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THE CASE OF HUSEIN BACHIR BRAHIM

ASYLUM SEEKERS FROM WESTERN SAHARA & THE PRACTICE
OF SPAIN

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Introduction: Asylum seekers from Western Sahara & the practice of Spain

The 1951 Refugee Convention, signed and ratified by Spain in 1978, sets forward the right to seek international protection.

The right to seek asylum is similarly stipulated in the Declaration of Human Rights Article 14, stating that “everyone has the right to seek and to enjoy in other countries asylum from persecution”.

Husein Bachir Brahim, a 27-year old Saharawi travelled to Spain in January 2019 to seek international protection, fearing that he would be arrested by the Moroccan authorities in response to his political opinion relating to the right to self-determination for the people of Western Sahara.

The UN Committee Against Torture, The Special Rapporteur on Torture and the Working Group on Arbitrary Detention has all reported a systematic use of force against the Saharawi people in Western Sahara, and highlights that Saharawi’s advocating for the right to self-determination are subjected to comprehensive police violence, abductions, torture and subjected to arbitrary arrest and arbitrary detention.¹²

Husein was deported to Morocco, 10 days after his arrival to Spain. Upon his arrival in Morocco, he was arrested and imprisoned in Luidadya prison in Marrakech, accused of “illegal political activities”.

Husein was subjected to the same treatment as numerous Saharawi’s was subjected to before him: An automatic and collective deportation of Saharawi’s from Spain to Morocco, the Occupying Power of Western Sahara, on the basis that Morocco is capable of providing protection to the people of Western Sahara.

”Owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it”.

1915 Refugee Convention

¹ CAT/C/MAR/CO/4, Committee against Torture, Consideration of reports submitted by States parties under Article 19 of the Convention, concluding observations of the Committee against torture (2011); A/HRC/22/53/Add 2, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez, Mission to Morocco (2013). A/HRC/27/28/Add5, Report of the Working Group on Arbitrary Detention. Mission to Morocco (2013).

² Report of the Working Group on Arbitrary Detention, Mission to Morocco. A/HRC/27/48/Add.5, para 62-71

The case of Husein Bachir Brahim

Husein travelled from El Aaiún (the capital of Western Sahara) to Barranco Mulión in Las Palmas (Gran Canaria) on 11 January 2019 in a small boat. Upon arrival in Spain, he sought asylum on the grounds of political persecution, claiming that he was being persecuted by the Moroccan State and actively pursued by the Moroccan police in retaliation for his activities as a human rights defender, advocating for the independence of Western Sahara.

Only ten days after having arrived in Spain, Husein was detained by the police in Lanzarote. Without being presented in front of a judicial or administrative organ, and, despite having sought international protection, Husein was deported from Spain to Morocco on 17 January 2019.

After being deported from Spain to Morocco, 27-year-old Husein was arrested and imprisoned, accused of “illegal political activities” in response to his political activism relating to the right to self-determination for the Saharawi people.

Upon his arrival in Morocco, Husein was immediately placed in handcuffs and arrested, in response to his political and human rights activism, and imprisoned in Luidadya prison in Marrakech.



Before traveling to Spain, Husein was enrolled in his third year of law school at the University of Zohr in Agadir. There, he was one of the most active students, engaged in the Western Sahara issue, advocating for the right to self-determination for the Saharawi people. Now, Husein is imprisoned, accused of “illegal political activities”.

The Moroccan Penal Code provides that individuals can be prosecuted and imprisoned for speech deemed to harm Islam, the monarchy, or Morocco’s territorial integrity. The reference to the territorial boundaries of the Kingdom of Morocco is related to Western Sahara, and the Kingdom’s sovereignty claim. Morocco has thus effectively criminalized speech deemed to harm the territorial integrity of Morocco.

It was for this very reason Husein chose to travel to Spain in order to seek international protection, claiming that Morocco is - due to his political opinions relating to the right to self-determination for the people of Western Sahara - unwilling to protect him.



To deprive a people of protection

By deporting citizens from Western Sahara, Spain has adopted migration policies and practices that effectively prevent people fleeing from serious human rights violations in Western Sahara to seek international protection in Spain. During a visit to Rabat in October 2018, the Secretary of State for Migration in Spain, Consuelo Rumí, stated that “Morocco is not amongst the countries in which its inhabitants is granted asylum or refugee status, for justified reasons”. In its migration practices, Spain is including Western Sahara into the territory of Morocco, treating Moroccan nationals and Saharawi’s alike.

Western Sahara is, and has, since 1963, been considered by the UN as a non-self-governing territory. “Saharawis” are the indigenous people of Western Sahara; entitled to the right to self-determination in conformity with the principles contained in General Assembly resolutions 1514 (XV), 1541 (XV) and 2625 (XXV). The right to self-determination is a human right enshrined in the Universal Charter on Human Rights, and in common article 1 of both the ICCPR and ICESCR, and further stipulated in Additional Protocol 1 to the four Geneva Conventions, and is to be regarded as a norm erga omnes.

Western Sahara and International Law

Western Sahara is enlisted as a non-self-governing territory, subjected to the right to self-determination in conformity with the principles contained in General Assembly resolutions 1514 (XV) and 1541 (XV).

As Morocco invaded a territory, in 1975, in which it does not hold sovereignty over (ICJ Advisory Opinion, Western Sahara, 1975), falling under the administration of a “High Contracting Party” (Spain), rendering the conflict and international armed conflict (GCIV article 2 (2)), Morocco’s presence in Western Sahara, without the consent of the people of Western Sahara, is the one of an “occupying power” falling under Article 42 of 1907 Hague Regulations and Article 2 of the Fourth Geneva Convention of 1949.

Hence, such obligations are by their very nature “the concern of all states” and, “in view of the importance of the rights involved, all States can be held to have legal interests in their protection. In that sense, the International Court of Justice has held that “all States are under an obligation not to recognize the illegal situation resulting” from the breach of an obligation erga omnes.³ As highlighted by the International Court of Justice with regard to inhabitants of a mandated territory: “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization’.”⁴

Advocate General Wathelet highlighted, in his Advisory Opinion regarding Western Sahara, that “instead of being able to exercise its right to self-determination along the lines stated by the International Court of Justice in its Advisory Opinion on Western Sahara, the people of Western Sahara have thus far been deprived of the opportunity even to exercise that right on the conditions

³ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para 159.

⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, para 70, citing Advisory Opinion on the International Status of South West Africa, ICJ Reports 1950, p. 132.

set out in United Nations General Assembly Resolutions 1514 (XV), 1541 (XV), 2625 (XXV), 3458 A and B (XXX), by a series of measures culminating in the partition of the territory of Western Sahara in 1976 and its annexation in 1976 and 1979”, in which “the Kingdom of Morocco proceeded to integrate Western Sahara in its territory by partition and annexation, without consulting the people of Western Sahara and without United Nations supervision”.⁵

To include the territory of Western Sahara into the territory of Morocco, and to treat Saharawi’s, the people of Western Sahara, as Moroccan nationals, is consequently to recognize an illegal situation resulting from a breach of an obligation erga omnes.

The persecution of the people of Western Sahara living under Moroccan occupation has been widely documented by the UN Committee on Torture, the Special Rapporteur on Torture and the UN Working Group on Arbitrary Detention.⁶⁷ The reports documents how Saharawi’s is persecuted by the Moroccan Government, due to their support for the right to self-determination for the Saharawi people. The reports similarly document how Saharawi’s, fleeing from Western Sahara, a territory currently held under Moroccan Occupation, have a well-founded fear of being persecuted on grounds of political opinion - with an Occupying Power who is - having criminalized speech deemed to harm the territorial integrity of Morocco - unwilling to protect them.



Layounee, Western Sahara, 28 June 2018. Photo by Equipe Media

⁵ Ibid., para 182-183

⁶ CAT/C/MAR/CO/4, Committee against Torture, Consideration of reports submitted by States parties under Article 19 of the Convention, concluding observations of the Committee against torture (2011); A/HRC/22/53/Add 2, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Méndez, Mission to Morocco (2013). A/HRC/27/28/Add5, Report of the Working Group on Arbitrary Detention. Mission to Morocco (2013).

⁷ Report of the Working Group on Arbitrary Detention, Mission to Morocco. A/HRC/27/48/Add.5, para 62-71



Recommendations

By the deportation of young Husein, Spain has overlooked their obligations towards the international community, and breached its obligations under the Refugee Convention, the Declaration of Human Rights, and the EU Charter of Fundamental Rights.

Adala UK recommends Spain to:

- Review its migration policies, ensuring that Western Sahara is not included in the territory of Morocco, but that asylum seekers from Western Sahara is treated separate from asylum seekers coming from Morocco, in order not to recognize the illegal situation resulting from the breach of an obligation erga omnes.
- To review its migration policies in relation to asylum seekers from Western Sahara, taking into account the criminalization of expressions deemed to harm the territorial integrity of Morocco, as well as reports issued by the United Nations, documenting the persecution of Saharawi 's advocating for the right to self-determination for the people of Western Sahara
- Abide by its obligation under the 1915 Refugee Convention, the Declaration on Human Rights and the EU Charter of Fundamental Rights. In particular, Adala UK urges Spain to ensure that no person seeking international protection who faces risks of being arbitrary detained, tortured or subjected to inhumane treatment, is deported, and to abide by the principle of non-deportation.
- Adala UK asks Spain to follow up the case of Husein Bachir Brahim closely, in order to ensure that he is not subjected to torture or inhumane treatment and that his right to a fair trial is respected. We ask Spain to ensure that Husein Bachir Brahim is not held on arbitrary detention in response to his political opinions concerning the right to self-determination for the people of Western Sahara.



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