity?"

THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE OF OCTOBER 16, 1975

Regarding the first question, aimed to determine if the territory was or not *terra nullius* at the time of its colonization by Spain, the conclusion reached by the International Court of Justice was negative, based on the law in force at the time. According to this law, *terra nullius* was any territory that could be occupied because it had no owner or, in other words, because it was not inhabited by socially and politically organised populations.

[10] Juan Soroeta Liceras, *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional*, page 44.

The Court's decision was supported by two main arguments. Firstly, it considered the fact that at the time of Spain's colonisation the territory "was inhabited by peoples who, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them".

Secondly, it decided that when Spain colonised the territory, it was convinced that it was not an ownerless territory. In his Order of December, 1884 the King of Spain had proclaimed that he was taking Rio de Oro "under his protection" on the basis of agreements entered into with the chiefs "of the local independent tribes of this part of the coast". Furthermore, with respect to the Sakiet El Hamra territory, in its negotiations with France on the boundaries of the territory, "Spain has not tried to acquire sovereignty over a *terra nullius*".

In order to analyse the second question posed by the General Assembly, the court had first to consider how it should interpret the expression "existing judicial ties between the territory and the Kingdom of Morocco and the Mauritanian entity," used in Resolution 3292 (XXIX), and concluded that it must be understood as referring to "such legal ties as may affect the policy to be followed in the decolonisation of Western Sahara".

With respect to the existing relations between the Territory and the Kingdom of Morocco, the Court came to the conclusion that the evidence presented by the Kingdom, which in the opinion of the authorities must justify "its internal display of authority in the territory", "do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco. They do not show that Morocco displayed any effective and exclusive State activity in Western Sahara. They do, however, provide indications that a legal tie of allegiance existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory".

Given that at the time of the Territory's colonisation the State of Mauritania still did not exist, the International Court of Justice opted for the denomination "Mauritanian entity". The expression, used for the first time in 1974 during the General Assembly sessions which would conclude with the adoption of Resolution 3292 (XXIX), showed that at the time of the colonisation of the territory it did not have a collective personality

distinct from the several emirates or tribes which comprised it. In this sense, and although it recognised that the nomadic character of a great portion of the territory's population had, as a logical consequence, established certain legal ties between the tribes of Western Sahara and those that lived in the territories which today form part of the Islamic Republic of Mauritania, the Court rejects "that at the time of colonisation by Spain there did not exist between Western Sahara and the Mauritanian entity any tie of sovereignty or of allegiance of tribes, or of *simple inclusion* in the same legal entity".

A compilation of the principle conclusions of the Court in this ruling is given in its paragraph 162, which states the following: "The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, 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 General Assembly 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."

THE SITUATION AFTER THE "MADRID ACCORDS" OF NOVEMBER, 1975: FROM THE CONFLICT TO POST-CONFLICT AND THE SEARCH FOR A WAY OUT WITHIN THE UNITED NATIONS FRAMEWORK.

Morocco's first reaction when the Court's ruling was made public, whose content was obviously not at all to the liking of the Kingdom of Hassan II, was to invade the territory[11] through what is known as the "Green March"[12] which

[11] The United Nations Security Council reacted with a series of Resolutions (Resolution 377,379 and 380), in the last of these, adopted by consensus on November 6, 1975, for the first time and emphatically, "notes with regret" and "deplores" the holding of the Green March, calling upon Morocco to "withdraw immediately" from Western Sahara all the participants in the march. This was the last resolution that the

simultaneously brought the military onto the eastern border and a civilian protest onto the western border.

The impact of the refusal of the Security Council to accept the legitimacy of the occupation and the attitude of the World powers which permanently comprise it, forced Morocco to seek an alternative reaction. Thus Morocco's next attempt at obtaining judicial title over the territory came at the hands of the so-called "Madrid Accords". These blatantly illegal[13] pacts, entered into on November 14, 1975 less than a week after the death of the dictator, Franco, were an attempt to bring about by way of an international judicial instrument[14] the "transfer" of the territory's administration to a tripartite entity in which Morocco and Mauritania participated alongside Spain. This "transfer" operated only briefly (until February 26, 1976), after which the title expired (if, that is, it ever had legal-international validity at all[15]), converting the Moroccan and Mauritanian presence in the territory into purely factual.

It will come as no surprise that the practice of the United Nations has been to repeatedly deny the adaptation of the Madrid Accords to the law. In the first place, it still considers the Western Sahara problem as a decolonisation issue and, in fact, the Territory has been included in the list of non-self-governing territories and its situation is periodically discussed in the Decolonisation Committee of the General Assembly. In the second place, in connection with the above, the Organisation's official reports never

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Security Council would adopt in relation to Western Sahara until three years later when, through Resolution 621 (1988), the question of the referendum was revisited.

[12] Initially made known by Morocco as the Green March (green being the sacred colour of Islam), it was later rebaptized by the POLISARIO Front as the "Black March", in deference to the disastrous consequences it had on the Saharawi People. In this sense, Balta affirms that the parallel march held by the population of Western Sahara in its flight to Tindouf was attacked by the Moroccan air force, not only with traditional weaponry, but also with NAPALM (Balta, P: *Le Gran Maghreb, des indépendances à l'an 2000*, Ed. La Décourverte, París, 1990).

[13] See in this respect Professor Carlos Ruiz Miguel's article cited in the bibliography, "Los Acuerdos de Madrid, inmorales, ilegales y políticamente suicidas". In this work the author classifies the would-be international treaty as "one of the most infamous documents and with the most pernicious effects" in the entire history of Spain.

[14] The Madrid Accords, it should be recalled, violate not only international law but also the Spanish domestic law of the time, since they ignored the stipulation of the Parliamentary Law of 1942 that Parliament be informed of said treaty, which was not done. Further, given that the Madrid Accords were not even published in the Official State Bulletin, they also violate the Preamble to the Civil Code which requires that they are.

[15] It should be remembered here that, in accordance with article 77.1.c) of the United Nations Charter, Spain, as the administrative power, had only two options to relinquish its responsibility: either to proceed with the decolonisation, which could only be done through a referendum of self-determination, as the

refer to Morocco and Mauritania as administrators of Western Sahara (Mauritania alone until 1979, the end of the armed conflict between this country and the POLISARIO Front). Furthermore, several United Nations Resolutions speak of the "persistent occupation" of Western Sahara by Morocco, the equivalent of saying that this presence has no judicial authority, but is only supported by the consummate facts. A fourth and very relevant argument is the fact that up to now no State has formally recognised the legality of Morocco's occupation of the Western Sahara territory.

Spain's hasty withdrawal from the territory, in February, 1976 gave rise to a long and bloody war between the POLISARIO Front and Morocco and Mauritania, although in August, 1979 a peace agreement was reached with the Mauritanian authorities and the conflict continued with Morocco alone.[16] This is not the appropriate place to go into the military aspect of the confrontation. Notwithstanding, it can be understood that an open war which raged for fifteen years produced immense pain for countless Moroccan and Saharawi families. At the present time, in the Tindouf refugee camps, it is not easy to find a family which has not had one of its members become a direct victim of the arms used in the conflict. Not so different is the situation of many, many people on the other side of the sand wall, mines and barbed wire built by the Moroccan army in the mid-80s in an attempt to halt the incursions of the Saharawi forces. Indeed, this wall, regrettably still unknown to the civil society as a whole north of the Gibraltar Strait, is one of the primary reasons for the grave human rights situation which thrives in the region, as will be seen later.

Another dire consequence of the bloodshed during so many years was the reality of the prisoners of war. Conforming to the demands of international human rights organisations, the POLISARIO Front began a process of releasing Moroccan prisoners of war that would last for years, culminating in August, 2005, with the liberation of the last 404 prisoners. Organizations of solidarity with the Saharawi People from all around the world and various institutional organizations continue to demand reciprocity

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International Court of Justice took pains to point out, or to not decolonise but transfer the administration of the territory to the Trusteeship Council of the United Nations.

[16] Mauritania formally recognised the Saharawi Arab Democratic Republic in 1984. As a result of the peace agreement with Mauritania, Morocco responded in September, 1979 by extending its occupation to the territory evacuated by Mauritania, ending the division of the territory signed in April, 1976 between both countries. In Resolutions 3437/1979 and 3518/1980 the General Assembly of the United Nations

from Morocco, by publicly denouncing, in cooperation with the International Committee of the Red Cross, the plight of all disappeared Saharawis, including those disappeared during the military campaigns.[17]

After much procrastination between 1988[18] and 1990, the Settlement Plan presented by the Secretary-General finally received the full acceptance of Morocco and the POLISARIO Front and was given the final endorsement of the Security Council through Resolutions 658 (1990) and 690 (1991). It was not until April, 1991 that the Security Council authorised the dispatch to the territory of a United Nations Mission for the Referendum in Western Sahara (MINURSO). [19]

Since 1991 the bombs have given way to diplomacy. While in the military field the issue was at a complete standstill, there can be no doubt, that Morocco has been the one to take the most advantage of the political game. The impressive framework of legations and foreign affairs officials which the Kingdom has at its disposal has enabled it to engineer an intensive lobby around the Western Sahara to the point that the tension between "law" and "politics" can be appreciated more clearly in the Western Sahara conflict than in any other.[20]

Different political initiatives have been developed within the United Nations, some of which have been bluntly opposed by the POLISARIO Front, others by Morocco and still others rejected out of hand by both sides. Nevertheless, over time, as mentioned earlier, a pervading feeling of anxiety and frustration has been pushing the Western Sahara question off the political agenda of many countries. However, this has not prevented the actions of leading world powers such as the United States and the States of the European Union (the first more centred on the "global fight against

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condemned "vigorously the Moroccan military occupation and its extension into the zone evacuated by Mauritania".

[17] Resolution of the European Parliament on Human Rights in Western Sahara of October 27, 2005.

[18] On August 30, 1988 the United Nations Secretary-General, Javier Pérez de Cuellar, made the first step forward on obtaining from both parties in the conflict their, "initial acceptance" of a peace project to hold a referendum of self-determination in the territory.

[19] Since its establishment, the Secretary-General has usually presented two reports a year before the Security Council which report on the development of the work carried out by MINURSA. In the last document, of October 19, 2007 it was pointed out that the Mission has a task force of 227 people, among them military observers, police agents and other effectives.

[20] In this sense, Carlos Ruiz Miguel: "El largo camino jurídico y político hacia el Plan Baker II. ¿Estación de término?" 2005, cited in the bibliography.

terrorism" and the second more concerned with maintaining good trade relations with neighbouring Morocco, their sights set on the fishing agreements along the Saharawi coast in particular) from benefiting from a seemingly petrified political context in which unequal power relations are patent and ever more accentuated.

To that must be added the incomprehensibly irresponsible attitude of the successive Spanish governments, especially that headed by José Luis Rodríguez Zapatero, that have been unwilling to take on the great weight of historical responsibility which Spain surreptitiously tried to shake off thirty years ago. In reality the responsibility is greater now than then; with the settlement of the rules relating to free determination of the United Nations Charter, Spain still remains the "administrative power" of the Territory, a condition it never really lost in the view of international law.

A FIRST LOOK AT THE "HUMAN DIMENSION" OF THE CONFLICT. ATTENTION TO THE GRAVE SITUATION OF THE DISPLACED POPULATION IN TINDOUF REFUGEE CAMPS

The Moroccan occupation of the Territory produced the opening of the blackest chapter of the entire conflict and one of the bitterest faces of Saharawi social reality today and in the last thirty years. "The incursion of Moroccan forces provoked the exodus of 40,000 Saharawi civilians, the majority seniors, women and children (the men had joined the resistance), who fled from the cities and were the object of systematic bombardment by the Moroccan air forces in Umdreiga, Amgala and Tifariti in their exodus towards the interior of the desert in February 1976 with NAPALM, white phosphorous and fragmentation bombs, internationally banned arms. The International Federation of Human Rights (IFHR) denounced in February, 1976 that the Saharawi People was the victim of real political genocide at the hands of the Moroccan army. The repression was fierce according to information from the International Red Cross and Amnesty International."[21]

[21] Item One of the complaint filed before the Spanish National Court by a group of Saharawi citizens on September 14 2006 against the Moroccans responsible for the massive and systemic violations suffered by the population of Western Sahara since 1975 constituted by crimes such as genocide, illegal detention, torture and crimes against humanity. On October 29, 2007 the Magistrate-judge Baltazar Garzón of the

The massive exodus of such an important contingent of Saharawis gave rise to the improvised establishment of the Tindouf refugee camps in the desert of southern Algeria, where the government of the Saharawi Arab Democratic Republic has its headquarters approximately thirty kilometres from the Western Sahara border. Since the start of the occupation, the refugee population in the camps depends exclusively on outside help for its survival, mainly from the United Nations High Commissioner for Refugees (UNHCR), the World Food Program (WFP), the European Commission's Humanitarian Aid Office (ECHO) and state, regional and local governments mostly from the State of Spain through different associations and organizations.

It is difficult to know the exact number of displaced people in the camps; the different agencies of the United Nations that have moved around the area and the non-governmental organisations that have arrived have been unable to determine how many with any accuracy. The difficulty lies basically in the concurrence of the population that habitually resides in the camp with the Saharawi nomad population, a numerically important community which leaves the camps during the rainy season in search of pastureland for their livestock.

Since September 2005, according to the United Nations Secretary-General's report to the Security Council in October of that year,[22] the number of beneficiaries of humanitarian aid has risen to 90,000 people deemed to be the most vulnerable members of camp populations. However, humanitarian agencies have been forced to double their efforts and provide additional help that is normally insufficient delivering, for example, a further 35,000 food rations for refugees whose livelihoods were affected by the torrential rains of February, 2006,[23] or distributing supplementary rations to pregnant and lactating women and to malnourished children under the age of five to address the chronic malnutrition and anaemia.[24]

Central Instruction issued a ruling initiating a preliminary investigation in application of the principle of universal justice. The significance of this highly important judicial action will be returned to later.

[22] UN Index: S/2005/648, October 13, 2005, paragraph 11.

[23] Secretary-General's Report, UN index: S/2006/817, October 16, 2006, paragraph 32.

[24] Secretary-General's Report, UN index: S/2007/619, October 19, 2007, paragraph 39.

In spite of its gravity, the purpose of this report is not to analyse the humanitarian situation in the Tindouf refugee camps.[25] Notwithstanding, neither can it be forgotten that, as the Secretary-General recognises in his October, 2007 report, "The human dimension of the conflict, including the plight of the Western Sahara refugees, is a continuing concern". The document notes that "The humanitarian activities of the international community, led by UNHCR and the World Food Programme (WFP), on behalf of Western Saharan refugees continue to be conducted in a challenging environment. The food pipeline remains fragile and delays in shipping have caused disruption to food aid delivery. Cereals, which constitute 70 per cent of the current food basket, were not distributed in the month of July. In the coming six months, shortfalls of cereals, pulses and high energy biscuits are expected. The absence of secure food stocks since October 2006 continues to be a major concern."[26]

The report (supposedly kept secret but whose contents can now be easily accessed by Internet, as previously mentioned) of the investigating committee sent by the High Commissioner of the United Nations for Human Rights to both occupied Saharawi territory and the refugee camps brings little comfort. Indeed, it states that, "The refugees in the camps around Tindouf are lacking adequate housing, with most of them living in shacks made of brick or mud, have a precarious access to healthcare, have scarce access to food and water, all rationed, and lack the means to adequately educate their children."

Recently, the United Nations High Commissioner for Refugees (UNHCR) has publicly demanded of the international community the adoption of a serious commitment in relation to this constant humanitarian crisis. In a press release of October 16 last year,[27] UNHCR regretted the poor response from donors to the request for 3.5 million dollars made at the beginning of the year to enable them to continue the trust-building activities, including family visits, telephone services and seminars aimed at putting Saharawi refugee families in the Tindouf camps in contact with their relatives in the territory of Western Sahara.

[25] A rigorous study of the issue can be found in the work of Carlos Martín Beristain and Itziar Lozano, *Ni guerra ni paz. Desarrollo en el refugio. Esperanza y desafíos de la cooperación con el Sahara*, 2002, mentioned in the bibliography.
[26] Secretary-General's Report, UN index: S/2007/619, October 19, 2007, paragraphs 38 and 66.

The forced flight ("expulsion" would not be an exaggeration) of tens of thousands of Saharawis now thirty years ago was as a direct result of the occupation of the territory by forces of the Moroccan Kingdom. Since then, the situation in which the Saharawi refugees have been forced to survive has been more than regrettable. It is one of the cruellest facets of the conflict that wounds will not heal while this tense situation of neither peace nor war persists. Far beyond pointing the finger at those responsible, the international community must react without delay to attend to the needs of the victims of this flatly heartrending reality.

WHAT IS THE LEGAL STATUS OF WESTERN SAHARA TODAY?

On November 13, 2001, the president of the Security Council requested from the Under Secretary-General for Legal Affairs, Hans Corell, on behalf of the members of the Council a report on "the legality, in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and agreements concerning Western Sahara of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara".

Hans Corell's report[28] of January 29, 2002 is of capital importance since it is the first official document to address exclusively the legal status of the Territory since the Advisory Opinion of the International Court of Justice in 1975.

This document will be the object of discussion again later in relation to the exploitation of the natural resources of the Saharawi People. Nevertheless, it is worth mentioning here that the report recalls how "In a series of General Assembly resolutions on the Question of Spanish/Western Sahara, the applicability to the territory of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV), was reaffirmed" (paragraph 5). It also makes clear that "The Madrid Agreement did not transfer sovereignty over the territory, nor

[27] "UNHCR needs funds for two important operations: Western Sahara/Algeria and Repatriation to Mauritania", October 16, 2007.
[28] UN index: S/2002/161. Published document of February 12, 2002.

did it confer upon any of the signatories the status of an administering Power - a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as Non-Self-Governing Territory" (paragraph 6).

Apart from the content of this 2002 report, it seems timely to bring up the opinion held by an important number of academics and independent experts[29] who, on referring to the current situation in Western Sahara, would clearly have to agree that we are up against an authentic international crime, and that the principal outcome, therefore, must be the international responsibility of Morocco and Mauritania as well as Spain as the key actors in the delivery and later occupation and division of the Territory.

Finally, it should be recalled that the current situation of Western Sahara is that of a territory with a dual international legal nature: on one hand, it is a non-self-governing territory, according to Article 73 of the United Nations Charter,[30] and on the other, it is a military occupied territory, as a result of the Moroccan military occupation and, therefore, must be subject to the judicial parameters of the International Humanitarian Law and also, therefore, to the application of the Fourth Geneva Convention of 1949, regarding the protection of civilians during time of war,[31] an agreement to which Morocco has been party since 1957.

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[29] In this sense, for example, Juan Soroeta Liceras: *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional*, page 164; Julio González Campos, "Los acuerdos nulos de Madrid", *El País*, September 18, 1977.

[30] As recently reaffirmed by the United Nations General Assembly (Resolution 61/122, of January 15, 2007), "in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self government in terms of Chapter XI of the Charter of the United Nations, the administering Power concerned should continue to transmit information under Article 73 *e* of the Charter with respect to that Territory". According to this Resolution, it is evident that, although de facto is not so, legally Spain continues to be the territory's administrative power. In fact, the General Assembly has not adopted any decision that suggests otherwise.

[31] Article 146 of this convention, in its first paragraph, states that, "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article". And Article 147 classifies as "grave breaches" all those "involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

As already claimed by some experts of the reality of the conflict,[32] it would be fitting and timely for the international community, headed by the Security Council, to proceed to a formal and definitive classification of the Sahara as "occupied territory", an extreme that did not raise so many doubts in the cases of Palestine and East Timor.

Specific classification by the Security Council, while not a sine qua non condition for the application of Humanitarian Law, would, nevertheless, facilitate the invocation of said legislation and indicate at least a consensus of the actual situation and be an invaluable resource to call upon at any time, given that its legal content prohibits, among other extremes, the alteration of the human composition of an occupied territory and the appropriation of natural wealth.

The absence of its formal legal classification as occupied territory does not mean that the international community is unaware of the facts surrounding Western Sahara. If this were not military occupation, how could you explain the ceasefire and the deployment of MINURSO forces along the length of the "wall" to separate the two sides, or the relevant resolutions of the Peace Plan regarding the quartering of troops, or the Accords concerning the number of troops and their withdrawal?

This has been a very quick review of some of the issues which are considered key to a better understanding of the context and legal status of the territory in question. As mentioned on repeated occasions, the aim of this work is not to adopt a political stance in relation to the future of the Western Sahara territory, but a review of the fundamental vertices between which this conflict moves was inevitable. Having arrived at this point, it is now time to go into the matter in more depth, to embark on a conscientious and comprehensive analysis of the human rights situation in the Occupied Territories of Western Sahara.

[32] Felipe Briones Vives: "El derecho de autodeterminación del Pueblo Saharaui", mentioned in the bibliography.

THE REALITY OF HUMAN RIGHTS IN OCCUPIED TERRITORIES OF WESTERN SAHARA.
PATTERNS OF ABUSE AND THOSE MAINLY RESPONSIBLE

FREEDOM OF MOVEMENT RESTRICTIONS IN A MILITARY OCCUPIED TERRRITORY

One of many walls of shame.

Western Sahara is a territory under the military occupation of Morocco. In truth, it is a partially occupied territory. The main obstacle to freedom of movement is a wall. Barely visible from the air (and apparently nonexistent for the majority of European observers) it is camouflaged to the same colours as the desert sand and divides Western Sahara into the occupied zone and the "free" zone, where authorities of the Saharawi Arab Democratic Republic have their jurisdiction. It is the result of the central military action begun in June, 1982 and developed by the Moroccan Army during the armed conflict. Seriously harassed during the first years by the incursions of the POLISARIO Front, the castrating construction was a key element of the Moroccan war strategy.

Cutting through the Saharawi territory from north to south, the wall is actually a group of eight defensive walls approximately 2,500 kilometres in length (information sources differ as to the exact measure, even among official reports from within the United Nations, for example, some putting the length at 2,000 and others closer to 3,000 kilometres).

The wall is constructed of sand walls two and a half metres high and one and a half metres wide and stone walls two metres high and one and a half metres wide, with barbed wire in the defence zones of the Moroccan military companies. Similarly, scarps and counterscarps (ditches three metres wide and one deep to impede the advance of

tanks and other motorized vehicles) extend alongside the wall and minefields (a mix of antipersonnel and anti-handling devices), the corner stone of the defensive device, are planted to the front, back and sides of all the positions. In addition to the extensive infrastructure various kinds of radar of French-American origin are in operation and troops are deployed with sentry posts every two and a half kilometres. It is difficult to pinpoint the exact number of effectives mobilized in the area, but certain communications from the United Nations Mission (MINURSA) suggest that to the east of the wall or berm, that is, on the "Moroccan side" there are close to 120,000 soldiers, as opposed to around 12,000 on the other side.

The great number of mines planted around the wall converts the Saharawi population into one of the most threatened communities on the planet and is one of the United Nations Secretary-General's principle motives for concern, which he confirms in his reports. For certain, the job of dismantling the mines that threaten the daily lives of thousands of people has been a constant in MINURSO activity since the beginning of its mission in 1991. Nevertheless, although the Secretary-General has given progress reports every six months, in the last two to the Security Council on Western Sahara the Secretary-General admits that, "The abundant presence of mines and unexploded ordnance throughout Western Sahara, including areas where MINURSO military observers and logistical vehicles operate on a daily basis, is a cause of serious concern".[33]

The Secretary-General has announced that "Landmine Action", a non governmental organisation based in the United Kingdom, began a complete reconnaissance in August, 2006 to locate unexploded mines and explosive devices and clean up the areas to the east of the berm with the cooperation of the United Nations Mine Action Service and MINURSO. "This work continues and, as of 30 September 2007, Landmine Action had surveyed 49 designated dangerous areas and marked 267 spots indicating the presence of mines and unexploded ordnance, recovered 114 pieces of unexploded ordnance and mines from the field and carried out 177 demolition tasks.[34]" Add to this that, "As at 31 March 2007, Landmine Action had assisted the Frente Polisario with the destruction of stockpiles of 6,757 anti-personnel mines in line

[33] Reports of April 13 (S/2007/202, paragraph 21) and October 19 (S/2007/619, paragraph 29), 2007.
[34] Report of October 19, 2007 (S/2007/619, paragraph 33).

with the Geneva Call's "Deed of commitment" for non-State actors, which the Frente Polisario signed on 3 November 2005 (S/2006/249, para. 14). Landmine Action has also surveyed 78 designated dangerous areas and marked 112 spots indicating the presence of mines and unexploded ordnance in areas east of the berm.[35]"

The complicity between the "administrative power" and the "occupying power" in the supply of arms.

According to claims by Amnesty International, Greenpeace and Intermón Oxfam, Morocco is a regular destination for military and defence supplies exported from Spain. Morocco has appeared in all the official statistics on exports since 2000, especially in the "military terrain vehicles" category. In 2005, news that Spain would give some twenty old M-60 tanks to Morocco provoked significant political reactions and considerable media commotion. Still, to the regret of these three organizations, neither journalists nor delegates bothered to ask the successive Spanish governments to explain the multi-million euro exportation of military vehicles to Morocco. In 2002, the year of the diplomatic crisis between the two countries over the occupation of Perejil Island, Moroccan sales were in excess of six million euros. In 2005, the figure rose to over nine million euros and extended to sales from other product categories including "ammunition, devices and components," "bombs, torpedoes, rockets and missiles" and "aeroplanes."

The latest official data from the Executive to the General Courts states that during 2006 Spain sold arms worth upwards of 16 million euros to Morocco, although the government report provides details on only half of the sales, those said to be of "all-terrain vehicles for transportation," giving no further information on the rest of the products exported.[36]

Between 2002 and 2006 Morocco was the destination for arms and double-use vehicles with a value of more than 53 million euros including ammunition, devices and components; weapons with smooth bore cannons, 20 calibre or greater; bombs,

[35] Report of April 13, 2007 (S/2007/202, paragraph 25).

torpedoes, rockets, missiles; terrain vehicles; double-use products and technologies such as materials, chemical substances, micro-organisms and toxins, etc.

In their February, 2007 report *Comercio de armas en España: una ley con agujeros* (Arms Trade in Spain; a law with loopholes), Amnesty International, Greenpeace and Intermón Oxfam, in the section dedicated to foreign trade with the Kingdom of Morocco, voiced the following concerns: "Aside from the unresolved territorial contention in Western Sahara, a cause of tension in the region, Morocco continues to be criticised for grave violations to human rights and for the repression of Saharawi activists. Although in recent years progress has been made in some aspects relating to human rights, there continue to be complaints of grave violations to human rights by Moroccan security forces against immigrants, those seeking asylum and refugees. Considering all these elements, it can be affirmed that the criteria of the Code of Conduct of the European Union is being interpreted and applied with excessive flexibility.[37]"

According to official sources the increase in trade relations of all kinds has made Spain one of Morocco's leading customers, suppliers and investors, second only to France, with around 600 Spanish businesses operating in the country. The market share of Spanish companies in Morocco has risen from 7.9% in 1995 to 14.9% in 2004.[38] In the same year, Morocco was already Spain's eleventh customer, absorbing 1.4% of its exports and 5.3% of all Spanish foreign investments. If in 2002 Spanish investments in the industrial sector were assessed at 5.5 million euros, in 2005 those investments reached 60 million having tripled since 2004.[39]

Against this economic background to the bilateral relations between the two States, the Spanish president, José Luis Rodríguez Zapatero, in the common statement

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[36] "Las ONG piden al Senado que agilice el trámite y no rebaje el contenido de la Ley de Comercio de Armas. Amnistía Internacional, Fundació per la Pau, Greenpeace e Intermón Oxfam dan la bienvenida a la aprobación hoy en el pleno del Congreso del texto de la ley", press release, November 22, 2007.
[37] Amnesty International, Greenpeace and Intermón Oxfam, *Comercio de armas en España: una ley con agujeros. Recomendaciones al proyecto de ley sobre el comercio exterior de material de defensa y doble uso*, February, 2007, page 13.
[38] "Marruecos. Plan integral de desarrollo del mercado. Ejecución 2005. Programación 2006-2007", Secretary of State for Tourism and Trade – Ministry of Industry, Tourism and Trade.
[39] "Investissements espagnols : L'effet Zapatero", *L'économiste*, December 14, 2007. http://www.leconomiste.com/article.html?a=82723.

signed by the governments of Morocco and Spain in the VIII Summit Meeting held in Rabat in May, 2007 congratulated himself on the "solid and permanent commitment of the Kingdom of Morocco to the protection of human rights and for the concrete progress made in the consolidation of the Rule of Law."

Defenders of Saharawi human rights: a difficult and dangerous job.

The Preamble to the Moroccan constitution states: "Aware of the need of incorporating its work within the frame of the international organisations of which it has become an active and dynamic member, the Kingdom of Morocco fully adheres to the principles, rights and obligations arising from the charters of such organisations, as it reaffirms its determination to abide by the universally recognised human rights."

The United Nations General Assembly in December, 1998 adopted the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," also know as the "Declaration on the Defence of Human Rights.[40]" Article 1 of the Declaration introduces the corpus of specific rights acknowledged to defenders stating that "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels."

The Declaration describes the rights of defenders and the specific liberties and activities that are fundamental to their work. Among these are the right to know, seek, obtain and receive information about all human rights and fundamental freedoms, to participate in peaceful activities against violations of human rights and fundamental freedoms, to lodge complaints when governments do not comply with the rules of human rights and to offer suggestions for improvement. Through the adoption of this Declaration, public powers are forced to ensure that defenders of human rights can carry out their work of denunciation without interference, hindrance or fear of reprisals.

[40] Resolution 53/144, UN index: A/RES/53/144, March 8, 1999.

Nevertheless, reality is stubborn and a transparent demonstration of how Moroccan authorities sever the rights recognised for defenders of the International Law of Human Rights and constantly restrict the freedoms of expression, reunion and association. In November, 2005 the government blocked several Internet pages that defended the right to free determination of the Saharawi people and supported the POLISARIO Front. Many of these pages remained inaccessible within the territories until King Mohamed VI visited the zone in March, 2006.[41] According to information from Human Rights Watch, when a United Nations delegation consulted the Moroccan authorities they were told the censorship was a necessary measure to prevent attacks to the "territorial integrity" of the Kingdom.[42]

Human rights associations in Western Sahara are the habitual target of repressive actions by the Moroccan authorities.[43] To be specific, the Saharawi Section of the Forum for Truth and Justice (Forum Vérité et Justice), legally registered since 1999, was dissolved by judicial order in June, 2003 as a result of a legal suit. The lawsuit made reference to arguments such as "conspiring with international institutions and organisations hostile to Morocco, in order to endanger the diplomatic position of the Kingdom of Morocco," and "involvement in the diffusion of slogans against territorial integrity." According to the international organisation for the protection and promotion of the work of human rights defenders, Front Line, the dissolution of the Saharawi section of the Forum for Truth and Justice was triggered by its collaboration with international non governmental organisations and the United Nations to publicise evidence of human rights violations and its insistence that the right to free determination was a basic human right. On May 11, 2006 the Executive Committee of the Saharawi section of the Forum for Truth and Justice applied for a new licence under the same name and is still awaiting a response from the authorities.

Along the same lines, the Saharawi Association of Victims of Grave Human Rights Violations Committed by the Moroccan State (Association Sahraouie de

[41] U.S.A. Department of State, "Western Sahara, Country Reports on Human Rights Practices, 2006", March 6, 2007.
[42] Human Rights Watch, "Report 2007, Morocco and Western Sahara", January, 2007. Stated in the same way in the report of the United Nations High Commissioner for Human Rights of September, 2006 (paragraph 29).
[43] In this respect, see Front Line's report of its investigative mission to the Occupied Territories in May, 2006 and the High Commissioner's report (paragraphs 31-35).

Victimes de Violations Graves de Droits Humains Commisses par l'État Marocain) was unable to register as an association before governmental authorities. According to its members, the authorities repeatedly rejected the documentation and refused to issue a receipt, paralysing the entire administrative process.

In another example, the Moroccan Association of Human Rights (Association Marocaine des Droits Humains), despite being legally registered since 1997 (and constituted in Morocco in 1979), was forced to close its doors in 2003, since which time it has not received a further licence to pursue its activities.

Given the illegality of their organisations, many human rights defenders who continued to work despite not being registered have been persecuted for militancy within illegal organisations. Some officials of the Ministry of the Interior have even stated before the delegation of the High Commissioner for Human Rights that no licence would be given to any organisation if among its objectives were the questioning of Moroccan territorial integrity. Certainly, article 3 of the Dahir (Royal Decree) 1-58-376, of November 15, 1958 (modified in 1959 and 1973), on the right of association prohibits the registration of any organisation whose motives constitute an "attack on territorial integrity". In its report, the delegation of the High Commissioner questions whether these limitations can be considered in accordance with the admissible restrictions according to article 19 (freedom of expression) and 22 (freedom of association) of the International Covenant of Civil and Political Rights regarding the preservation of national security, public order, public health and morality.

Article 12 of the International Covenant of Civil and Political Rights of 1966, of which Morocco is a State party since 1979, regarding liberty of movement and reiterating article 13 of the Universal Declaration of 1948, states in the second item that "Everyone shall be free to leave any country, including his own," adding in the fourth item, "No one shall be arbitrarily deprived of the right to enter his own country".

The Human Rights Committee, created as a direct result of the International Covenant to ensure its implementation, has established its interpretation of the above rule in General Comment No. 27 of 1999.[44]

In it the Human Rights Committee affirms that "Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee."

The Committee recalls that, "Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. It is no justification for the State to claim that its national would be able to return to its territory without a passport."

Regarding the restrictions to the right of free movement authorised by the third item of article 12 of the Covenant, the Committee notes that, "States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. art. 5, para. 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution." It goes on to affirm that, "it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected." Followed by, "The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial

[44] UN index: CCPR/C/21/Rev.1/Add.9, November 2, 1999.

authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided."

Finally, referring to the meaning of the fourth paragraph of article 12, the Committee understands that, "In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."

In line with this position, in its latest Concluding Observations on the application of the International Covenant on Civil and Political Rights by Moroccan authorities, the Human Rights Committee stated, "The Committee is concerned that some representatives of non-governmental organizations had their passports confiscated and were thus prevented from attending a meeting of non-governmental organizations on the question of Western Sahara at the fifty-ninth session of the Commission on Human Rights in Geneva.[45]"

As reported by Front Line,[46] in recent years defenders of human rights have had their passports confiscated and as a result been unable to travel. One of them is Sidi Mohamed Dadach, an ex-political prisoner held for twenty-five years until 2001 and winner of the Rafto Prize for human rights in 2002. On March 23, 2003 as he prepared to travel to Geneva to participate in a session of the Human Rights Commission, he was arrested by Moroccan authorities at the airport who seized his passport and detained him

[45] Concluding Observations of the Human Rights Committee: Morocco, UN index: CCPR/CO/82/MAR, December 1, 2004, paragraph 18.
[46] Report of the investigative mission in the Occupied Territories in May, 2006. The delegation of the High Commissioner echoed this concern in its report (paragraph 36).

along with three other people. He was released some time later although his passport was not returned.

In the same year, 2003, a delegation of human rights defenders and family members of disappeared people also found it impossible to get to Geneva to take part in a meeting at United Nations headquarters. All had valid passports and visas for entry into Switzerland; these, along with the airline tickets, were seized by the Moroccan authorities.

Human rights defender Ali-Salem Tamek also reported to Front Line that the Moroccan government did not hand over his passport until 2004, and only then thanks to important international pressure.

In February, 2006 after suffering abuse at the hands of the police, Mami Amar Salem was abandoned by Moroccan security forces on the border that separates Western Sahara from Mauritania, in "No Man's Land". Moroccan officials immediately confiscated his identity papers and he has not been allowed entry into the Territory since. In exchange for permission to enter Mauritania, the Kingdom of Morocco authorities forced his family to return to the border and hand over all their personal documents. This is the first time that Morocco has stripped a Saharawi of his passport outside Western Sahara Territories.[47]

ARBITRARY DETENTIONS, TORTURE AND OTHER ABUSE, FORCED DISAPPEARANCES AND THE FIGHT AGAINST IMPUNITY

Defenders of Saharawi human rights: a difficult and dangerous job (Bis).

Article 7 of the International Covenant on Civil and Political Rights of 1966 is clear and mirrors article 5 of the 1948 Universal Declaration of Human Rights, in that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The prohibition described in article 7 is sealed by the positive order in

[47] "La lucha de un saharaui en tierra de nadie", *ABC*, July12, 2007. http://www.abc.es/hemeroteca/historico-12-07-2007/abc/Internacional/la-lucha-de-un-saharaui-en-tierra-de-nadie_1634195506672.html.

article 10.1, according to which "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule cannot be in any way dependent on the material resources available in the State party. The rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[48]

The text of article 7 does not allow any limitations. Even in exceptional situations such as those mentioned in article 4 of the Covenant ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed,") nothing authorises the suspension of the clause of article 7 and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.[49]

Article 7 must be interpreted in conjunction with article 2.3 of the Covenant, which establishes the obligation to provide effective resources to ensure the right to reparation to victims of violations to their rights recognised in the Covenant. Consequently, the right to file a complaint against the ill-treatments prohibited by article 7 must be acknowledged by the legal system of each State Party. Similarly, the complaints must be investigated promptly and independently by the competent authorities in order to enforce an effective remedy.[50]

It is also relevant here to bring up article 9 of the International Covenant which in its first paragraph recognises that, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as

[48] General Comments No. 21 of the Human Rights Committee, of April 10, 1992, relating to article 10 of the Covenant and which replaces the previous General Comments No.9, of 1982, paragraph 4.
[49] General Comments No. 20 of the Human Rights Committee, of March 10, 1992, relating to article 7 of the Covenant and which replaces the previous General Comments No.7, of 1982, paragraph 3.
[50] General Comments No. 20 of the Human Rights Committee, paragraph 14.

are established by law." Similarly, "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him," (paragraph 2). It goes on to say, in paragraph 3, 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement." Paragraph 4 refers to the well-known habeas corpus in that, "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Finally, in line with article 2.3 above, paragraph 5 establishes that, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

In addition to being a member State of the International Covenant on Civil and Political Rights, since 1993 Morocco has been part of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. Article 1.1 of said Convention understands "torture" as being any act, "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Article 2 of the Convention demands that each State Party take, "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction," (section 1) and insists that, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture," (section 2).

Similarly, in article 16 the Convention imposes obligations on the States in relation to "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." As a result, all forms of torture and other ill-treatments are expressly forbidden by International Law Ander all circumstances.

The reality of the torture and other cruel, inhuman and degrading treatment in Morocco and Western Sahara has been a constant cause for concern for human rights organs of the United Nations. To be exact, in its latest report on the Kingdom of Morocco and its internal application of the Convention against Torture,[51] the Committee against Torture has communicated its recommendations to the Moroccan authorities based on the following motives for concern: *a)* the non-existence of information on exceptional circumstances, and an order from a superior officer or a public authority as grounds for excluding criminal responsibility; *b)* the considerable extension of the time limit for police custody; *c)* the non-existence during the period of police custody, of guarantees of rapid and appropriate access to the assistance of a lawyer and a doctor, and to a relative; *d)* the increase in the number of arrests for political reasons, of the number of detainees in general, including political prisoners, and the increase in the number of allegations of torture and cruel, inhuman or degrading treatment, which implicate the National Surveillance Directorate; *e)* the lack of information about measures taken by the judicial, administrative and other authorities to act on complaints and undertake inquiries, indictments, proceedings and trials in respect of perpetrators of acts of torture, notably to victims of disappearance or arbitrary detention and their next of kin; *f)* the application to acts of torture of the prescription period provided for by ordinary law, which deprives victims of their imprescriptible right to initiate proceedings; *g)* the absence of a provision of criminal law prohibiting any statement obtained under torture from being invoked as evidence in any proceedings; *h)* the number of fatalities in prisons, and finally *i)* the overcrowding, and the allegation of beatings and violence between prisoners.

[51] Concluding Observation of the Committee Against Torture: Morocco, February 5,2004, UN index: CAT/C/CR/31.2, paragraph 5.

Along the same lines, the Human Rights Committee has shown in its latest report,[52] as in many previous statements, its concern "at the numerous allegations of torture and ill-treatment of detainees and at the fact that the officials who are guilty of such acts are generally liable to disciplinary action only, where any sanction exists." It also regrets, "that no independent inquiries are conducted in police stations and other places of detention in order to guarantee that no torture or ill-treatment takes place." The Committee then exhorts the Moroccan State to "ensure that complaints of torture and/or ill-treatment are examined promptly and independently. The conclusions of such examinations should be studied in depth by the relevant authorities so that those responsible can be not only disciplined but also punished under criminal law. All places of detention should be subject to independent inspection."

In the territories of Western Sahara it is the human rights defenders and political activists who are the main targets of violence from police authorities through illegal detentions, tortures and other abuse.

May, 2005 saw the rebellion that has been known from the outset as the "Saharawi Intifada". Although the date coincided with the 32nd anniversary of the beginning of the POLISARIO Front's armed struggle, what detonated the Western Sahara uprising was the transfer on May 21, 2005 of a Saharawi prisoner, Ahmed Haddi, from El Aaiún to Agadir 550 kilometres to the North in Morocco, along with complaints that he had been ill-treated. Ahmed Haddi had been imprisoned in 2003 for drug trafficking and insulting the monarchy, apparently based on a pre-trial confession reputedly obtained by torture, an allegation which was never investigated. According to claims by human rights organizations, when members of Haddi's family and local activists protested against the transfer, security forces dispersed them violently sparking a series of new protests over several days.

Between May 24 and 26, hundreds of demonstrators (between 300 and 1,300 depending on the source) took to the streets of El Aaiún to denounce what they considered undue police action and claim Western Sahara independence. During the following days, the disturbances spread to other cities in the Occupied Territories such

[52] Concluding Observations of the Human Rights Committee: Morocco, December 1, 2004, UN index: CCPR/CO/82/MAR, paragraph 14.

as Smara and Dakhla, and were accompanied by demonstrations by Saharawi students living in Moroccan cities including Agadir, Casablanca, Fes, Marrakech and Rabat.

Over a hundred civilians were arrested during the demonstrations or in relation to them. Around 90 were released without charges after being held for between several hours and several days; but some 25 were accused of criminal conspiracy, disruption of public order, damage to public property and other offences. Many of those detained claim to have been tortured or ill-treated, either to make them sign a confession, to dissuade them from continuing with the protests or as punishment for advocating Western Sahara's independence from Morocco. After the disturbances, Moroccan authorities prohibited a group of Spanish parliamentarians and other people from entering Western Sahara to investigate the facts.

Amnesty International[53] expressed its concern about the excessive use of force by Moroccan security personnel when dispersing the protestors. The human rights organisation indicated that it was vital to hold an urgent and rigorous investigation of the allegations of torture and ill-treatment and that any officials found to have ordered, used or condoned torture are identified and brought to justice. Amnesty International said it was also concerned by reports that local human rights defenders and journalists had been assaulted, harassed or intimated by officials, and in some cases briefly detained. It urged Moroccan authorities to look into the allegations and to respect the rights of local human rights defenders to report on what occurred.

According to the report submitted by the United Nations High Commissioner for Human Rights,[54] the violence used by security forces during the disturbances resulted in the death, on October 30, 2005 of Hamdi Lembarki, who had taken part in the pro-referendum demonstration in the streets of El Aaiún and died from his injuries in a hospital. According to eye-witnesses, several Moroccan police officers arrested him during the demonstration, took him to a nearby wall, surrounded him and repeatedly beat him with batons on the head and other parts of his body. Hamdi Lembarki was found unconscious on the ground by some people who drove him to the hospital where

[53] "Morocco / Western Sahara: Justice must begin with torture inquiries", Public Statement of June 22, 2005, index AI: MDE 29/003/2005.
[54] Report of the High Commissioner's Mission of May and June, 2006, paragraphs 14 and 15.

he died. An initial autopsy indicated that his death was the result of injuries to the skull. After a complaint was filed by Mr Lembarki's father an investigation was opened by the El Aaiún Court of Appeal. In addition, a second autopsy was ordered by the Office of the Public Prosecutor. At the time of the High Commissioner's report, September 2006, two police officers were in custody and had been charged with having inflicted injuries with a weapon and thereby "unintentionally" causing the death while acting in their capacity of public employees.

According to the claims made by the organisations and defenders of human rights, the authors of abuse have changed over recent years.[55] Today, it seems, cases of forced disappearance have ground to a halt but the torture and cruel, inhuman and degrading treatment is still the modus operandi of police officers in the Occupied Territories. The current strategy is to obtain as much information as possible in the shortest time. In general, illegal detention occurs through kidnapping. According to data from the Committee against Torture in Dakhla, one in five detainees is held in custody for 6 to 10 hours. The rest remain in the police station for a day or, in some cases, more than two days. About five per cent end up in jail. The rest are taken by vehicle to the farthest point from the city and thrown out. There are cases where police officials contact the health centres and forbid them to issue medical certificates accrediting the facts, occasionally going so far as to prevent staff from attending to the victims of torture and ill-treatment.

In addition, Moroccan authorities try to harass the families of human rights activists by breaking into and ransacking their homes and causing material damage, denying their rights before public administrations, making access to their place of employment difficult, etc., promoting a policy of fear from which it is hard to escape.

Existing information shows that the majority of arrests and acts of torture take place during Saharawi national festivals, on the anniversaries of the proclamation of the Saharawi Arab Democratic Republic or the insurgence of the POLISARIO Front, etc. It is also commonplace when detainees are about to be released from prison, before a festival or on the arrival or departure of delegations from international organisations.

[55] This information was taken from the interview with El Mami Amar Salem, president of the Saharawi Committee against Torture of Dakhla in Vitoria-Gasteiz in July, 2007.

A case in point is that of Gleina Burhah who, just two days after his testimony to Human Rights Watch during a visit to the territories, was brutally arrested and taken to the police station for taking part in an organised demonstration in El Aaiún on November 9, 2007 in defence of self determination and independence for the Saharawi people. Several other people were detained along with Gleina Burhah and according to reports many of them were subjected to torture and ill-treatment.[56] The arrival of the Human Rights Watch delegation coincided with the Moroccan regime's commemoration of the Green March on November 6. To mark the anniversary, protest demonstrations were organised in El Aaiún and other Western Sahara cities including Bojado and Smara, where Moroccan police responded by ransacking the homes of several families including those of Ali Latrach, Mohamed Salem Uld Hadi, Aluat and Haimedaha.[57]

According to claims by human rights activists, a series of dangerous circumstances has arisen throughout the year that has generated a change in the repressive police system. Firstly, many activists that had previously been pardoned were once again imprisoned. And secondly, cases are beginning to arise of torture and ill-treatment to women and children. Perhaps one of the bloodiest stories is that of Aminetu Bulha, a pregnant woman who lost her baby in a forced abortion.

Even more difficult, if that is possible, for Saharawi women.

The Saharawi woman has traditionally played a fundamental role in the development of the traditional Saharawi life, and still does today, both in the territories known as Western Sahara and in the refugee camps of Tindouf. Undoubtedly, this factor bears a direct relation to the way in which the human rights of many Saharawi women have been and still are the object of grave abuse.

[56] Collection of writings for a Free Sahara, "Detenciones en las ciudades ocupadas tras la visita de HRW. Detención de la familia del activista Luali Amaidan", November 11, 2007. http://poemariosahara.blogspot.com/2007/11/detenciones-en-las-ciudades-ocupadas.html.
[57] AFAPREDESA, "Detenidos y torturados durante la visita de Human Rights Watch", November 7, 2007. http://www.afapredesa.org/index.php?option=com_content&task=view&id=89&Itemid=2.

During more than thirty years of Moroccan occupation, cases of rape, beatings, arbitrary detention, humiliation and disappearance of Saharawi women activists in occupied Sahara have become commonplace. Regrettably, the barbarity continues.[58]

A chilling testimony of violence against Saharawi women is that of sisters Fatma and Mamia Salek, imprisoned for 16 years in Moroccan jails where they witnessed the torture and death of their parents. In the course of their detention they were moved to different prisons, suffered torture, beatings and all kinds of humiliation in inhuman conditions. When they were released the sisters were in an appalling condition and chronically ill. They lived for 9 more years in the occupied zones, where they continued to be persecuted and harassed. The Salek sisters finally fled in a small boat from Western Sahara to the Canary Islands in 1999.

The most recent cases of violence against women began in May, 2005 against the backdrop of the Saharawi Intifada. Women such as Fatma Ayach, Galia Djimi and Aminatou Haidar are outstanding human rights activists who were imprisoned in the 80s, their whereabouts unknown for years. Once released, they continued to be persecuted and threatened. When the peaceful resistance protests began in 2005 the Moroccan authorities had the women in their sights again and they were subsequently imprisoned once more.

Aminatou Haidar has achieved world acclaim. A prominent human rights activist and ex-disappeared, she was incarcerated in an unknown location from 1987 to 1991. In June, 2005 during a demonstration, she was beaten and gravely injured on the head by Moroccan police officers. She was placed under arrest in the hospital where she was receiving treatment and subsequently transferred to prison. A hunger strike during the several months of detention seriously endangered her health. A candidate for the Sakharov Prize for freedom of thought in December, 2005 while she was still imprisoned, she received the Juan María Bandrés Award for the defence of the right to asylum and solidarity with refugees from the Spanish Commission for Refugee Aid. More recently, she was awarded the 2007 Silver Rose Prize by the international NGO network, Solidar, for her work for human liberty and dignity.

[58] See: Conchi Moya, "Mujeres saharauis en las zonas ocupadas", November, 2007. http://www.umdraiga.com/lecturas_recomendadas/mujeressaharauis.htm.

One of the most recent cases of human rights violations against Saharawi women is that of the young student, 27-year-old Sultana Jaya. Sultana was an active participant in the student protests in Marrakech until, in a demonstration in May of 2007, she lost an eye. One of the police officers sent to suffocate the demonstration became enraged with Sultana and bludgeoned her right eye out of its socket with a truncheon. Accused of protesting with violence and spying for the POLISARIO Front, she was tried and condemned to eight months in prison which, after an appeal, was reduced to three, although thanks to a Swedish NGO's intervention she was able to leave the country and avoid serving the sentence.[59]

Since the beginning of the Saharawi Intifada in May, 2005 the university campuses of Agadir, Marrakech and Rabat (there are no universities in Western Sahara) have been the setting where many young Saharawi students have staged protests against human rights violations and pro self-determination.[60] For 21-year-old activist Rabab Amidane discrimination against Saharawi students in Moroccan universities is now worse than ever. She claims the police follow students wherever they go and even take note of those who do not show due respect for the Moroccan flag and national anthem. On November 9, 2007, when Rabab was in Norway after passing through Madrid and Lisbon, Moroccan police destroyed her family home in El Aaiún and detained all the family members, including her 14-year-old sister.[61]

A glance at the recent past. The fight against impunity for crimes committed during and after the armed conflict.

Paragraph 3 of article 2 of the International Covenant on Civil and Political Rights affirms that, "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been

[59] "Una mirada para Sultana", *El Periódico*, October 29, 2007. http://www.elperiodico.com/default.asp?idpublicacio_PK=46&idioma=CAS&idnoticia_PK=453956&idseccio_PK=1007&h.

[60] This situation was echoed in the paragraph relating to human rights in the United Nations Secretary-General's latest report to the Security Council, October 19, 2007, UN index: S/2007/619, paragraph 51.

[61] "Marruecos nos somete a un férreo control policial", *Periódico Diagonal*, November 28, 2007. http://www.diagonalperiodico.net/article4870.html.

committed by persons acting in an official capacity." It goes on to say that, "any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."

The Human Rights Committee addresses this in its General Comments No. 31[62] of October, 2004 and points out, "A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy." Furthermore, "where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[63]

In line with the above, as the Human Rights Committee affirms, "As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant." The obligations of the States, "arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance[64] (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations." The Committee

[62] General Comments No.31 of the Human Rights Committee, March 29, 2004, on the nature of the general legal obligation imposed on States parties to the Covenant, which replaces the previous General Comments No.3, of 1981, UN index: CCPR/C/21/Rev.1/Add.13, May 26, 2004, paragraphs 15-19.

[63] Special attention to the issue is given in the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", adopted by the General Assembly Resolution 60/147, UN index: A/RES/60/147, March 21, 2006, and previously by the Human Rights Commission in Resolution 2005/35, UN index: E/CN.4/RES/2005/35, April 20, 2005.

[64] The "forced disappearance", according to article 2 of the International Convention for the protection of all persons from forced disappearance, adopted by the General Assembly in December, 2006 through its Resolution 61/177 (UN index: A/RES/61/177, January 12, 2007), can be defined as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law". This international treaty, when it comes into force according to its article 39, will establish a series of obligations for States parties relating to the fight against impunity for the perpetrators of the crime of forced disappearance and reparation for the victims. Morocco has still not ratified this text, although it did sign it on February 6, 2007.

also refers to the Rome Statute of 1998 of the International Criminal Court, article 7 and recalls that, when committed, "as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity."

"Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20[65]) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable."

"The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations."

Especially relevant is the Committee's point that, "States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law." As a result, according to the Human Rights Committee's authentic interpretation of the International Covenant on Civil and Political Rights, all States Parties (of which Morocco is one) have the legal obligation to "assist each other" in bringing to justice those suspected of crimes such as torture and other ill-treatments, forced disappearance and extrajudicial execution.

In January, 2004 King Mohammed VI created the Equity and Reconciliation Commission to resounding international praise. The entity is constituted as what other

[65] "The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full

countries recognise as a truth commission and aims to investigate the grave violations to human rights committed between 1956 and 1999, particularly cases of forced disappearance and arbitrary detention. The Commission's mandate, however, expressly excludes the identification of those responsible for the human rights violations and the recommendation to open legal investigations.

The Equity and Reconciliation Commission concluded its work in November, 2005 and presented its report in which the number of victims of forced disappearance rose to 742, with a further 66 cases under ongoing investigation because they showed "elements apparently concurrent with forced disappearance". The Human Rights Advisory board, that is, the Moroccan advisory committee on human rights, established that by mid 2006 an exhaustive list of the cases of forced disappearance would be published. Up to now this list has not been published and no progress has been made on providing victims with effective access to justice and holding accountable those responsible for the crimes.[66]

Although reports from the United Nations Working Group on Enforced or Involuntary Disappearance in recent years have made reference to the disappearance of 248 people, mainly between 1972 and 1980 and linked in one way or another to the POLISARIO Front, information in their latest report,[67] shows that the number of outstanding cases has now dropped considerably to 97,[68] due to a large extent to information recently provided by the Moroccan government, undoubtedly as a result of investigations by the Equity and Reconciliation Committee.

The perpetrators of the forced disappearances of Western Sahara people by Moroccan agents under official mandate have still not been identified, tried and

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rehabilitation as may be possible.", General Comments No.20 of the Human Rights Committee, March 10, 1992, paragraph 15.

[66] Amnesty International Report 2007, "Morocco and Western Sahara", index AI: POL 10/001/2007.

[67] Report of the United Nations Working Group on Enforced of Involuntary Disappearance to the General Assembly, UN index: A/HRC/4/41, January 25, 2007, page 60, paragraphs 275-276.

[68] In spite of the time elapsed since the events, information still surfaces about mass graves which are found. Recently, for example, the Association of Disappeared Saharawis reported the discovery of five bodies in a grave in the vicinity of the infamous "Black Prison" where a still undetermined number of Saharawi prisoners were secretly detained between 1976 and 1978. This and other similar cases must be investigated with the strictest rigor. Source: Sahara Press Service, November 30, 2007, http://www.spsrasd.info/es/detail.php?id=274.

sanctioned,[69] a major cause for concern for the Human Rights Committee. Despite their report to that effect in 2004, as on previous occasions (in 1994 and 1999), the authorities of the Kingdom of Morocco have still not responded to their concerns.

In the quest for truth, justice and reparation for the victims of human rights violations, the respective functions of truth commissions and justice tribunals are not interchangeable and must not be confused. They are, instead, complementary. Truth commissions are not intended to replace civil, administrative or criminal tribunals. They cannot be a mechanism to substitute judicial procedures to establish individual criminal responsibility; decisions taken exclusively by political organs or administrative dependencies (in the case of government-created truth commissions, or, in this case, by the monarchy itself) are not in themselves an effective resource for victims of human rights violations as intended in article 2.3 of the International Covenant on Civil and Political Rights.

International Human Rights organisations have systematically stressed that the work of a truth commission must be backed up by judicial action. Examining the grave human rights violations committed in Chile during the military dictatorship, the United Nations Human Rights Committee affirmed that "The Committee welcomes the fact that the State party has taken steps, such as the establishment of the National Commission on Political Prisoners and Torture (CNPPT) in 2003, to ensure that victims of the human rights violations committed by Chile's military dictatorship receive compensation, but is concerned by the lack of official investigations to determine direct responsibility for the serious human rights violations committed during this period (articles 2, 6 and 7 of the Covenant)." It goes on, "The State party should see to it that serious human rights violations committed during the dictatorship do not go unpunished. Specifically, it should ensure that those suspected of being responsible for such acts are in fact prosecuted. Additional steps should be taken to establish individual responsibility.[70]"

[69] Human Rights Committee Concluding Observations: Morocco, December 1, 2004, UN index: CCPR/CO/82/MAR, paragraph 12.
[70] Human Rights Committee Concluding Observations: Chile, UN index: CCPR/C/CHL/CO/5, April 17, 2007, paragraph 9.

Similarly, the United Nations Committee against Torture in a reference to South Africa noted, "with appreciation the remarkable work of the Truth and Reconciliation Commission and its role in the peaceful transition," but went on to make the following recommendation: "The State party should consider bringing to justice persons responsible for the institutionalization of torture as an instrument of oppression to perpetuate apartheid and grant adequate compensation to all victims. The State party should also consider other methods of accountability for acts of torture committed under the apartheid regime, and thus combat impunity.[71]"

The Truth and Reconciliation Committee of Sierra Leone also recognised that other institutions could more effectively address the third component of the fight against impunity together with the right to truth and the right to reparation, that is, the right to justice: "Just as the Commission may address the 'right to truth' component of the struggle against impunity better than the Special Court for Sierra Leone, the contrary may be the case with respect to the 'right to justice' component.[72]"

Aware of this, Amnesty International has demanded that Moroccan authorities ensure that all investigations into cases of forced disappearance are duly conducted and that all perpetrators of human rights violations are identified and brought to justice. The international human rights organisation also demands that all those suspected of being responsible for grave human rights violations should be suspended, pending prosecution.[73]

Seeking to satisfy the principle of justice in finding those responsible for the systematic human rights violations suffered by the Western Sahara population, on September 14, 2006 a group of Saharawi citizens filed a complaint before the Audiencia Nacional (National Court of Spain) against 31 Moroccans for the crimes of genocide, illegal detention, torture and crimes against humanity for the disappearance of 542 Saharawis from the beginning of the Moroccan occupation at the end of 1975 when

[71] Committee Against Torture Concluding Observations: South Africa, UN index: CAT/C/ZAF/CO/1, December 7, 2006, paragraph 18.
[72] Truth and Reconciliation Commission of Sierra Leone, *Witness to Truth*, 2004, vol. 1, pages 44-45, paragraph 81.
[73] Amnesty International submission on Morocco for the United Nations Human Rights Council Universal Periodic Review, November, 2007, index AI: MDE 29/012/2007, page 3.

Spain withdrew from the territory and left it at the mercy of Hassan II, father of the current monarch.

The complaint was presented before the National Assembly grounded on the principle of universal jurisdiction, pursuant to article 23.4.a) of the Organic Law of the Judicial Branch with reference to the crime of genocide, which establishes with respect to absolute genocide the intervention of Spanish jurisdiction in acts committed by Spaniards or foreigners outside national territory whatever the nationality of the suspected perpetrator or the victim. The criminal must not have already been absolved, pardoned or charged abroad.

In light of the total inactivity of the Moroccan Ministry of Justice concerning the complaints, Spanish jurisdiction must intervene by applying the complementarity principle, now ratified in the Statute of the International Criminal Court, in order to avoid a judicial vacuum. According to the jurisprudence of the Supreme Court, "for the complaint to be admissible, the requirements, in this matter, are the same as those in relation to acts supposedly constitutive of a universal crime, the provision of serious and reasonable evidence that the alleged crimes have not been prosecuted effectively to date by territorial jurisdiction," (Supreme Court Decision 1362/2004, November 15, Scilingo case). In a very similar case, the Spanish Supreme Court's celebrated Decision 237/2005, September 26, on the Guatemala genocide case indicated that the requirements must be limited to the provision, "by official communication or by the claimant, of serious and reasonable evidence of judicial inactivity accrediting unwillingness or inability to effectively prosecute the crimes".

In the same important Decision, the Constitutional Court affirmed that the principle of universal jurisdiction is the manifestation, "not only of a commitment, but also of a shared interest among all the States, whose legitimacy, as a result, does not depend on the particular ulterior interests of each. In the same way, the conception of universal jurisdiction, in current International Law is not configured around connections grounded in particular State interests," as article 23.4 of the Organic Law of the Judicial Branch shows.

However, as the complaint itself maintains, (Legal Foundation IV), this does not prevent pointing out that there are circumstances in the allegations which legitimise the intervention of the Spanish courts even more. For one thing, as mentioned previously, Western Sahara is a non-self-governing territory of which Spain is the administrative authority although it withdrew from the territory in February, 1976. For another, it should be remembered that, in virtue of Law 40/1975 of November 19 on Decolonisation, and Decree 2258/1976 of August 10 on the option of Spanish nationality for Saharawi naturals, an important number of the victims of the alleged crimes are of Spanish nationality. It is the victims, therefore, who deserve a more intense protection from Spanish jurisdiction for the existence of what Spanish jurisprudence has classified as, "a nexus with national interest". In this respect, the recognition of Spanish jurisdiction to try these crimes would comply with the ruling addressed in the Preamble to the Spanish Constitution of 1978, through which public powers are called upon to, "protect all Spaniards and Spanish peoples in the exercise of human rights".

After the rectification of some procedural deficiencies by the complainants and having better defined some of the charges allocated to each of the defendants and their participation in the allegations, and having received the favourable report from the Prosecutor's Office, on October 29, 2007 the Magistrate-Judge of the Central Examining Court No.5, Baltasar Garzón Real, made a decision to accept the competence to judge the claims against thirteen individuals presumed responsible for crimes of genocide and torture, and initiated prior proceedings to that end.

In the inquiry opened by Judge Garzón figures General Hosni Bensliman, 72, chief of the Gendarrmerie Royale since 1985 and one of the pillars of the Moroccan regime. In fact, he is the only high level security official named by Hassan II who continues to hold his position with Mohammed VI. The list put together in Judge Garzón's court order includes retired high level officials (such as Abdelhafid Ben Hachem, ex director of National Security) but also one who remains in active service (Hariz El Arbi, Police Commissioner of Dakhla).

The case of Hosni Bensliman is particularly remarkable considering that when the King and Queen of Spain made a State visit to Morocco in January, 2005, the

Spanish Council of Ministers awarded him the Grand Cross of the Order of Isabella the Catholic.

As already pointed out, according to the International Law of Human Rights, Moroccan authorities are required to collaborate with Judge Baltasar Garzón in seeking the attribution of individual responsibilities and in the fight against impunity. It is unlikely, judging by the angry reactions emanating from Rabat, that either the Judicial Power, much less the Moroccan Executive will deign to collaborate with Spanish justice in this case, or that we will see images of the arrest of Hosni Bensliman. At least from now on neither he nor any of the twelve others accused will be able to travel to Spanish soil or any other European country. We must wait expectantly to see how the judicial process develops, but one thing is certain, it constitutes an authentic leap forward against impunity and injustice. In the words of Martin Luther King, injustice anywhere, is a threat to justice everywhere.

OMISSION OF PROCEDURAL GUARANTEES AND VIOLATION OF THE RIGHT TO DUE PROCESS.

Article 14 of the International Covenant on Civil and Political Rights, interpreted according to the Human Rights Committee's General Comments No.13 of April, 1984 addresses the guarantees inherent in the right to due process. Among the rights and principles provided in the rule are equality before the courts and tribunals, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, the principle of publicity of hearings, the principle of presumption of innocence, the right to be informed of the charges alleged, the right to be tried without undue delay, the right either to defend himself in person or to be assisted by counsel of his own choosing and, where necessary, the assistance of an interpreter free of any charge, the right to provide proof and exculpatory evidence and to not testify against himself, the right to have any conviction and sentence reviewed by a higher

court, the right to compensation in the event of a miscarriage of justice and, finally, the *non bis in idem* principle of not being tried twice for the same criminal act.[74]

In its Concluding Observations on Morocco in December, 2004, the Human Rights Committee expressed concern that detainees in territories under Moroccan jurisdiction can only obtain the services of a lawyer from the time at which their custody is extended (that is, usually after 48 hours or 72 if they appear before the Prosecutor's Office and up to 96 hours when the crime is "against the State's internal or external security," commonly attributed to Saharawi activists). The Committee recalls in the report its own jurisprudence in which, particularly in matters where the defendant may incur the death penalty (although the last known execution in Morocco was in 1993, the death sentence is still a criminal sanction applicable under internal legislation[75]), the detainee should receive effective assistance from a lawyer at every stage of the proceedings. Similarly, the Committee insisted on its repeatedly expressed concern that the independence of the Moroccan judiciary is not fully guaranteed.[76]

It is surprising, then, that in its response to the Committee's report, the Moroccan government finds justification in that, "the legislator (article 66 of the Code of Criminal Procedure) only authorises the lawyer to communicate with his client after the beginning of the extension of the preventive detention in order to preserve the confidentiality of the investigation, the investigative techniques and the evidence necessary to present the facts.[77]" The complete opposition of this idea to international parameters on the protection of the right to due process does not seem to worry Moroccan authorities. The absence of legal assistance from when the charges are first made (that is, from the beginning of the period of police custody) constitutes an

[74] Valuable information regarding the finer details of the guarantees of the judicial process in accordance with the guidelines of the International Law on Human Rights can be found in the Amnesty International manual *Fair Trials*, published in 1998, index AI: POL 30/02/98/s.

[75] Morocco, after adopting a consciously oppositional stance to the international moratorium on the death penalty in the commission relating to the latest session of the United Nations General Assembly, finally abstained from voting in the plenary of December 18. See in this respect: "Pena de muerte en Marruecos: conformismo y apatía", by Abderrahim El Ouani, December 8, 2007, http://www.rebelion.org/noticia.php?id=60168.

[76] Concluding Observations of the Human Rights Committee: Morocco, December 1, 200, index: CCPR/CO/82/MAR, paragraphs 16 and 19.

[77] Response of the Government of Morocco to the Concluding Observations of the Human Rights Committee, February 28, 2005, UN index: CCPR/CO/82/MAR/Add.1, page 3.

authentic breach of the most elemental procedural guarantees and of the right to defence itself.

For the past several years, the General Council of Spanish Bar Associations (CGAE) along with some Bar Associations (mainly those of Badajoz and Barcelona), have followed the example of entities from Italy, France and Switzerland and also Amnesty International[78] who, since the onset of the Intifada in May, 2005 have sent international observation missions to El Aaiún in order to verify, on-site, that the right to due process and the correct administration of justice is upheld in diverse criminal proceedings against Saharawi prisoners.[79] The investigations coincide in their assessment that, in reality, the inadequacies of the Moroccan judicial system, especially when it comes to trying Saharawi people, are structural and not mere occasional deficiencies.

According to claims by Saharawi activists many courts when prosecuting detainees from Western Sahara and in the knowledge that international observers will be present at the hearing will often postpone the trial date to make it difficult for the visitors to attend.[80] Nevertheless, expert jurists who have been able to attend the entire oral phase of the trial have witnessed serious demonstrations of aggression to the right to due process: the lack of evidentiary motions both in the admission of evidence against the accused and the denial of the validity of exculpatory evidence; the undue extension of detention in police stations with little or no guarantee of protection against ill-treatment[81]; the interference and pressure of other public powers of the State outside

[78] Amnesty International published in November, 2005 a monographic report on judicial procedures against these activists and some others. See *Morocco / Western Sahara: Saharawi human rights defenders under attack*, November 24, 2005. These public statements can also be consulted: "Morocco / Western Sahara: human rights defenders on trial," November 28, 2005, index AI: MDE 29/009/2005, and "Morocco / Western Sahara: human rights defenders jailed after questionable trial," December 15, 2005, index AI: MDE 29/010/2005.

[79] In this respect, see the "Informe sobre el juicio celebrado en El Aaiún (Sahara Occidental) el 24 de abril de 2002", by Cristina Navarro and José Manuel de la Fuente Serrano, published in *El Vuelo de Ícaro: Revista de Derechos Humanos, crítica política y análisis de la economía*, nº 4, 2003, and the Spanish General Council of the Judiciary's report on this issue from 2003 and 2005, all cited in the bibliography.

[80] Interview with El Mami Amar Salem, President of the Saharawi Committee Against Torture of Dakhla, in Vitoria-Gasteiz in July, 2007. This same assessment was taken by various lawyers before the delegation of the United Nations High Commissioner for Human Rights (Report of the High Commissioner, September, 2006, paragraph 22).

[81] The delegation of independent jurists of the General Council of the Judiciary regretted, in 2003, that they were unable to visit the Saharawi prisoners incarcerated in the Lajal Prison in the city of El Aaiún (also sadly known as the "Black Jail"), due to the inordinate amount of bureaucratic red tape imposed on them by the authorities.

the legal stratum; the "conscious and active" omission of the right of the accused to the investigation of torture, despite "obvious and flagrant signs of the detainees having suffered torture by members of the security forces, and in spite of the accused and their defenders having reiterated this in the instruction phase and in the plenary phase," the court going so far as to prevent that "the records state the identification of the authors of the torture, thereby avoiding their investigation and prosecution."

Similarly, the mission of the Office of the United Nations High Commissioner for Human Rights, based on their observations during a visit to the area in May and June, 2006, stated their concerns about the existence of serious deficiencies with regard to securing the right to a fair trial.[82]

These conclusions, along with many others drawn in the reports mentioned, provide a more than sufficient argument for the judicial proceedings which were observed to be considered unfair and, therefore, deemed *void ab initio*.

One of the trials most closely followed by observers from the Spanish General Council of the Judiciary was that of seven human rights defenders who were arrested between June and August, 2005 and brought to trial on charges related to participation or incitation during the demonstrations which marked the outbreak of the Intifada. These were Aminatou Haidar, Ali-Salem Tamek, Mohamed El-Moutaouakil, Houssein Lidri, Brahim Noumria, Larbi Messaoud and H'mad Hammad. Some of those detained were not in the Occupied Territories at the time of the protests and Ali-Salem Tamek was arrested on his return from Europe where he had given conferences on the human rights situation in Western Sahara.

An eighth human rights defender, Brahim Dahane, was arrested on October 30, 2005, apparently as a result of activities in response to the detention of the other defenders. He was accused of inciting or directly participating in violent acts, and

[82] Mission report of the Office of the United Nations High Commissioner for Human Rights, September, 2006, paragraphs 20-26.

forming part of an unauthorised association, the Saharawi Association of Victims of Grave Human Rights, of which he is the president.[83]

The first seven defenders, together with seven other activists, were convicted by the Appeals Court of El Aaiún on December 14, 2005, in a process riddled with irregularities. Aminatou Haidar was sentenced to seven months in prison, Ali-Salem Tamek to eight, a term which was later stretched to ten months, Mohamed El-Moutaoakil, Houssein Lidri, Brahim Noumria and Larbi Messaoud to ten months each, and H'mad Hammad to two years.

Five of the seven defenders, Mohamed El-Moutaouakil, Houssein Lidri, Brahim Noumria, Larbi Messaoud y H'mad Hammad, were released by royal pardon on March 25, 2006 on the occasion of a visit of King Mohammed VI to the Occupied Territories. Aminatou Haidar was released in January, 2006 after completing her seven month prison sentence.

Ali-Salem Tamek and Brahim Dahane were released on April 22 of the same year following a second royal pardon. As a result, the proceedings against Brahim Dahane and another sixteen detainees, scheduled for April 25, were cancelled.[84]

In another case, on March 6, 2007 Brahim Sabbar and Ahmed Sbai, both members of the Saharawi Association of Victims of Grave Human Rights Violations Committed by the Moroccan State, were found guilty of inciting violent protest activities and belonging to an unauthorised association. The court sentenced them to one year in prison to be added in Brahim Sabbar's case to the two years he received on June 27, 2006 and confirmed the following month in a trial full of irregularities for presumably assaulting and disobeying a police officer.

The trial against Brahim Sabbar and Ahmed Sbai lasted less than an hour and the defendants refused to answer questions in protest over the charges brought against them. The defence lawyers had previously withdrawn from the case protesting that the

[83] See Amnesty International's public statement on just this case: "Morocco / Western Sahara: Saharawi human rights defender on trial," April 3, 2006, index AI: MDE 29/007/2006.
[84] Report of the mission to Western Sahara of the international organisation Front Line in May, 2006.

authorities dismissed their request to investigate the presumed ill-treatment inflicted on the defendants while being transferred between the court and the prison and during a prisoners' protest at the jail.

On May 22, 2007 a court of appeal extended the March sentences of Brahim Sabbar and Ahmed Sbai to eighteen months. At the hearing, and in a courtroom filled with security forces, Brahim Sabbar broke his silence to respond to a question put by the court, stating: "I am a human rights activist. I have incited the Saharawi people to defend their rights peacefully."

Both Brahim Sabbar and Ahmed Sbai were brought before another court on October 8 last year for "offending the judges" by chanting slogans in defence of Saharawi self-determination during a previous hearing. In light of this they may be facing an additional sentence of one year and a heavy fine. Both activists, along with three other Saharawis charged with the same offence, were expelled from the courtroom by order of the court president because they continued to claim the right to self-determination for the Saharawi people and expressed their support for the POLISARIO Front. Awaiting judgment, Amnesty International considers Brahim Sabbar and Ahmed Sbai prisoners of conscience since they are imprisoned for carrying out peaceful activities in defence of human rights and the right to free determination of the Saharawi people.[85]

ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE PLUNDERING OF WESTERN SAHARA'S NATURAL RESOURCES

Economic, social and cultural rights and the right to development in the Saharawi case.

"Illiteracy is becoming more widespread, progress is not uniform or harmonious, and there is still gender inequity and great differences in development levels in different

[85] Public statements "Morocco / Western Sahara: stop the judicial harassment of Saharawi human rights defenders," February 5, 2007, index AI: MDE 29/003/2007, "Morocco / Western Sahara: Saharawi human rights defenders sentenced to a year in prison," March 8, 2007, index AI: MDE 29/004/2007, and "Morocco / Western Sahara: Saharawi human rights defenders face yet another prison sentence," October 11, 2007, index AI: MDE 29/011/2007.

regions. In 2006, the UNDP Human Development Report ranked Morocco at 123rd in the world,[86] which is very low. The reforms have still made hardly any visible impact on conditions of life in the country, and the greatest challenge facing the administration is to improve the governance of these social programmes.[87]" This is the global vision of Morocco presented in the 2007 Report of the conglomerate of international organisations, Social Watch, whose chapter on Morocco takes the title "Social protection hampered by bad governance."

Since 1979 Morocco has been a party to the International Covenant on Economic, Social and Cultural Rights and, therefore, must adhere to article 2 of the Covenant by undertaking to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." The second paragraph of the same article points out that, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The international norms on economic, social and cultural rights, although universally applicable, take into account the different resources available to each State. They concede that the full realisation of these rights can only be reached progressively through time, when sufficient human, technical and economic resources among other means are made available through international cooperation and assistance, such as development aid.[88]

It should be taken into account that in addition to the obligation to achieve progressive realisation, the States have various immediate obligations relating to economic, social and cultural rights which do not depend on the availability of

[86] In the Human Development Report of 2007 of the United Nations Development Program, published at the end of November, Morocco descended to 126th place.
[87] Social Watch: *Report 2007. In Dignity and Rights*, chapter relating to Morocco, page 190.
[88] Amnesty International: *Human rights for human dignity. A primer on economic, social and cultural rights*, 2005, index AI: POL 34/009/2005, page 40.

resources.[89] In the first place, the obligation to "take steps" is an immediate one. The concept of progressive realisation of rights does not justify the inactivity of governments because the country has not reached a certain level of economic development. States which cite circumstances beyond their control to justify measures which imply a reduction in the exercise of rights must demonstrate that they have been unable to avoid the negative impact of that right. Another immediate obligation of the State is to give priority to "minimum obligations," that is, those necessary to ensure the minimum essential levels of each of the rights.[90] In the third place, it should not be forgotten that the right to non-discrimination is an immediate obligation. Equally, the obligation to give priority to the most vulnerable is an obligation of principle.

A fundamental question in relation to the guidance behind the economic, social and cultural rights is that of justiciability. José Bengoa, who was a member of the United Nations Sub-Commission for the Promotion and Protection of Human Rights, has defined justiciability as "the process whereby the rights established in International Covenants on Human Rights and other instruments may effectively be claimed in courts of justice and public bodies and justice may be administered as in the case of any other right that has been violated.[91]"

The United Nations Committee on Economic, Social and Cultural Rights, the organ responsible for monitoring the implementation of the International Covenant of 1966 and for its authentic interpretation in what are known as the "General Comments," has not taken an emphatic position regarding an eventual right of the individual to demand the respect of his or her economic, social and cultural rights through internal jurisdictional resources. It has, however, made some key points: "The International Covenant on Economic, Social and Cultural Rights contains no direct counterpart to article 2, paragraph 3 (b), of the International Covenant on Civil and Political Rights,

[89] Committee of Economic, Social and Cultural Rights, General Comments Nº 3, The nature of States parties obligations, 1990, UN index: E/1991/23, paragraphs 9-12.
[90] Thus, "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant." Committee of Economic, Social and Cultural Rights: General Comments Nº 3, The nature of States parties obligations, 1990, UN index: E/1991/23, paragraph 10.
[91] José Bengoa, "Final report on the relationship between the enjoyment of human rights in particular economic, social and cultural rights, and income distribution." June, 1997, UN index: E/CN.4/Sub.2/1997/9, paragraph 82.

which obligates States parties to, inter alia, "develop the possibilities of judicial remedy". Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies." In addition, the Committee on Economic, Social and Cultural Rights has warned that while the Covenant does not stipulate the specific means by which it is to be implemented in the national legal order, there is no provision obligating its comprehensive incorporation into national law, or according it any specific type of status. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, "the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant."

The Committee is aware that in the majority of the States parties the courts are still a long way from looking to the Covenant as a regulatory source of acknowledgment of rights.[92] It notes, therefore, that, "Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.[93]"

[92] In order to bring new, objective elements to the open debate within the Working Group on the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights, the Secretary-General of the United Nations produced, in November, 2004 a selection of interesting legal cases which reflect a range of economic, social and cultural rights. Secretary-General of the United Nations, "Selection of case law on economic, social and cultural rights," UN index: E/CN.4/2005/WG.23/CRP.1.

[93] Committee for Economic, Social and Cultural Rights, General Comments No. 9: The domestic application of the Covenant, 1998, UN index: E/1999/22, paragraphs 3, 5 and 14.

Similarly, the Committee also, "notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.[94]"

The Committee on Economic, Social and Cultural Rights,[95] emphasizes the principles outlined in articles 55 and 56 of the Charter of the United Nations and draws a close link between the obligation to achieve the realisation[96] of economic, social and cultural rights and the acknowledgment of the right to development by referring to international cooperation as a complementary obligation for all States parties for the maximum realisation of economic, social and cultural rights. The Committee points out that the obligation to cooperate in the development of the peoples, "is particularly incumbent upon those States which are in a position to assist others in this regard." Similarly, the Committee, "notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a

[94] Committee on Economic, Social and Cultural Rights, General Comments No.3: The nature of States parties obligations, 1990, UN index: E/1991/23, paragraph 5.

[95] Committee on Economic, Social and Cultural Rights, General Comments No.3: The nature of States parties obligations, 1990, UN index: E/1991/23, paragraphs 13 and 14.

[96] As calmly understood by conventional human rights organs of the United Nations and other international organisations as well as the great majority of the doctrine encompassed in the topic, the realisation of human rights calls for the observance of a three-fold obligation: to respect, understood as not interfering with the exercise of the right; to protect, that is, ensure that others do not interfere, mainly by way of regulations and effective legal remedies; and to implement, that is, among other activities, promoting rights, facilitating access to rights and ensuring the exercise of rights to those who are unable to do so for themselves.

position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries."

The above-mentioned Declaration on the Right to Development defines this right as, "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."

The right to development is conceptualised as fundamental to the set of collective rights of the people.[97] The General Assembly has produced a relevant legal corpus directly relating due respect for the right to free determination of peoples under colonial rule to the right to development of those same people. Thus, after several years of repeated acknowledgment of the sovereignty of peoples under colonial power over their natural resources,[98] the United Nations General Assembly, in Resolution 50/33, of December 6, 1995 established a distinction between economic activities that are detrimental to the peoples of non-self-governing territories and those activities undertaken to their benefit. In the second paragraph of the Resolution, the Assembly affirms, "the value of foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories."

The principle of "permanent sovereignty over natural resources," understood as the right to the peoples to use and dispose of the natural resources in their territories in the interest of development and the common good, was established by the General Assembly in its Resolution 1803 (XVII), of December 13, 1962. It was later reaffirmed

[97] It must be stated that the right to development enjoys specific acknowledgement in the basic regulatory text on human rights of the African regional system, the African Charter on Human and Peoples' Rights of 1981, "Banjul Charter", in which article 22.1 affirms that, "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

[98] "… the exploitation and plundering of the marine and other natural resources of colonial and Non-Self-Governing Territories by foreign economic interests, in violation of the relevant resolutions of the United Nations, is a threat to the integrity and prosperity of those Territories." "… any administering Power that deprives the colonial peoples of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources, (…) violates the solemn obligations it has assumed under the Charter of the United Nations." Resolutions 48/46, of December 10, 1993, and 49/40, of December 9, 1994.

in the International Covenants of Civil and Political Rights and Economic, Social and Cultural Rights, both of December 16, 1966,[99] and also in subsequent General Assembly Resolutions particularly Resolution 3201 (S-VI, Extraordinary Session), of May 1, 1974 entitled "Declaration on the Establishment of a New International Economic Order," and Resolution 3281 (XXIX), of December 12, 1974 which contains the Charter of Economic Rights and Duties of States.

Grounded on these documents and after the analysis of the jurisprudence of the International Court of Justice and the States' practice, in January, 2002 Hans Corell, the Under-Secretary-General for Legal Affairs, published his opinions in answer to a request from the Security Council on, "the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and agreements concerning Western Sahara of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara".

When Mr. Corell's report was written two foreign companies had entered into some kind of contract with Moroccan authorities for the exploration and exploitation of oil in Western Sahara territory: the United States company Kerr-McGee and the French Total-Fina-Elf. Both contracts, apparently, made for an initial period of 12 months, have standard options for the relinquishment of the rights under the contract or their continuation, including an option for future oil contracts in the respective areas or parts thereof.

In this respect, and going beyond the specific cases of these two companies, Mr. Corell's rather ambiguous conclusion[100] is that, "it must be recognised, however, that in the present case, the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued. The conclusion is, therefore, that, while the specific contracts which are the

[99] Article 1.2 of both Covenants establish that "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

[100] A critical reading of this report can be found in Raphael Fisera's thesis: *A People vs. Corporations? Self-determination, Natural Resources and Transnational Corporations in Western Sahara*, December, 2004, pages 32-37.

subject of the Security Council's request are not in themselves illegal, *if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories*" (emphasis added).

These notes contain the basic premises for understanding the peculiarities of the terrain where the natural resources of Western Sahara are situated. During the years of the occupation, the Saharawi People has lived through a painful pillage of its natural resources for which many political and economic agents can be held responsible including, as will be seen, the Kingdom of Morocco as de facto authority over the Occupied Territories. The close link that exists between the principle of sovereignty over human resources and the right to development on one hand, and between this and economic, social and cultural rights on the other, only serves to emphasize that the aggressive policy of usurpation of natural resources by Morocco constitutes a blatant aggression to the human rights of the Saharawi people.

Keys to the plundering of natural resources in Western Sahara territories: many guilty of the same abuse.

For years the Moroccan government has resorted to the authorisation of lush benefits in order to push the colonisation of the Occupied Territories of Western Sahara by Moroccan citizens[101] to the point where, today, the great majority of residents in the Territories are not of Saharawi origin. The Moroccan government makes valuable contributions of petrol, water, housing and foodstuffs to Moroccan citizens who opt to relocate to the Occupied Territories, although many soon see their expectations dowsed and feel cheated when many of the promises made by the authorities are not kept.

[101] As well as the citizens, today sees the Territories besieged by military effectives. According to the testimony of H'mad Hammad, member of the Collective of the Saharawi Human Rights Defenders (CODESA) on page 9 of the magazine *Nouvelles Sahraouies*, nº 125, in October, 2007, his most optimistic estimations are that some 160,000 soldiers of the Moroccan Royal Armed Forces, 15,000 Royal Gendarmerie agents, 18,000 elements from the Auxiliary Forces (Mojaznis), 21,000 police officers, and thousands more secret agents are concentrated in Western Sahara. In addition, there are thousands of agents of the Ministry of the Interior who act as informers to the different police, military and security services.

One of the first direct effects of this phenomenon is the great discrimination against the Saharawi identity which translates to an attempt to erase all trace of Saharawi tradition and eradicate its cultural and historical heritage.[102] Thus it is commonplace for Saharawi rites and customs to be pushed aside to make way for Moroccan traditions. Saharawi identity is being deliberately destroyed and the Saharawi people are becoming the minority in their own Western Sahara.[103]

When consulted Moroccan authorities and diplomacy are inclined to boast about the attention Western Sahara receives in governmental policies on interior development. Spokespersons of the Kingdom point out with practised eloquence that the principle of non-discrimination between "Moroccan nationals" (a group which they obviously consider to include the Saharawis) is the inspiration for all political activity. A mere sample of this is given in a report presented by the Moroccan government to the Committee on Economic, Social and Cultural Rights at the end of 2005 (published by the United Nations in March of the following year): "The differences in cultural traditions, customs and heritage between groups in the northern, southern, central, Atlas and Saharan regions and between Arabs, Amazighs, Jews and Christians, have never been a divisive factor but rather enhance national unity. This is a rule which applies to all and on which everyone agrees, including Moroccans in the Saharan regions. Persons from these regions are given equal consideration with regard to legal transactions, legal treatment, the channelling of investments and the creation of employment opportunities in accordance with the principle of equal conditions of life, equal investment of resources and equal sharing of wealth.[104]"

In May, 2006 the Moroccan government complemented the above mentioned report with a second[105]. Defending itself in the face of the constant interest shown by the Committee of Economic, Social and Cultural Rights on the situation of these rights

[102] See the paragraph on the destruction of archaeological fields regarding this.
[103] Interview with El Mami Amar Salem, president of the Saharawi Committee Against Torture of Dakhla, in Vitoria-Gasteiz in July, 2007.
[104] Answers provided by the Moroccan government to the list of issues (E/C.12/Q/MAR/2) to be taken up in connection with the consideration of the third periodic report of Morocco concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural rights (E/1994/104/Add.29), UN index: E/C.12/MAR/Q/2/Add.1, of March 2, 2006, page 7.
[105] Second responses provided by the Moroccan government to the issues (E/C.12/Q/MAR/2) to be taken up in connection with the consideration of the third periodic report of Morocco concerning articles 1 through 15 of the International Covenant on Economic, Social and Cultural Rights (E/1994/104/Add.29), UN index: E/C.12/MAR/Q/2/Add.2, May 3, 2006, pages 4-5.

in Western Sahara, the government stated that, "The special attention that the Saharan provinces have been accorded since 1976 is reflected in social, economic and cultural programmes aimed at the development of, inter alia, construction works, health and education services, basic infrastructure, the administration, the economy, services, sports and culture."

In the same openly pompous tone the document goes on to point out that, "The provinces are given special attention under the National Initiative for Social Development. Since its establishment, the Development Agency for Southern Morocco has designed an integrated development programme worth 8 billion dirhams and consisting of a series of ambitious programmes intended to fulfil the aspirations of the population. The programmes draw on the region's human and natural resources in order to build up basic infrastructures; to expand electricity, drinking water and road networks; to bring administrative structures closer to the public; to universalize education; to provide decent housing and medical and sports facilities; to promote Saharan culture and to organize local festivals to revive the region's cultural heritage. *These programmes also seek to boost the economy by supporting the fishing sector, especially traditional sea fishing, as well as tourism and traditional industries, and by launching economic projects that will turn the region into a pole of economic growth with distinctive features complementing those of other regions. It would then benefit all Moroccans, in both the north and south of the country, without any distinction or discrimination, in accordance with the principles set forth in the Constitution*" (emphasis added).

It is obvious how the Kingdom of Alaoui's representation clearly ignores the criteria established by both the International Court of Justice and the United Nations General Assembly on the issue of natural resources. Nevertheless, it can also be appreciated that although it makes no distinction and reiterates once more the supposed identity between inhabitants of Western Sahara origin, Moroccan citizens and Moroccan colonials residing in the Occupied Territories, one way or another the Moroccan government tries to maintain that the ultimate aim of these public actions (usually with foreign capital, as will be made clear), is to "benefit all Moroccans, in both the north and south of the country." It is understood that, in the official Moroccan dialect, this includes Saharawis, of course it does.

That being as it may, although the Executive may try to dress up the practice of commercialising the natural resources of Western Sahara, as will be shown in the following pages, it cannot be inferred that this has worked to the advantage of the Saharawi People. For the rest, evidently, the POLISARIO Front has never been consulted in connection with these investment projects, in spite of being considered the legitimate representative of Western Sahara by organs of the United Nations. What has happened and continues to happen with hydrocarbons, fishing and other elements like phosphates, and even tourism and the sand trade, is a clear demonstration of what is being discussed here.

Hydrocarbons in Occupied Territories.

It can be said that until the beginning of this decade, interest in exploiting the natural resources of Western Sahara by transnational petroleum and natural gas companies was largely symbolic owing to the rather unmotivating relationship between the political risks and eventual profits. On top of these disadvantages are technical challenges in the extraction of Saharawi reserves and the presence of large and much more accessible gas deposits in neighbouring countries such as Algeria.

Nevertheless, this scenario changed completely in October, 2001 when the Moroccan national oil company, ONAREP (Office National de Recherches et d'Exploitations Pétrolières) announced the signing of two contracts with two of the leading companies in the hydrocarbon sector: the French Total (at that time, Total-Fina-Elf) and the United States' Kerr McGee.

The agreements consisted of the evaluation of hydrocarbon resources in areas close to Boujdour and Dakhla and the analysis of seismic data to get a more detailed profile of the area's geological features. Similarly, the contracts contained a clause in which both companies reserved the option to convert their licences into firm agreements for petroleum exploration and exploitation, both activities to be developed in cooperation with the ONAREP.

As stated earlier, the contracts signed with the two multinationals triggered the petition for Hans Corell's report of January, 2002. The French company finalised its activities in the area in December, 2004, allegedly for commercial reasons, although curiously, the decision coincided with an international pressure campaign coordinated by the Sahara Arab Democratic Republic in conjunction with non governmental organisations from around the world.[106] In June, 2005 the same pressure incited the Norwegian fund administrator, Skagenfondene to divest from the United States' company Kerr McGee.[107]

As can be appreciated, the actions against these two hydrocarbon companies, undoubtedly two of the most important on the global stage, were clear examples of the pressure which can be exerted by the so-called court of public opinion. Certainly, in the struggle for due respect for the title holders of Western Sahara's natural resources there have been occasions on which pressure from international organisations has forced transnational companies, and their countries' governments, to back-pedal.

Perhaps the most paradigmatic example of the success of social movements against private transnational initiatives is, precisely, the campaign championed by the Norwegian Support Committee for Western Sahara from May, 2002 to June, 2003[108] against TGS Nopac. The Norwegian company had been subcontracted by Total and Kerr McGee to conduct the geological study of the continental shelf of Western Sahara. As a result of the campaign, the company declared that it would not pursue new projects in Western Sahara territories until the political situation underwent decisive changes.[109]

The most recent case in Spain is that of Iberdrola, a company which in June, 2007 entered into a contract with the Moroccan electricity operator, Office National de L'Electricité (ONE), to analyse the viability of wind farms which it intended to install in

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[106] This web site can be consulted for more information: www.arso.org.

[107] In fact, in June, 2005 the Norwegian Minister of Finance, Per-Kristian Foss, announced his government's decision to withdraw its participation in the aforementioned company saying the company, "committed an especially grave violation of ethical standards, because it could strengthen Morocco's claim to sovereignty and prejudice the UNO's peace process," (*El País*, June 21, 2005), addressed by Juan Soroeta Liceras in his work "El plan de paz del Sahara Occidental, ¿viaje a ninguna parte?", 2005, page 21, mentioned in the bibliography.

[108] More information on this organisation at this link: http://www.vest-sahara.no/index.php?dl=en.

[109] An in-depth study of the campaign conducted by the Norwegian Committee can be found in the work of Raphaël Fisera, *A People vs. Corporations? Self-determination, Natural Resources and Transnational Corporations in Western Sahara*, pages 79 – 89, mentioned in the bibliography.

the Saharawi capital, El Aaiún. After the intervention of the international organisation Western Sahara Resource Watch, alongside support shown by many people through an Internet campaign, the energy company announced it would not go ahead with the agreement if this constituted an "attack on international Law".[110] In a letter sent by Xabier Viteri Solaun, director general of Iberdrola Energías Renovables, SA to Western Sahara Resource Watch dated July 24, 2007 the company promised that it "will not develop any project which does not draw sufficient consent from the agents and communities affected."[111]

In an attempt to thwart these activities, in May, 2005 the government of the Saharawi Arab Democratic Republic took the initiative by making public an invitation to authorise concessions for the exploration and exploitation of petroleum and natural gas in the Territory, thus exercising a right acknowledged to it by international regulation itself. Although chances are slim that possible contracts with the SADR are put into effect while the Territory is still under Moroccan control, the move may have certain potential. For one thing, because looking to the future, and in the event that the Saharawi people finally gain their independence, it could encourage certain companies to take the SADR into account. For another, because, as we have seen, campaigns mounted up to now have demonstrated the vulnerability of some companies and even States when faced with the sensitivity of public opinion.[112]

The Fishing Agreement between the European Union and Morocco.

According to studies conducted by a number of expert agencies the waters that bathe the coastline of Western Sahara territories is home to one of the richest fishing grounds in the world.[113] The idea of setting up a fishing operations base in the territory

[110] "Iberdrola solicita el permiso saharaui para ubicar el parque eólico en El Aaiun", *Libertad Digital*, July 20, 2007. http://www.libertaddigital.com/noticias/noticia_1276309882.html.
[111] The letter can be found at the following link: http://saharaoccidental.blogspot.com/2007/07/exito-de-western-sahara-resource-watch.html.
[112] Juan Soroeta Liceras, "El plan de paz del Sahara Occidental, ¿viaje a ninguna parte?" 2005, page 21, mentioned in the bibliography.
[113] For example, Bravo de Laguna Cabrera, J., "La pesca en el banco sahariano", Instituto Español de Oceanografía, *El Campo*, nº 99, 1985, page 69. It is important to note that fishing in Western Sahara seas accounts for 64% of Morocco's income from fishing in its entire territory (cfr. Berrada Gouzi, N., Godeau, R., "Pourquoi Agadir ne décolle pas", in the collective work "Que font les Marocains au Sahara?", *Jeune Afrique*, nº 34, supplement nº 1722, January, 1994, page 43), collected by Juan Soroeta

goes back to the mid 19th century. It could be thought, then, that the main reason for Spain's decision to embark on the colonisation adventure in the Sahara was precisely for the fishing.

On July 28, 2005 the European Union and Morocco signed a fishing agreement that, just like previous agreements between both parties in 1988, 1992, and 1995 and between Morocco and Spain in 1983, extended the application to "waters under Moroccan sovereignty" as well as to "waters under Moroccan jurisdiction," an expression supposedly used to refer to waters situated to the south of Cape Noun, that is, south of the internationally recognised border between Morocco and Western Sahara (the parallel of 27º 40').[114]

According to article 12, the agreement has a duration of four years and came into force on March 1, 2006. Its content is far more modest than the previous one considerably reducing both the quota and its financial counterpart by almost a quarter for biological reasons.

Article 7 indicates that, "The Community shall grant Morocco a financial contribution in accordance with the terms and conditions laid down in the Protocol and Annexes. This contribution shall be composed of two related elements, namely: a) a financial contribution for access by Community vessels to Moroccan fishing zones, without prejudice to the fees due by Community vessels for the licence fee; b) *Community financial support for introducing a national fisheries policy based on responsible fishing and on the sustainable exploitation of fisheries resources in Moroccan waters*" (emphasis added). Similarly, article 10 of the agreement provides for the constitution of a commission between both parties to monitor the implementation of the international treaty.

Liceras, *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional*, page 226, mentioned in the bibliography.

[114] Article 11. Zone of application: "El presente Acuerdo se aplicará, por una parte, en los territorios en los que se aplica el Tratado constitutivo de la Comunidad Europea, con arreglo a las condiciones previstas por dicho Tratado, y, por otra, en el *territorio de Marruecos* y en las *aguas bajo jurisdicción marroquí*". Asimismo, el artículo 2 del tratado define la "zona de pesca marroquí" como "las aguas *bajo soberanía o jurisdicción* del Reino de Marruecos" (las cursivas son nuestras).

On February 20, 2006 the European Parliament's Legal Service issued a report on the alignment of the agreement under analysis with the principles of international law. Surprisingly, the said document stated that, "It cannot be prejudged that Morocco will not comply with its obligations under international law vis-à-vis the people of Western Sahara." It goes on to affirm that, "It is therefore up to them to assume their responsibilities in that respect."

This crude attempt by the European Union (and, as a result, by its member countries, especially Spain, since close to 90% of the European fleet that fishes in these waters is Spanish) to dodge the issue at hand and shirk their responsibility leaves no doubt that it ignores what has been and is the Moroccan policy up to now. Nothing points to Morocco being willing to promote a fishing policy defined and implemented in mutual agreement with the wishes of the legitimate representative of the Saharawi people. In addition, the interpretation above makes no mention whatsoever that it is only the People subjected to colonial rule that hold the title over the territory's natural resources, whereas the majority of inhabitants of the Occupied Territories are colonials of Moroccan origin and, therefore, do not enjoy such rights.[115]

Furthermore, Hans Corell himself in an interview given to a Swedish radio station expressed his disapproval with the content of this agreement and declared that the protests pouring from some Europarliamentarians coincide with his own opinion given in his report for the Security Council as Legal Adviser to the United Nations.[116]

In the same way, there are no grounds for addressing the eventuality of including a clause obligating Morocco to provide any kind of compensation to the Saharawis for the use of their territorial waters, apparently envisioned by the European Union negotiators. In fact, the possibility of compensating the Saharawis for the use of their territorial waters only exists in as much as any compensation presupposes an agreement signed by the administrative power of the Territory (in accordance with article 73 of the

[115] Hans Morten Haugen, "The right to self-determination and natural resources: the case of Western Sahara", in *Law, Environment and Development Journal*, volume 3/1, 2007, page 78, mentioned in the bibliography.
[116] "The European Union accepts the agreement on Occupied Waters", interview with the ex legal counsel to the United Nations, Hans Corell, at the Swedish radio station *Ekot*, May 22, 2006, available at the following link: http://groups.yahoo.com/group/Sahara-Update/message/1758.

Charter of the United Nations), a status which the Kingdom of Morocco has never held over the Western Sahara territory.

The content of this treaty between the European Union and Morocco uncovers the shame of an organisation which pretends to be a model of protection of human rights and of respect for international legality, extremes which it claims are at the forefront of its foreign policy. To be specific, this attitude is all the more regrettable when compared with that shown at around the same time by a power which can hardly be suspected of hostility towards the Alauí Kingdom: the United States.

On June 17, 2004 the United States and Morocco signed a free trade agreement that, among other issues, proceeded to eliminate, from the time it came into force, the duties applicable up to then on practically all industrial and consumable products traded bilaterally between the two countries. Robert Zoellick, governmental representative for foreign trade who had personally drafted the agreement, when a congressman raised the issue, responded explicitly: "The position of the (United States) administration in Western Sahara is clear: the sovereignty of Western Sahara is in dispute, and the United States fully supports the efforts of the United Nations to resolve the issue. Neither the United States nor many other States recognise the sovereignty of Morocco over Western Sahara (…). The Free Trade Agreement will apply to trade and investments in internationally recognised Moroccan territories, and will not include Western Sahara.[117]"

Without a doubt, this attitude and no other should have been adopted by the European Union, at least if it aspires to follow the premise "to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter," as the inspiring principle of its foreign policy according to article 11.1 of the Treaty of the European Union.

Other natural resources: phosphates, sand and tourism.

[117] Cited by Juan Soroeta Liceras, "El plan de paz del Sahara Occidental, ¿viaje a ninguna parte?" 2005, page 23, mentioned in the bibliography.

Morocco has three quarters of the world's reserves of phosphates, is the first world exporter and third world producer after the United States and Russia. The mining sector occupies an important place in Moroccan economy representing 30% of the income from exports and employs over 60,000 people.

The importance of Western Sahara phosphates is such that it holds a predominant position in the illegal Madrid Accords of 1975. The famous Bou Craa reserves are estimated at around 132 million tons and annual production hovers around three million, making it the third most important exploitation under Moroccan control.[118] The potential of the Saharawi Bou Craa mine is likely to be even greater due, among other factors, to the possibility of extracting uranium from the phosphatic mineral.

Apparently, foreign trade from the port of El Aaiún is an ongoing activity and high ranking officials from the Moroccan army perform a leading role in phosphate extraction.

Since 1977, the Spanish State has been present on the administrative board of Phosboucraa and has a 35% stake in the company. The fact that Spain does not control the company does nothing to exonerate it: Spain cannot ignore the reality of the outrageous labour rights situation that many of the workers have endured for over thirty years, as several human rights organisations have denounced.[119]

Just a few kilometres from El Aaiún airport enormous quantities of sand are transported by trucks belonging to business entities headed by important Moroccan and Saharawi magnates. According to some information,[120] the sand is exported from the port of El Aaiún to the Canary Islands.

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[118] Hans Morten Haugen, "The right to self-determination and natural resources: the case of Western Sahara", in *Law, Environment and Development Journal*, volum 3/1, 2007, page 77, mentioned in the bibliography.

[119] France Libertés and AFASPA, *La situación de los derechos civiles, políticos, socio-económicos y culturales de los saharauis. La situación de la explotación económica de este territorio no autónomo*, page 37, mentioned in the bibliography.

[120] *Le Matin du Sahara*, July 11, 2002. Similarly the Government of the Autonomous Community of the Canaries itself boasts of having "golden" sand from the Sahara on its beaches. See, for example, the following link: http://www.canariasturistico.com/TE_playas.asp?letra=&pag=60.

It is common knowledge that sand is an important element in the construction industry and public works. According to France Libertés and AFASPA (the French Association of Friendship and Solidarity with the Peoples of Africa), the truck-loading activities go on ceaselessly day and night. The sand market extends right along the coastline with little control over its exploitation. But the scarcity of this resource and the serious threat it poses to the environment is obvious. If the line of sand dunes along the coast disappears it would certainly provoke the impoverishment of agricultural lands and indeed of the entire coastal region.[121]

Deserving of its own chapter is the tourism sector which, if up to now has undergone little development, is flagged to occupy a privileged place in the future economy of the territory. Contracts in this sector, too, are signed directly by Morocco with different foreign companies,[122] thus avoiding the obstacles inherent in any official agreement with governmental negotiators. Clearly, once again, it is a matter of natural resources whose exploitation corresponds exclusively to the Saharawi people. Companies who aim to reap economic benefits are incurring in violations of international law, aggressions for which the Saharawi State may well demand responsibility in the future.

The looting and destruction of archaeological sites by MINURSO members.

Recently, the magazine "El Observador"[123] reported that for years MINURSO soldiers in the liberated territories of Western Sahara have been plundering important archaeological relics more than 80,000 years old.

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[121] France Libertés and AFASPA, *La situación de los derechos civiles, políticos, socio-económicos y culturales de los saharauis. La situación de la explotación económica de este territorio no autónomo*, page 39, mentioned in the bibliography.

[122] The case of Club Med is emphasized by Juan Soroeta Liceras, *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del Derecho Internacional*, page 234, mentioned in the bibliography.

[123] "Soldados de la ONU expolian y destruyen yacimientos arqueológicos en los territorios liberados del Sahara Occidental, con un gran valor histórico y una antigüedad de más de 80.000 años", October 31, 2007. http://www.airon60.com/index.php?option=com_content&task=view&id=1125&Itemid=29.
"Quim Soler, arqueólogo de la Universidad de Girona: "En el Sahara están en peligro pinturas rupestres y restos arqueológicos que deberían ser Patrimonio Cultural de la Humanidad", November 8, 2007.
http://www.airon60.com/index.php?option=com_content&task=view&id=1138&Itemid=29.
Image gallery:
http://www.airon60.com/index.php?option=com_content&task=view&id=1137&Itemid=99999999.

According to Professor Quim Soler of the University of Gerona, "UNESCO knows about this because we ourselves have informed them about what is happening. Among the graffiti are some which MINURSO soldiers have signed with their name and tag number. Something must be done because if not we all know what will happen. They are in danger and some relics could easily be destroyed when they should be part of human heritage."

Archaeologist Teresa Muñiz assures that over 30 rock shelters with cave paintings have been located (containing at least 1,500 painted motifs), and that the remainder house workshops where stone tools were made with chronologies from the Lower Palaeolithic to the Epipalaeolithic, in addition to cylindrical graves. The sites of Erqueyez, for example, close to the village of Tifariti, are, in her judgment, "comparable in wealth and importance to Tassili N'ajjer, in Algeria, which is Human Heritage, and with Akakus, in Lybia."

The importance of the Saharan cave paintings is partly because their discovery has been only recent. Muñiz says that, "alongside elements of prehistoric cultural material there are others pertaining to the present day such as bullet casings, grenade fragments, remains of destroyed and abandoned armaments, and an abundance of fighters' graves in close proximity to the megalithic necropolis. Other man-made modifications include black or white graffiti on the walls of the rock shelters in Arab and Latin characters and the plundering of panels, some which appear incomplete having been partially extracted using a hammer and chisel. It is a savage and destructive practice that has been used since Spanish colonial times and now the sites are being plundered by, among others, the military personnel of the United Nations stationed close to the archaeological complex."

Saharawi archaeologist Hasan Mohamed Alí goes even further. He claims it has been proved that there are prehistoric tools, stone chips and other relics in the rooms of United Nations soldiers in the Tifariti and Berlehlu camps.

The international community must watch over the priceless archaeological sites of Western Sahara with scrupulous respect and ensure that no member of MINURSO

abuses these objects and sites in any way. Timely action must be taken so that this does not happen again.

CONCLUSIONS

- In Western Sahara, the question of human rights runs parallel to the issues concerning the right to self-determination, though the universality principle of human rights compels us to look beyond the strictly political debates and appreciate the authentic human problem which derives from the grave situation of these rights in Occupied Territories of Western Sahara.

- A host of responsibilities and blame can be laid at the door of multiple political agents with respect to human rights in Western Sahara. Within the international community, leading powers such as the United States and the European Union and the States which comprise it have played a crucial role in sketching the political panorama of Western Sahara, and continue to do so, thus casting an undoubtedly malignant shadow over the reality of human rights. There is no doubt that Spain has a key role to perform as the Territory's "administrative power", a status it has never lost. In any case, the prime responsibility for what is happening in Western Sahara concerning human rights lies with the Kingdom of Morocco, due to its condition as "occupying authority".

- In tandem with the responsibility of the States, globalization gives a boost to the power quotient of transnational businesses enabling them to exert enormous pressure on public policies which, as a consequence, often result in aggressions to human rights, for which the companies must be held accountable. In the case of Western Sahara, certain transnational companies have played leading roles in the plundering of the natural resources of the Saharawi people.

- Defenders of human rights are a habitual target of repressive actions by the Moroccan authorities. The abuse to which women activists are subjected is especially disturbing. These violations to human rights take the form of restrictions to freedom of movement, freedom of expression and freedom of association. They also translate to torture and other ill-treatments and to the lack of procedural guarantees.

- The violation of the right to due process for detainees of Saharawi origin, fundamentally when they are human rights defenders or political activists, constitutes a pathological evil of the Moroccan judicial system in the Territories.

- An authentic reparation for the victims of abuse committed during the armed conflict and in subsequent years, especially in regard to the cases of forced disappearance, should be founded as much on the quest for truth as on the basic pillar of justice and the fight against impunity.

- Due to the close link that exists between the principle of sovereignty over human resources and the right to development, on one hand, and between this and economic, social and cultural rights on the other, it must be emphatically stated that the aggressive policy of usurpation of natural resources by Morocco constitutes a blatant aggression to the human rights of the Saharawi people.

- In Western Sahara, as in other places on the planet, there can be neither peace nor viable political concord between the parties without first finding a solution to the motives of concern regarding human rights and without guaranteeing the just reparation that the victims deserve.

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