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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Written statement* submitted by the International Fellowship of Reconciliation, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[18 August 2017]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Western Sahara Independence of judges and lawyers

Kingdom of Morocco: the Right to a fair trial and the Independence of Judges and Lawyers denied when addressing Western Sahara

Introduction¹

The Report of the Office of the UN High Commissioner for Human Rights entitled “Compilation on Morocco”² is silent about the constitutional and legislative framework of the Kingdom of Morocco and the issues of right to a fair trial and the independence of the judiciary.

However, in its Concluding Observations on Morocco-s latest Periodic Report under the International Covenant on Civil and Political Rights, the Human Rights Committee³ expressed its concern about cases in which irregularities appear to have occurred in court proceedings and also about cases in which lawyers and judges have been the target of threats and intimidation and of interference in their work.

The Committee recommended to the Kingdom of Morocco to: (a) guarantee and uphold the full independence and impartiality of the judiciary and ensure that judges are free of pressure and interference in the performance of their work; and (b) ensure that all court proceedings are conducted in full observance of the due process guarantees set forth in article 14 of the Covenant.

The Report of the Office of the UN High Commissioner for Human Rights entitled “Summary of stakeholders’ submissions on Morocco” mentions⁴ Amnesty International’s submission in relation to the reforms of the judiciary which “[...] have fallen short of ensuring judicial independence, as was recommended during Morocco’s previous UPR.”

The Draft report of the Working Group on the UPR on the Kingdom of Morocco⁵ mentions a number of generic recommendations offered by members of the Working Group concerning the reform and the independence of the judiciary.

Legal background

In 1963, the UN General Assembly recognized Western Sahara as a Non Self-Governing Territory⁶ and mandated the Administering Power, Spain, to determine the procedure for the holding of a referendum under UN auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination⁷.

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.

On 6 November 1975, the Kingdom of Morocco invaded militarily Western Sahara and brought thousands of Moroccan civilians into the Territory (Green march). On the same day, the UN Security Council adopted resolution 380, calling Morocco immediately to withdraw from the Territory of Western Sahara all the participants in the march.

At the same time, the International Court of Justice released an Advisory Opinion⁸ in which it states, inter alia, that “The inferences to be drawn from the information before the Court... are in accord in not providing indications of the existence,... of any legal tie of territorial sovereignty between Western Sahara and the Moroccan State.”

1 This written contribution benefited from the assistance of the Liga para la Protección de los Presos Saharauis (LPPS), El Aiun – Western Sahara and of the Asociación Profesional de Abogados Saharauis en España (APRASE), Spain

2 A/HRC/WG.6/27MAR/2

3 CCPR/C/MAR/CO/6 (parr. 33 - 34)

4 A/HRC/WG.6/27MAR/3 (par. 34)

5 A/HRC/WG.6/27/L.4

6 UNGA Resolution 1956 (XVIII)

7 UNGA Resolution 2229 (XXI)

Recent judgments of the Grand Chamber of the Court of Justice of the European Union⁹ (December 2016) and of the High Court of South Africa in Port Elisabeth¹⁰ (June 2017) have reaffirmed that Western Sahara has a separate and distinct status in relation to the Kingdom of Morocco and that the Moroccan occupation of a large part of Western Sahara does not affect the Western Sahara's international status as a Non Self-Governing Territory.

At present, Western Sahara is the only Non Self-Governing Territory which has no internationally recognized Administering Power and is under foreign occupation.

Applicability of the International Humanitarian Law

The invasion and occupation of a large part of Western Sahara by the Kingdom of Morocco obliges the latter to respect the International Humanitarian Law.

By practicing coercion, corporal punishment, torture, and degrading and inhuman treatments against members of the Polisario Front¹¹ before the Ceasefire Agreement of 1990 and subsequently, until the present on the civilian Sahrawi population, the Kingdom of Morocco has violated and continues to violate Articles 31 and 32 of the IVth Geneva Convention.

By deporting the native people of Western Sahara and sponsoring the transfer of Moroccan citizens into this occupied territory, the Kingdom of Morocco is in violation of Article 49 of the IVth Geneva Convention.

By detaining and prosecuting on its national territory persons who have allegedly committed criminal offences in the occupied territory of Western Sahara, the Kingdom of Morocco is in violation of Article 76 of the IVth Geneva Convention.

Constitutional and legislative framework with regard to Western Sahara

Regardless of the International Court of Justice's Advisory Opinion of 1975, many resolutions of the UN General Assembly and the UN Security Council, and of the Organization of African Unity and of the African Union, the Kingdom of Morocco continues to insist that the part of the Non Self-Governing Territory of Western Sahara which it occupies as integral part of its national Territory.

This assumption not only seriously challenges the good faith for which the UN Security Council calls for in its resolution¹², but also has a direct consequence in the legal framework of the Kingdom.

Decree no. 2-15-40 (20/02/2015)¹³ set the new territorial division, which counts 12 Regions, among those: Laâyoune - Sakia El Hamra (including the provinces and wilayas of Laâyoune, Boujdour, Tarfaya and Es-Samara) and Dakhla-Oued Eddahab (including the provinces and wilayas of Oued Ed-Dahab and Aousserd).

Article 275 e / of the new Penal Code¹⁴ stipulates that "anyone who insults the Muslim religion, the monarchy or attempts to the territorial integrity of the Kingdom will be punished from six months to two years of imprisonment and a fine of 20,000 to 200,000 Dirhams¹⁵, or one of these two penalties". This is used to harass organisations campaigning for a referendum on self/determination in the Western Sahara, in violation of the articles of the Moroccan Constitution¹⁶

8 Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p.12

9 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160146en.pdf>

10 <http://www.saflii.org/za/cases/ZAECPEHC/2017/31.html>

11 The Popular Front for the Liberation of Saguia el-Hamra and Río de Oro, formally constituted on 10 May 1973, has been recognized by the UN General Assembly as the legal representative of the Non Self-Governing Territory of Western Sahara (UNGA Resolution 34/37 – 21 Nov. 1979)

12 Resolution 2351 (OP 8)

13 <http://www.pncl.gov.ma/fr/News/Alaune/Pages/Nouveau-d%C3%A9coupage-r%C3%A9gional-du-Royaume-.aspx>

14 Law No. 73.15 (published in the Official Bulletin on 15 August 2016)

15 100 Dirhams are equivalent to approximately 10,55 US \$

16 Dahir no. 1-11-91 du 27 chaabane 1432 (29 juillet 2011)

which guarantee the right to freedom of opinion and expression (art. 25), the freedom of the press (art. 28) and the right to freedom of peaceful assembly and association (art. 29). Moreover, human rights defenders in the territory are targeted by the security forces, systematically harassed, arrested and beaten.

The Gdeim Izik case

In October 2010, thousands of Sahrawi people erected a camp in the desert protesting peacefully against their poor economic and social conditions, human rights abuses and the occupation of the Territory by the Kingdom of Morocco.

On 8th November, the Moroccan forces entered the camp in order to dismantle it: the camp was burnt, 3000 people were arrested, among whom were 24 young Sahrawis accused of the murder of 11 Moroccan auxiliary forces.

The 24 were firstly sentenced by a Military Court in February 2013; all reported being subjected to torture and degrading treatments. They were condemned to severe sentences on the basis of confessions extracted under torture.

On 27 July 2016 the Moroccan Court of Cassation quashed the decision of the Military Court, basing its claim on the lack of factual evidence necessary to characterize the offenses and referred the case back to the Rabat Court of Appeal.

The trial started on 26 December 2016, went through several postponements¹⁷ and ended on 19 July with the confirmation of the sentences handed down in February 2013 by the Military Court.

It is to be noted that, following a complaint lodged by one of the detainees (Mr. Ennaâma Asfari), on 15th November 2016, the United Nations Committee Against Torture¹⁸ found that the facts revealed a violation by the Kingdom of Morocco of articles 1, 12, 13, 14, 15 and 16. The Kingdom of Morocco has rejected the decision of the Committee.

On 16th May 2017, exhausted by months of a trial marked by manifest iniquity, the 24 defendants and their Moroccan and Saharawi lawyers announced their desire to no longer participate in what they consider to be a mock trial. The same day, the President of the Court dismissed the two French lawyers (Me. Olfa Ouled and Me. Ingrid Metton) and assigned four new lawyers to represent the accused.

The numerous violations of the rights of the 24 accused have been detailed in the ACAT-France joint communication to the UN Special Rapporteurs on Torture and other cruel, inhuman or degrading treatment or punishment, on the independence of judges and lawyers, on the situation of human rights defenders, on the promotion and protection of the right to freedom of opinion and expression and on the rights to freedom of peaceful assembly and of association¹⁹.

Article 107 of the Moroccan's Constitution guarantees the independence of the judiciary, but in practice the domestic courts have no choice but to rule, in violation of international law, on the basis that Western Sahara is part of the Kingdom of Morocco.

Recommendations

Over and above the recommendations which it has received during its consideration under the Universal Periodic Review, IFOR calls upon the Kingdom of Morocco

- to terminate its occupation of the Non Self-Governing Territory of Western Sahara;
- to implement without delay all recommendations addressed to it by the Treaty Bodies;
- to release all political prisoners, especially Sahrawis.

17 The Rabat Court of Appeal sited on 26 Dec. 2016, from 23rd to 25th January 2017, from 13th to 15th March 2017, on 27th March, from 8th to 19th May 2017, from 5th to 15th June 2017, from 11th to 19th June 2017.

18 CAT/C/59/D/606/2014 (published on 12 Dec. 2016)

19 https://www.acatfrance.fr/public/communication_rs_gdeim_izik.pdf