Extraterritorial Obligations of the State to Uphold Economic, Social and Cultural Rights

5X: Morocco/EU Fisheries Agreement

Country of victims: Western Sahara

Source: Julia St. Thomas and Joseph Schechla, Housing and Land Rights network – Habitat international Coalition.

States breaching their ETO: Morocco and European Union States.

States whose fleets that will operate under this agreement are from France, Germany, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain and United Kingdom (England, Northern Ireland, Scotland and Wales).

Signature: Types of extra-territorial State obligations breached

2. TNCs, private actors and their regulation, and 3(b). Trade and investment (multilateral)

Respect; i.e., to refrain from violating or interfering with the realisation of economic, social and cultural rights, and failure to implement the over-riding covenanted principles of self-determination and international cooperation; Protect; i.e. failure to protect Sahrawi rights holders from the conduct of Morocco and actors under EU jurisdiction and/or effective control (individuals and constituent States) and failure to exercise due diligence to prevent, punish or investigate ESCR violations and violations related to the breached over-riding principles of application in ICESCR: self-determination and international cooperation.

Description

On 15 May 2006 the European Parliament adopted a long-negotiated Fisheries Partnership Agreement with the Kingdom of Morocco. The Agreement provides for the EU to pay Morocco €144.4 million over four years in return for allowing 119 European vessels (100 Spanish, 14 Portuguese, 4 French and 1 Italian) to fish in Morocco's Atlantic coastal waters. The EU Fisheries Ministers and EU Fishery Commissioner Joe Borg endorsed the agreement, which also allows EU vessels to fish in the undefined territorial waters of the Kingdom of Morocco, thus permitting exploitation of the territorial waters of the Western Sahara, which Morocco currently occupies.

The Western Sahara, a former Spanish colony, remains on the UN list of nonself-governing territories since 1963. Following Morocco's domestically popular and militarily enforced invasion and occupation of Western Sahara in 1975, the ICJ issued its Advisory Opinion finding that no legal ties of territorial sovereignty existed between the Western Sahara and Morocco (or Mauritania) and that the future of the territory was a question of the Sahrawi people's self-determination to be determined by way of referendum. Despite the ICJ decision, Spain formed an illegal agreement with Morocco and Mauritania, conferring its administrative responsibilities in the territory to those States.

In 1979, Mauritania withdrew from Sahrawi territory under pressure from the armed resistance of the Frente POLISARIO, following which Morocco asserted its *de facto* control over the majority (ca. 80%) of the self-determination unit. The rest of the territory falls under the *de facto* control of POLISARIO, which is internationally recognized as the political representation of the Sahrawi people. The UN recognizes each party's *de facto* territorial control, but formally recognizes neither party as sovereign, pending the projected referendum, which Morocco consistently stalls, while carrying out population transfer to ensure a reliable nonindigenous Moroccan majority that it insists would be eligible for participation in the referendum.

Europe's agreement with Morocco, which permits European exploitation of Sahrawi territorial waters, was negotiated with an occupying power that holds no rights to Sahrawi natural resources, as UN under-secretary for Legal Affairs Hans Corell affirmed in his 2002 ruling[1] that stated that the exploitation of natural resources in such an occupied territory violates international law, unless it serves the interests and benefit, and reflects the consent of the people(s) of the nonself-governing territory.

However, the EU has recognized Morocco as the *de facto* administering power of the territory with rights to dispose of the indigenous rights-holding people's natural wealth and resources, while prejudicing obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. Moreover, the illegal Partnership Agreement also deprives the indigenous people of pursuing its economic, social and cultural development, and of its own means of subsistence.

A portion of the EU funds secured by Morocco through the partnership are earmarked for scientific cooperation and the development of the Moroccan fleet, which conceivably could benefit some portion of the indigenous population, in addition to Moroccan occupiers and settlers. Thus, is it not clear whether Morocco also violated the obligation and over-riding covenanted principles of *applying the maximum of available resources* or *progressive realization/nonretrogression* in measures to fulfill some rights holders' ESCR resident in the Moroccan-occupied zone.[2]

The POLISARIO, however, has not been a party to the negotiations with the EU partner, nor has either collaborating party addressed its call for transparency in the negotiations. POLISARIO has urged the EU to respect the

juridical status of Morocco as the occupier of the self-determination unit, to apply faithfully the UN Convention on the Law of the Sea, as well as the internationally recognized border between the Kingdom of Morocco and the Western Sahara. Apart from expressed dissent from Finish, Irish, Swedish and Dutch delegates to the EU Commission during the relevant debate, both Morocco and EU have ignored those calls to legal compliance.

Territorial HR analysis

All of the relevant violations in this case are extraterritorial in nature. However, Morocco bears the obligation also to ensure local judiciability of international treaties relative to ESCR.[3] The rights set out in the international human rights instruments to which Morocco has either acceded or ratified are protected by the constitution as per the preamble and these provisions may be invoked before Moroccan courts.

Extraterritorial HR analysis

With a view to local application, under international law, ICJ Advisory Opinion, the January 2002 Legal opinion of the UN Under-secretary for Legal Affairs on the status of Western Sahara natural resources and African Union resolutions, Morocco is recognized as the illegal occupying power in the Western Sahara. By its exploitation of Western Sahara's territorial waters, Morocco may also breach Articles 19, 39, 49, 56, 73, 77, 157 and 193 of the UN Convention for the Law of the Sea (UNCLOS), to which Morocco is a party,[4]

While Morocco has withdrawn from the African Union, it is a party to the seven core human rights treaties, which the Vienna Convention on the Law of Treaties[5] and corresponding principles of international law require it to apply locally and to harmonize domestic legislation with those public-law treaty provisions. In illegally exploiting the resources of the Western Sahara, including without the consent of the indigenous population, Morocco is also in breach of its obligations under CESCR (Article 1.2) and ICCPR (Article 1.1, 1.2), as it continues to obstruct the Sahrawi people's right to self-determination. Morocco is also in violation of its obligations to uphold fundamental human rights in economic partnerships as established in its Association Agreement (Article 2) with the EU,[6] as well as the Charter of Economic Rights and Duties of States (1974), in particular, Articles 1, 2.[7]

The EU stands in violation of its extraterritorial obligations primarily through acts of omission. Article 2 of the Euro-Mediterranean Association Agreement with Morocco ensures that the fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and external policies of the European Community and of Morocco in their association, and those norms shall constitute an essential element of the Agreement.

Article 6 of the Maastricht Treaty, concerning the rule of law, compels the EU not to disregard the juridical status that the UN attributes to Morocco in the Western Sahara, which accords it no right to govern the resources of the territory. While the EU has ignored Morocco's status in international law and recognized the legitimacy of Morocco as a *de facto* administering power in

negotiating the Partnership Agreement, it has not extended the same recognition to POLISARIO, thereby excluding the party, subject of self-determination, as a relevant stakeholder in negotiations and concerning the natural resources of the disputed territory.

ILO Convention 169, Article 15.1 recognizes that "The rights of peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." Denmark, Netherlands, Norway, Spain have ratified ILO No. 169. (Morocco has not.)

All concerned European States are party to the ICESCR. The Covenant's Articles 1.2 and 2 guarantee the right of the peoples of a territory to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law.

In proceeding with the Partnership, the EU is in violation of its collective obligations under international law, the primacy of which is reaffirmed in the Association Agreement, as it has failed to ensure the representation of the Sahrawi's interests in negotiating the exploitation of their natural resources. Moreover, the EU has failed to regulate the activities of Morocco concerning the fisheries and to apply criteria and indicators (as per the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights Articles 14 (a)–(e), concerning violations by commission, and Article 15 (a)–(j)) for assessing Morocco's compliance with the contingency of the Partnership Agreement; that the Sahrawi population benefit from the exploitation of the resources of their territory.

By its exploitation of Western Sahara's territorial waters, European States parties also may breach Articles 19, 39, 49, 56, 73, 77, 157 and 193 of the UN Convention for the Law of the Sea (UNCLOS). While this instrument is not strictly a human rights instrument, it upholds the general public law principle and human right of self-determination and extends rights and protections applicable to the indigenous Sahrawi people and its representatives.

States critical of the Partnership Agreement include Finland, Ireland, Sweden and the Netherlands, who requested close scrutiny of the implementation of the Agreement to ensure the benefit of the Sahrawi population. Sweden was vehemently opposed and asserted that the Agreement undermined the EU's support for the process of decolonization and self-determination in the case of the Western Sahara.[8]

Lessons Learned

The legal bases upon which the Agreement is founded have also been strongly criticised by several European leading lawyers.[9]

This FPA provides fishing possibilities for a maximum of 137 EU vessels, varying from small-scale to industrial fisheries. Fishing opportunities under the

agreement cover six fisheries categories, three of them specifically for small-scale fleets.[10]

The EU financial contribution amounts to €144.4 million over the four years, or some €36.1 million per year. In line with the Agreement approach, a substantial part of this amount (€13.5 million per year) has been earmarked for measures to support the development of sustainable fishing activities in Moroccan waters and to help modernize Morocco's coastal fleet.[11]

The license fees paid by the owners of the vessels operating under this agreement will vary according to the fishery concerned and could amount to an additional annual income for Morocco estimated at around €3.4 million.

Remedies and Accountability Mechanisms:

Legal challenges are possible within individual European State jurisdiction to challenge private companies operating under the Fisheries Partnership Agreement.

Legal challenges are possible also under EU jurisdiction (i.e., European Court of Human Rights) to challenge EU States and governments operating under the Fisheries Partnership Agreement.

EU customs agents enforcing European trade law would apply Article 2 of the Association Agreement to prevent the import of goods and resources originating in an occupied territory.

EU legislation could require country of origin certification for fish and fish products to distinguish and reflect accurately the source of such goods and resources as “Morocco” or “Western Sahara.” In such an event, a boycott or official ban could target products derived from illegally acquired resources in an occupied territory. Without such distinction and certification, all such products on European and other markets through or from Morocco could come under boycott or official restriction.

Under the draft articles on Responsibility of States for Internationally Wrongful Acts, a third State, other than the directly affected State, could invoke State responsibility if “the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group,” or “The obligation breached is owed to the international community as a whole” (Article 48). Thus, conceivably, another State in the African Union, or in other multilateral group including Western Sahara, could invoke those articles against the EU and Morocco for the injury affecting Western Sahara.

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[1] Hans Corell, “Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council,” S/2002/161, 12 February 2002.

[2] € 13.5 million per year, has been earmarked for measures to support the development of sustainable fishing activities in Moroccan waters and to help modernize Morocco's coastal fleet. These measures include support for:

- cushioning the impact of the withdrawal of driftnets on the fleets concerned;
- modernizing and upgrading Morocco's coastal fleet;
- modernizing landing and handling of fisheries products;

- programs for the restructuring of small-scale fishing;
- scientific research, training programs and professional organizations;
- support to professional organizations;
- training;
- upgrading the marketing and promotion structures for fisheries products.

[3] Committee on Economic, Social and Cultural Rights, “General Comment No. 3: the nature of state obligations” and “General Comment No. 9: The domestic application of the Covenant.”

[4] On 31 May 2007, Morocco registered instruments of ratification for the United Nations Convention on the Law of the Sea (1982), in force as from 16 November 1994, and the Agreement relating to the implementation of Part XI of the Convention (in force as from 28 July 1996).

[5] Which Morocco ratified on 26 September 1972.

[6] Which reads: “Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.”

[7] Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50. Article 16 reads: **“**1. It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neocolonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them. [ratification status?]

2. No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.

[8] Swedish Minister of Agriculture Ann-Christin Nykvist told the press after the meeting: "I voted against the fisheries agreement with Morocco because Western Sahara is not part of Moroccan territory according to international law". Robin Rosenkranz, Swedish agricultural counselor in Brussels, is quoted as having said "How can the EU on the one hand support the United Nations resolution and not recognise the annexation of the Western Sahara and on the other hand have a fisheries agreement with Morocco that covers the occupied areas? We want to be a neutral part in solving this conflict." Attributed to Financial Times, as cited in “New EU - Morocco fisheries agreement in breach of international law,” FISH Fiskesekretariatet/Fisheries Secretariat, at: http://www.fishsec.org/article.asp?CategoryID=1&ContextID=13.

[9] For example, see analysis of Spanish law professor and expert in the Western Sahara dispute Carlos Ruiz Miguel, “Is the EU-Morocco fishing agreement an attempt by Spain to legalise Moroccan Occupation of the Western Sahara?" Análisis No. 97, 7 March 2006, at: http://www.fishelsewhere.org/documents/Sherpa%20legal%20analysis.doc; and that of the French lawyers group SHERPA, “ANALYSE JURIDIQUE Fisheries Partnership Agreement," 3 April 2006, at: http://www.fishelsewhere.org/documents/Sherpa%20legal%20analysis.doc.

[10] Small-scale fisheries:
- Pelagic fisheries (seiners): 20 vessels, targeting mainly sardine and anchovy;
- Long-liners: 30 vessels, targeting mainly scabbardfish and sparidae;
- Lines, pole and line, and traps: 20 vessels, targeting mainly croaker and sparidae;

Demersal fisheries (close to the sea floor):

Long lines, trawls and nets: 22 vessels, targeting black hake, scabbardfish, leerfish/bonito

Tuna:

Seiners and pole and line: 27 vessels, targeting tunas and related species

Small pelagic fisheries (mid-water): Annual quota of 60,000 tonnes for a maximum of 18 vessels, target species: sardine, sardinella, mackerel, horse mackerel and anchovy.

[11] Supra, note 2.