

Summary, made by WSRW, of the Status Report issued by the Research Department of the Bundestag on March 2019.

The original report can be found on our website: <https://www.wsrw.org/files/dated/2020-05-04/bundestag-statusreport-ws2019.pdf>

International law aspects of the conflict of Western Sahara

On March 18th 2019, the section WD 2 (Foreign Affairs, International Law, Economic Cooperation and Development, Defense, Human Rights and Humanitarian Aid) of the research services of the German Bundestag have issued a status report on the international law aspects of the conflict of Western Sahara. It had been requested by MP Katja Keul (Bündnis 90/Die Grünen) in preparation of a draft motion. These reports gather facts on a particular topic and describe their placement within their corresponding context.

The report elaborates on the key aspects required for a legal examination of the status of the territory of Western Sahara under international law. It repeats the main statements of the ICJ advisory opinion of 1975, namely that there have not been found grounds that would impede the application of UN resolution 1514 (XV) and therefore the principle of self-determination. Furthermore, it underlines that in his 2002 legal opinion former UN Legal Counsel Hans Corell came to the conclusion that the 1975 Madrid Agreement did not transfer sovereignty over the territory nor did it “affect the international status of Western Sahara as a Non-Self-Governing Territory”. For this reason, in addition to the fact that Morocco does not consider itself administering power, the report concludes that Morocco is not to be considered administering power of Western Sahara, neither a ‘de-facto administering power’, since this term is not meaningful in context of international law following the opinion of the Advocate General in the preliminary ruling at the CJEU on the EU-Morocco Fisheries Agreement (C-266/16 2018).

Moreover, the report comes to the conclusion that “good reasons support the assumption that Morocco has annexed the part of Western Sahara under its control and that it continues to occupy it”. Further on, it states that Western Sahara is under occupation and that “Morocco is to be considered the occupying power”. For this conclusion, it refers in particular to the opinion of the Advocate General in the preliminary ruling at the CJEU on the EU-Morocco Fisheries Agreement. He had described the territorial acquisitions of parts of Western Sahara by Morocco in 1976 and 1979 as annexations and argued that Morocco is to be classified as an occupying power. Additionally, the report recalls the fact that, with regard to the application of international humanitarian law in the Fourth Geneva Convention and the Additional Protocol (I), “it does not matter whether it is actually the military that exercises the power”. Similarly, a consolidation of the status would not be “contrary to the application of the law of occupation”.

In its main part, the report examines possible violations of provisions concerning the transfer of civilians to an occupied territory under international criminal or humanitarian law,

respectively. According to the report, a violation of Article 8(1)(b)(viii) of the Rome Statute is ineligible since Morocco has not ratified it. On the other hand, Article 1(4) of the Additional Protocol (I) of the Fourth Geneva Convention ensures its applicability to Western Sahara, being in a state of decolonization. The report further elaborates on the fact that according to general understanding, the term 'transfer' is to be interpreted in a broader sense, which is supported by the fact that Article 8(1)(b)(viii) of the Rome Statute follows these lines and includes "direct" and "indirect" measures.

The report concludes that "the Moroccan government's policy of settlement of Moroccan citizens in the territory of Western Sahara", including indirect "measures that promote and facilitate migration into the occupied territory" like financial incentives and infrastructure projects, "substantiates a violation of Art. 85(4)(a) AP I in conjunction with Art. 49 (6) GC IV and, at the same time, an infringement of the prohibition of the transfer of parts of its own population into occupied territories, as stipulated in Article 49(6) of the Fourth Geneva Convention, and also established by customary law."