

Transitional justice measures to address the legacy of serious violations of human rights and humanitarian law committed in colonial contexts

Submitted by

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INTRODUCTION

The submitting organisations thank the Special Rapporteur for focusing on the question of the adoption of transitional justice measures to address the legacy of serious violations of human rights and humanitarian law committed in colonial contexts.

The submitting organisations intend to focus in particular on the preventive measures that should be taken in a colonial context and will refer to the case of Western Sahara.

On 11 December 1963, in adopting resolution 1956 (XVIII), the UN General Assembly included Western Sahara in the list of Non Self-Governing Territories (NSGT), pending decolonisation, to which the UN General Assembly resolution 1514 (XV) on the “Declaration on the Granting of Independence to Colonial Countries and Peoples” applies.

On 20 December 1966, in adopting resolution 2229 (XXI), the UN General Assembly invited the administering Power (Spain) to determine at the earliest possible date, in conformity with the aspiration of the indigenous people of Western Sahara, the procedures of 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.

On 26 February 1976, Spain informed the UN Secretary-General that as of that date it had terminated its presence in Western Sahara and relinquished its responsibilities over the Territory, without fulfilling its mandate as administering Power.

Since then, Western Sahara became the only NSGT that has not an internationally recognized administering Power.

Meanwhile, the Kingdom of Morocco invaded Western Sahara at the end of October 1975, and engaged in a war with the Polisario Front, which was already fighting for independence, against the Spanish colonial Power.

Since then, Western Sahara became the only NSGT that is under illegal military occupation¹.

The ceasefire entered into effect in 1991, following the creation by the UN Security Council of the UN Mission for the Referendum in Western Sahara (MINURSO), has been broken by the occupying Power last November 13, when the Moroccan Army

¹ A/HRC/38/NGO/24

entered the buffer zone of Guerguerat (South-West of the NSGT) and threatened with arms a peaceful demonstration of Sahrawi civilians, commemorating the 30th anniversary of the creation of MINURSO, whose main mission was to organise the referendum within 18 months of its establishment.

The longstanding Kingdom of Morocco's occupation and subsequent illegal annexation of the NSGT of Western Sahara has led to a number of systematic, gross violations of human rights as well as serious and continuous breaches of International Humanitarian Law; some of which are still occurring today, including hundreds of unsolved cases of enforced disappearance, torture, continuing colonisation, illegal plundering of natural resources.

Over the last ten years, hundreds of lawyers, human rights defenders, journalists, academicians and politicians have been denied access to or deported from the Non Self-Governing Territory of Western Sahara.

Nowadays, the Office of the High-Commissioner for Human Rights and the International Committee of the Red Cross do not have free access neither to the victims living in the occupied Western Sahara nor to the political / conscience prisoners detained on the soil of the Kingdom of Morocco.

THE LEGACY OF SERIOUS VIOLATIONS OF HUMAN RIGHTS AND HUMANITARIAN LAW COMMITTED IN COLONIAL CONTEXTS

The withdrawal of Spain in 1976, without fulfilling its mandate of decolonisation in its capacity of administering Power of the Non Self-Governing Territory, not only left open the wound of the serious violations of human rights and humanitarian law committed by the colonial Power, but has allowed the illegal occupation and annexation of the Territory by a foreign Power.

Almost all Saharawi families are affected by serious violations of human rights and humanitarian law committed by both, the former colonial Power and the current occupying Power.

More than 170'000 Saharawis are living in refugee camps in the Algerian desert: some of them are there since 1975, while the youngest, those of the fourth generation, are suffering physically and psychologically due to malnutrition and the absence of real perspective for their life.

The social and economic traditional structures of the Saharawi people have been destroyed by colonialism and occupation and the persistent occupation of the Territory makes it impossible for them to exercise their right to development.

TRANSITIONAL JUSTICE MEASURES

Transitional justice measures should be considered in situations of transition from conflict or authoritarian rule where there have been gross violations of human rights and serious violations of international humanitarian law.

Considering that the illegal occupation of the Non Self-Governing Territory of Western Sahara is still occurring and that the armed conflict that was frozen for 30 years has resumed, the submitting organisations do not consider that the work done by the Moroccan “Equity and Reconciliation Instance” in the early 2000’s can be accepted as a valid process of transitional justice for the Saharawi victims either in the occupied Western Sahara or in the Kingdom of Morocco’s soil.

Transitional justice measures in Western Sahara can only be adopted after a process of self-determination has taken place and the illegal occupation of the Territory has ended.

1. Mechanisms to hold accountable persons bearing responsibility for gross violations of human rights and serious violations of international humanitarian law

The main challenge faced by the Saharawi people to hold accountable persons bearing responsibility for gross violations of human rights and serious violations of international humanitarian law is linked to the persisting illegal occupation of the Non Self-Governing Territory by the Kingdom of Morocco.

No transitional justice process regarding gross violations of human rights and serious violations of international humanitarian law has been put in place by the former Spanish colonial ruler.

As per the gross violations of human rights and serious violations of international humanitarian law committed by the occupying Power since 1975, the submitting organisations highlight the fact that the Kingdom of Morocco has a systematic policy of denial of the phenomenon of enforced disappearances.

Nevertheless, it has to be noted that during the “Equity and Reconciliation Instance” process some cases have been admitted, although the date and place of disappearance were not correct. Furthermore, in recent years, some mass graves have been discovered by a group of experts led by Carlos Martín Beristain².

Following a complaint lodged as victim of torture by Ennaâma Asfari, a man belonging to the Gdeim Izik Group, the Committee Against Torture³ urged the Kingdom of Morocco to initiate a thorough and impartial investigation into the concerned incidents, to provide the complainant with fair and adequate compensation, including the means for the fullest rehabilitation possible, to refrain from any form of pressure, intimidation or reprisals likely to harm the physical and moral integrity of the complainant and his family and to enable the complainant to receive visits from his family in prison.

In three letters dated 9 February 2017, 5 February 2018 and 6 August 2019, the Moroccan authorities strongly rejected the decision taken by the Committee. Subsequently, the complainant was isolated from his fellows of the Gdeim Izik group and his wife (a French citizen) could see him only once in January 2018 following the direct intervention of the French Foreign Minister, Mr. Le Drian.

In its 2014 Mission to Morocco’s report⁴ the Working Group on Arbitrary Detention found that in cases involving supporters of independence for Western Sahara there is a pattern of torture and ill-treatment during arrest and in detention. Among the recommendations, the Working Group called for allegations of torture and ill-treatment being admitted at any stage of the trial and said that courts should be obliged to launch ex officio investigations whenever there are reasonable grounds to suspect torture or ill-treatment.

The Working Group, observing that the Moroccan criminal judicial system relies heavily on confessions as the main evidence to support conviction, also recommended reviewing criminal convictions that have been based solely on confessions in order to identify cases in which the conviction was based on confessions obtained under torture or ill-treatment, and to take the appropriate remedial measures.

² El Oasis de la Memoria : Memoria Histórica y Violaciones de Derechos en el Sáhara Occidental: Tomo I, II <https://publicaciones.hegoa.ehu.eus/publications/281>

³ CAT/C/59/D/606/2014

⁴ A/HRC/27/48/Add.5

More recently, the Working Group on Arbitrary Detention has taken up several complaints by Saharawi human rights defenders.

The Working Group constantly finds the deprivation of liberty of the cases submitted to it as arbitrary and requests the Government of Morocco to release the complainants without delay and to take all the measures necessary to remedy the serious material and moral harm they have suffered by providing comprehensive compensation⁵.

Again, the Moroccan authorities systematically reject the conclusions of the Working Group.

Furthermore, the decisions rendered by the Working Group are also supported by numerous communications⁶ addressed to the Kingdom of Morocco attesting to widespread and systematic abuses against Saharawi living under Moroccan occupation.

No positive actions have been taken by the occupying Power.

2. Measures to inquire on and establish the truth about gross violations of human rights and serious violations of international humanitarian law

As stated before, at the political level, the former colonial Power of Western Sahara never adopted any measure to inquire on and establish the truth.

Nevertheless, in 2007 Spanish judge Baltasar Garzon has ordered the opening of an inquiry into allegations of genocide in the Moroccan occupied Western Sahara. Plaintiffs were also looking for accountability for the 542 Sahrawis that Morocco 'disappeared' during the 1975-1991 war.

In 2015, the Asociación de Familiares de Presos y Desaparecidos Saharauis (AFAPREDESA) lodged a complaint before Spanish Judge Pablo Ruz (presiding the Central , highlighting some crimes committed in February 1976, just before Spain's withdrawal from the Territory. Judge Ruz considered as proved that between 1975 and 1991 "a widely systematic attack took place against the civil Saharawi population, committed by Moroccan military and police forces". He further stated that "All the requirements of the criminal procedures that genocide punishes are met".

⁵ See Annex

⁶ See Annex

The judge issued an indictment for the alleged crime of genocide, in real concurrence with: assassination, illegal detentions, enforced disappearances and torture, against 11 senior police and military Moroccan officials and issued international arrest order against these persons so that they can be brought before a criminal court⁷.

However, the lack of an extradition agreement between Spain and Morocco, as well as Spain's inability to try persons "in absentia", has kept the case from moving to the trial phase.

As per the gross violations of human rights and serious violations of international humanitarian law committed by the occupying Power since 1975, in referring to its introductory remarks, the submitting organisations reiterate that such comprehensive process can only take place with the end of the illegal occupation of Western Sahara by the Kingdom of Morocco.

Saharawi human rights defenders and human rights organisations are engaged in collecting evidences of these gross and serious violations and sometimes pay a heavy price for their activities.

In a joint communication⁸ addressed to the Moroccan government, four human rights Special procedures of the Human Rights Council express serious concerns about a multitude of abuses committed against eight prominent Sahrawi human rights defenders and describe a "hostile environment" towards human rights work in the occupied Western Sahara.

In the context of the longstanding illegal military occupation of the Non Self-Governing Territory by the Kingdom of Morocco, the submitting organizations consider that the United Nations bears a primarily responsibility over Western Sahara and towards the Saharawi people.

As a preventive measure, in order to establish the truth, the Special Committee on the Situation with regard to the implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples, in the framework of the mandate given to it by the General Assembly should organize a visit to the occupied Non Self-Governing Territory of Western Sahara.

Similarly, the Office of the High-Commissioner for Human Rights should dispatch an observation mission to the occupied Non Self-Governing Territory of Western Sahara.

⁷ Juzgado Central de Instrucción No. 5 – Audiencia Nacional – Madrid, 9 de Abril 2015 (annexed)

⁸ <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25731>

As a follow-up to the presentation of the report to the General Assembly, the submitting organizations also invite the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to request to the occupying Power to visit the occupied Non Self-Governing Territory of Western Sahara.

3. Measures to provide reparation to victims of gross violations of human rights and serious violations of international humanitarian law

In the case of the occupied Non Self-Governing Territory of Western Sahara, such measures can only be adopted in the framework of the negotiations for the holding of the referendum of self-determination.

4. Measures to memorialize the gross violations of human rights and serious violations of international humanitarian law

In the case of the occupied Non Self-Governing Territory of Western Sahara, while the Saharawi and international NGOs continue to collect information and evidences, institutional measures can only be adopted after the referendum of self-determination has taken place.

5. Measures to guarantee non-recurrence of the gross violations of human rights and serious violations of international humanitarian law

In the case of the occupied Non Self-Governing Territory of Western Sahara, such measures can only be ensured with the end of the illegal military occupation of the Territory.

ANNEX

CASE LAW OF THE UN HUMAN RIGHTS MECHANISMS

UN Working Group on Arbitrary Detention

- Opinion No. 68/2020, 23-27 November 2020, concerning Walid Salek El Batal
- Opinion No. 52/2020, 24- 28 August 2020, concerning Ali Saadouni
- Opinion No. 67/2019, 18-22 November 2019, concerning the Student Group/Group of El Wali
- Opinion No. 23/2019, 24 April – 3 May 2019, concerning Ndor Laaroussi
- Opinion No. 60/2018, 20-24 August 2018, concerning Mbarek Daoudi
- Opinion No. 31/2018, 17-26 April 2018, concerning Mohamed Al-Bambary
- Opinion No. 11/2017, 19-28 April 2017, concerning Salah Eddine Bassir

Communications of the UN Special Procedures

- Communication AL MAR 5/2020 dated 7 January 2021, concerning Naziha El Khalidi, Aminatou haidar, Mahfouda Bamba Lafgir (Lekfir), Yahya Mohame Elhafed Iaazza, Al-Hussein Al-Bashir Ibrahim, Mohamed Radi Elili, Ali Saadouni and Nour Eddin El Aargoubi
- Communication AL MAR 2/2020, dated 7 September 2020, concerning Hussein Bachir Brahim
- Communication AL MAR 3/2020, dated 21 July 2020 concerning Khatri Dadda
- Communication AL MAR 3/2019 dated 8 November 2019 concerning Walid Salek El Batal
- Communication AL MAR 2/2019 dated 4 June 2019 concerning Naziha El Khalidi
- Communication AL MAR 1/2019 dated 3 April 2019 concerning Naziha El Khalidi
- Communication AL MAR 3/2017 dated 20 July 2017 concerning the Gdeim Izik Group
- Communication AL MAR 5/2016 dated 12 December 2016 concerning Amidan Said and Brahim Laajail
- Communication AL MAR 2/2016 dated 6 May 2016 concerning expulsion of defence lawyers
- Communication AL MAR 1/2016 dated 22 March 2016 concerning El Ghalia Djimi
- Communication AL MAR 6/2015 dated 3 August 2015 concerning Fatimetou Bara, Ghalia Djimi and Alouat Sidi Mohamed
- Communication JAL AL MAR 7/2014 dated 13 November 2014 concerning M. Hassanna al-Wali
- Communication UA MAR 5/2014 dated 30 July 2014 concerning Mahmoud El Haissan
- Communication MAR 2/2014 dated 9 April 2014
- Communication JUA 1/2013 dated 24 May 2013
- Communication MAR 1/2012 dated 23 March 2012 concerning ASVDH
- Communication MAR 8/2011 dated 29 November 2011 concerning ASVDH
- Communication MAR 6/2011 dated 4 November 2011
- Communication MAR 1/2011 dated 3 February 2011 concerning the Gdeim Izik camp

UN Committee on economic, social and cultural rights

Concluding observations on the fourth periodic report of Morocco – E/C.12/MAR/CO/4* (08/10/2015).

UN Committee on Civil and political rights (Human Rights Committee)

Concluding observations on the sixth periodic report of Morocco – CCPR/C/MAR/CO/6 (02/11/2016).

UN Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 606/2014 – CAT/C59/D/606/2014 (15/11/2016).