



الوسيط من أجل الديمقراطية وحقوق الإنسان
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Le Médiateur pour la Démocratie et les Droits de l'Homme



Observations on the Report of "Human Rights Watch"

2009

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The Mediator for Democracy and Human Rights

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To Mr. Eric Goldenstein

**Research Manager of the Middle East and North Africa Human
Human Rights Watch Division**

Subject: Observations by the Mediator for Democracy and Human Rights on *"Human Rights in the Western Sahara and the Camps of Tindouf"*.

Dear Sir:

International and local non-governmental organizations (NGOs) that promote and work to protect human rights have achieved a well recognized experience in the denunciation of the violations of these rights through report mechanisms and other means. It must be admitted that Morocco has never constituted an exception to this rule and often has been the subject of periodic theme-based reports denouncing violations and abuses of human rights.

Although Morocco's reaction to these reports was in the beginning defensive and justificatory, the early 1990s witnessed a marked shift, with the inception of Human Rights Consultative Council (CCDH). The agenda of the very first meeting of CCDH included the examination of the Amnesty International report comprising lists of the people detained or disappeared in Morocco. This led to the creation of working commissions dealing with the situation existing in prisons and the conditions of

persons in custody. Measures were consequently taken for the release of political prisoners, the disappeared and return of exiles.

Against this backdrop we initiate a discussion on your report, to issue our observations on certain points of the report's content, to provide an answer to the original mission, which is that of the defense and protection of human rights, and the consolidation of achievements.

Accordingly, the Mediator for Democracy and Human Rights acts with regard to its mission which consists of the following:

- The monitoring of public policies and its harmonization, aiming at the enhancement and strengthening of democracy and human rights;
- The assessment of the experience of the Equity and Reconciliation Commission and the transitional justice process in Morocco;
- The interaction with some reports, issues and claims, with regard to the interdependence between democracy and Human Rights.

While praising the efforts put forth to prepare your report, the Mediator for Democracy and Human Rights submits herewith its observations, in the hope to have further opportunities to trigger in-depth discussions on the various issues raised.

Yours Sincerely,

Khadija MAROUAZI

Secretary General

The Mediator for Democracy and Human Rights

Observations of the Democracy and Human Rights Ombudsman

The methodology adopted by the Human Rights Watch (HRW) report is based on a comparison between the Human Rights situation in the Sahara and the Tindouf camps, with regard to civil rights as well as the right to fair trial. This implies the need for a description of the situation of these rights in the Sahara, and secondly in the Tindouf camps. Did this actually occur?

I. At the Level of the Sahara Region

1. Regarding the right to fair trial

The report gives some examples of trials which took place in the Sahara region, presuming an absence of the conditions required for a fair trial. The conclusions of the report are based on the following facts:

- The adoption of the minutes of the judicial police as elements of proof;
- The rejection by the court of applications for medical assessments made by the defendants to verify allegations of torture and other forms of abuse;
- The rejection of requests by lawyers calling for the testimony of defense witnesses if any.

From these presumptions, the report concludes that the judicial system in Morocco does not guarantee to the citizens of the Sahara the right to a fair trial. However, this conclusion is dependent on another level of

argumentation that requires a comparison with the functioning of the said judicial system in other regions of Morocco.

In spite of the progress attained in Morocco in reforming the relevant procedures and laws, either through amendment or harmonization, the judicial system generally remains incomplete. This deficiency becomes more apparent in the implementation of these laws. Complaints issued by citizens of the North, West and East of Morocco introduced to NGOs or Human Rights institutions regarding presumptions identical to those identified in the Sahara, remain significant with the absence of one or more guarantees of being fairly tried in the Kingdom as a whole.

Accordingly, the conclusion presuming the unfairness of justice in the Sahara presented in the report as being a characteristic of this region, leads one to suppose the existence of a discriminatory judicial system against citizens originating from the Sahara. However, this conclusion can be objectively accepted only when the comparison is made in both directions, and based on an enumeration of similar cases in the North, East and West of Morocco where the judicial system allegedly operates differently, and by comparing them to those identified in the Sahara according to international standards applied in this respect.

From this point of view, the recommendation contained in the report made on the basis of this conclusion, demanding the establishment of a mechanism for monitoring of the Human Rights situation in the Sahara, seems to be included in an abusive manner, which might explain the reason why, from the outset, the comparison of the judicial system in the Sahara with other regions of Morocco was deliberately overlooked. However, any conclusion regarding the Sahara at this level can be founded only on a concrete comparison with the other regions of Morocco.

Along the same lines, the conclusions made with regard to the cases listed in the report concluding the absence of conditions for fair trials in the

Sahara, place particular emphasis on the inadequacies of the investigative magistrate, whose role does not go beyond referring to the court the content of the minutes of the judicial police. As the same findings apply to Morocco as a whole, as do the complaints and claims included in the reports of NGOs working in the field of Human Rights in Morocco, the recommendation of the HRW report should have focused on:

- The need to accelerate the process of the legal and judicial reforms, beginning with the reform of the investigative magistrate institution, to be able to prosecute, acquit, confront, hear and investigate facts contained in the minutes of the judicial police.

Such a recommendation would have been reflexive of the concerns raised by the public opinion and the various actors involved. Also, it could have constituted an extension of the analyses contained in certain national and international reports, and the claims and action plans seeking to accelerate the justice system reforms as a whole.

Furthermore, from the cases cited, it is obvious that of the trial of a person in 2008¹, registered as an example among other cases to prove the absence of conditions allowing for fair trial, constitutes a blatant deviation in the line of reporting for the unfulfilled guarantees of fair trial. Although the HRW report recognizes the existence of these guarantees, the same report seems to have shifted focus from fair trial conditions, to unjustifiably discuss the instrument of indictment of violence perpetrated by a person against a female citizen, under the pretext that this person is a "Sahrawi activist". The report questions the true motivation of the accusatory charge but without hearing the victim of these acts of violence that were the origin of these proceedings. With reference to a NGO observing the

1. Page 43 of Human Rights Watch Report

trial, it is shown that: "the facts remain as reported in the case file and presented before the Court - facts that normally would be handled as a misdemeanor, especially considering that proof was not given neither in the contents of the case nor via the hearings, of the existence of a link between the case presented before the court coming under common law and the allegations of Mr...."²

2 .Regarding Civil Rights

The report presents an inventory of the abuses and violations of the freedom of expression, assembly and association in the Sahara region of Morocco.

This takes us back to the prohibition of the right to demonstrate and the difficulties encountered by associations going as far as decisions entailing prohibition or dissolution. In the formulation of these observations, the report describes the reasons for intervention or prohibition as follows:

- Use of violence by the demonstrators in exercising their right to demonstrate;
- A branch of a NGO stepping outside the statues of the parent association (case of the Moroccan Truth and Justice Forum);

As a result, the following remarks are imperative:

In the cases described illustrating the prohibition by the authorities of the right to demonstrate, the report should have referred to the law regulating civil rights and the distinctions made between demonstration and forming a crowd. The report indeed includes a description but with much confusion, of the different forms of protest, as being of the same type and purpose. For example, when it speaks about the celebration of the 10th of December, the international Human Rights Day in 2006³ in Laayoune city, it uses

2. *Press release of the OMDH on this subject published 28 May 2008.*

3. *Page 69 of the HRW report.*

different terms such as forming a crowd, gathering and demonstration to describe the same event.

Closely connected thereto, the report⁴ uses the following terms: sit-in, forming a crowd and demonstration in speaking about the same thing.

Moreover, when the report points out that "Moroccan law relating to public gatherings does not require any preliminary authorization for organizing a demonstration in public streets", but it fails to refer to the same law as modified and amended by Dahir n°1-02-200, enacted on July 23rd 2002, under the title: "demonstrations in public streets".

According to this law, for a march to be considered a demonstration, it should meet a certain number of criteria, and the absence of one thereof from a legal standpoint deprives it from being qualified as a demonstration. These criteria consist of preliminary organization and declaration to the local administrative authorities.

In the absence of organization as a particular component, the demonstration is transformed into forming a crowd, characterized by spontaneity, impetuosity and lack of organization. The preparation factor is characteristic of the demonstration. It makes it stand out through concerted action about the meeting place, the time of departure, the slogans, the itinerary and the place of break up, etc.

Likewise, without a preliminary declaration submitted to the local administrative authorities which is a mandatory measure, the demonstration becomes illegal crowding. According to the legislator, the end purpose of the preliminary declaration is to "inform the local administrative authorities in charge of law enforcement, to take all the security measures guaranteeing the exercise of this "civil right". The preliminary declaration is submitted to

4. Page 70 of the HRW report.

the administrative authorities in a minimum of three full days and no later than fifteen days prior to the date scheduled for the demonstration.

This distinction is clear at the level of the laws regulating the right to demonstrate, so what is at issue in the cases mentioned in the report? Considering that even if we reject such laws or call for their reform, they remain our point of reference until they are reformed or modified.

The frequent confusion made between demonstration and gathering⁵ throughout the report cross over the foundations according to which the findings, analysis and conclusions are made. Disregard of this distinction, in the absence of any crossing of the set lines during the demonstration, should not actually pose any particular problem. However, if the demonstration evolves into a riot with use of violence and destruction of property, with possible legal action, the said action will occur according to the provisions of article 255 of the criminal code of procedures and not on the basis of the law regulating demonstrations or the law on gatherings. The situation having completely changed, it is the provisions of the criminal code that will prevail and accordingly be applied.

By identifying and discussing the said crossing of lines, the report immediately bases its approach on the presumption of restriction of liberties. However, the increase in the number of associations and rise in the number of demonstrations organized, are all indicators of the widening scope of liberty, bearing witness to the fact that Rabat, Morocco's administrative capital, hosts a considerable number of national, regional or local protest demonstrations. The total number rose from 860 in 1998 to 1973⁶ in 2008.

5. See "law on gathering and law on demonstrations", Miloudi Hamdouchi, in the *Revue Marocaine de l'Administration Locale et du développement*, n° 57 and n°173

6. Press Conference given by the Wali of Rabat, December 2008.

It is obvious that this expansion in the margin of liberty places the State, the various actors and society in front of new challenges that will have to be worked out through dialogue and debate.

Apart from these legal points, the right to demonstrate raises new issues such as the legitimacy of an association (NGO) in calling ON the entire population to demonstrate while in the best of cases it controls only its own members. How to react in front of this new reality in the event of eventual disintegration into riots or conflicts of interest between citizens (those using public streets for their daily activities and those using them to demonstrate?).

Reducing the assessment of progress made with regard to civil liberty to a description of observed cases of abuse or only by comparison with the prevailing laws, without recalling the challenges linked to the changes Morocco is currently experiencing, makes this assessment only partial and therefore unable of contributing to the formulation of a global vision of what is occurring today inside the country.

With regard to the prohibition of associations in the Sahara, the report mentions the case of the Moroccan Truth and Justice Forum without reference to article 5 of the law regulating the right of association⁷ which stipulates in its last paragraph: "Any change occurring in the administration or management as well as any modification made to the statutes, any creation of branch offices, subsidiaries, or separate entities must, within the month of occurrence, give rise to a declaration in the same forms as above".

Because of this, any one would be totally confused in reading the text outside the Moroccan context: Does it deal with the wind up of an independent association whose name is "Truth and Justice Forum", or of a subsidiary of

7. Decree pursuant to the setting up of associations, as modified and completed by law n°00.75, REMALD, 2nd edition, 2007.

a national association called the "Moroccan Forum for Truth and Justice" after modification of the name by the subsidiary, without adhering to the regulations currently in force?

In the same direction, the report does not justify the conclusion thereto with regard to the case of prohibition of the creation of the "Sahraoui Association for victims of serious violation of Human Rights", in spite of the fact the administrative tribunal of Agadir issued them a receipt and consequently the right to exist as an association subsequent to refusal by the local authorities of Layoune. The difference in appreciation between the civil and legal authorities is proof enough of the inexistence of a systematic policy in Morocco regarding the Sahara region and the players operating in that region.

Furthermore, this particular case denotes the ever growing awareness by the players in the region of the need, in case of abuse, of using the full range of means of recourse available.

II. At the level the Tindouf camps in Algeria

By quoting the Moroccan NGOs that denounced violations of Human Rights in the camps of Tindouf, the report suggests that they come under official Moroccan bodies, without investigating the information on the facts and the testimony reported by the said NGOs and hastily conclude that the State gives precedence to the said NGOs at the expense of associations denouncing violations committed by the Moroccan authorities in the Sahara.

Along these lines, the report reveals nothing about in what category it classifies the hard work done in defending Human Rights and condemnation of violations, accomplished in Morocco over 20 years by NGOs operating in the field, as well as the publication the names of dozens of the disappeared, and of Sahraouis detained in legal and illegal detention

centers such as Agdez and Kalaat Magouna. The efforts deployed by the Bar Members Association of Morocco, AMDH, and OMDH or in a later phase, the Moroccan Truth and Justice Forum are documented and bear witness to the implication of the said associations for the defense of the victims of serious violations in Morocco without discrimination and totally independent from the State. In addition, several steps having been taken today on the way to finding fair solutions to these cases also constitute the result of their struggle in this regard.

Furthermore, the Moroccan press shows steady implication and continues to report and denounce various violations the players in the Sahara could undergo for their ideas or personal leaning.

In a comparison of the two judicial systems by observing hearings, the report makes mention of the arrests conducted in Tindouf further to the events of 2006, when the tribunals of the Polisario condemned 14 participants in the protest demonstration⁸ automatically held that: "the "HRW inquiry concluded that the confrontations of 2006 constituted an isolated event and entailed no serious loss or injury. These confrontations did not systematically lead to police brutality or repression of the demonstrators"⁹.

However, the report does not provide arguments to support this conviction. Indeed, the absence of data concerning the trials held in Tindouf in no way allows passing judgment on the type of judicial system existing in this region. This would have called for following the same approach consisting of the publication of the names of the fourteen detainees, an inquiry on their trial according to the same criteria as of a fair trial, which in turn should have referred to the exercise of the right of expression, demonstration and association not only limited to the sole existence of the said rights in conjunction with the laws currently in force in the region.

8. *Page 90 of the report*

9. *Page 93 of the report*

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