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for Human Rights and reports of the Office of the
High Commissioner and the Secretary-General**

Written statement* submitted by the American Association of Jurists, 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.

[13 February 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 is not part of the Kingdom of Morocco the European Union Court of Justice says

Introduction¹

After having been under Spanish colonial rule, Western Sahara was included by the UN General Assembly to the list of Non Self-Governing Territories in 1963².

In 1966, the UN General Assembly invited the Administering Power (Spain) to establish, in conformity with the aspirations of the indigenous people, the procedures for the holding of a referendum with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination.

While Spain never organized the referendum, the Kingdom of Morocco invaded the Non Self-Governing Territory (Green March) on 6 November 1975. The very same day, the UN Security Council, in adopting resolution 380, deplored the holding of the march and called upon the Kingdom of Morocco to immediately withdraw from the Territory of Western Sahara all the participants in the march.

On 26 February 1976, the Administering Power (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.

In 1991, after 15 years of war between the Polisario Front and the Kingdom of Morocco, the parties agreed on a cease-fire and the holding of a referendum. Thereafter, the UN Security Council approved the creation of the UN Mission for the Referendum in Western Sahara (MINURSO).

While the referendum has still not been organized, the Kingdom of Morocco has developed economic activities in the occupied territory, notably in the phosphates and fishing sectors.

The EU / Morocco agreements

The Euro-Mediterranean Agreement, that established an association between the European Communities and their Member States, and the Kingdom of Morocco, was signed in Brussels on 26 February 1996 and approved on behalf of the Communities by Decision 2000/204 of the Council and the Commission of 24 January 2000 (OJ 2000 L 70, p. 1)³.

In 2012, the European Union (EU) and Morocco concluded an agreement providing for reciprocal liberalization measures on agricultural products, processed agricultural products and fish and fishery products (the 'Liberalisation Agreement'). That agreement, which territorial scope depends on that of the EU-Morocco Association Agreement, was formally concluded by the EU on the basis of the Council decision 2012/497/EU of 8 March 2012.⁴

On 19 November 2012, the Polisario Front brought an action before the General Court seeking the annulment of that decision. Subsequently, the Council of the EU, Spain, France, Belgium, Germany, Portugal and the Confédération marocaine de l'agriculture et du développement rural appealed to the judgment of the General Court of the EU

The Judgment of the Court of Justice of the European Union⁵

On 21 December 2016, the Grand Chamber of the Court of Justice of the European Union (CJEU) decided that the Association agreement and the Liberalisation agreement between the EU and Morocco was not applicable to Western Sahara.

First, relying on the right to self-determination of the Sahrawi people, the CJEU ruled that Western Sahara has a "separate and distinct status [...] in relation to that of any State, including the Kingdom of Morocco" (§ 92). Therefore,

¹ This written contribution benefited from the assistance of Gilles Devers Law Office, Lyon (France)

² UNGA Res. 2229 (XVIII)

³ Footnote no. 1 of the Court of Justice of the European Union's Press Release No 146/16 (12.12.2016)

⁴ Court of Justice of the European Union's Press Release No 146/16 (12.12.2016)

⁵ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-12/cp160146en.pdf>

Western Sahara is not a part of the territory of Morocco and the Kingdom of Morocco has no sovereignty over Western Sahara.

Besides the principle of self-determination, this “separate and distinct status” of Western Sahara in relation to Morocco also derives from the international borders that have been established a century ago⁶ and confirmed in an international agreement concluded by the Polisario Front and the Kingdom of Morocco in 1997⁷.

Secondly, after underlining that the people of Western Sahara enjoyed the right to self-determination and that the Polisario Front was recognized by the UN as the legitimate representative of the Sahrawi people (§ 105), the CJEU found that the people of Western Sahara must be regarded as a ‘third party’ to the EU-Morocco relations. Therefore, the Saharawi people must give their consent for any international agreement to be applicable to the territory of Western Sahara and its natural resources (§ 106): the prior consent of the Sahrawi people is the only applicable legal criterion.

The recognition of the Polisario Front as the sole legitimate representative of the Sahrawi people

In its judgment, the Court rejected the argument that an international agreement could be lawfully applicable to Western Sahara if its implementation was beneficial to its “local population”. In clarifying the applicable law, the CJEU specially underlines that it is not necessary to determine whether such implementation is likely to harm [the Sahrawi people] or, on the contrary, to benefit it” (§ 106). It is sufficient to point out that, “in either case, that implementation must receive the consent of [the people of Western Sahara]” (§ 106).

In its decision, the CJEU quotes the article 1 of the constituting document of the Polisario Front (§ 21). According to this article, “the Polisario Front is a national liberation movement, the fruit of the long resistance of the Sahrawi people against the various forms of foreign occupation, created on 10 May 1973”.

Moreover, the Court mentions the peace agreement concluded between Mauritania and the Polisario Front (§ 34). Finally, it refers twice to the UNGA Resolution 34/37 that recognizes the Polisario Front as “the representative of the people of Western Sahara” (see § 35; § 105).

These findings of the CJEU are consistent with the opinion of the Advocate General delivered in September 2016 that describes the Polisario Front as a National Liberation Movement with international legal personality⁸.

Therefore, no agreements can cover the territory of Western Sahara without the prior consent of the Saharawi people through its sole representative, the Polisario Front.

The illegal occupation of Western Sahara by the Kingdom of Morocco

Amongst the various UN documents on Western Sahara, the CJEU refers to the conclusion of the ICJ, in its Advisory Opinion on Western Sahara, that “the materials and information presented to [the ICJ] do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco” (§ 28).

⁶ The southern and eastern boundaries with the Islamic Republic of Mauritania were established by the “Convention pour la délimitation des possessions françaises et espagnoles dans l’Afrique occidentale, sur la côte du Sahara et sur la côte du Golfe de Guinée”, signed in Paris on 27 June 1900. The Northern boundary of Western Sahara with the territory of the Kingdom of Morocco was delimited by two conventions, the Paris Convention signed on 3 October 1904, and the Madrid Convention signed on 27 November 1912. Its delimitation has been slightly corrected by the Madrid Convention signed on 19 December 1956.

⁷ The paragraph 3 of the Lisbon Compromise Agreement on Troop Confinement, concluded on 29 August 1997, reads as follows: “This compromise shall in no way change, alter or otherwise affect the internationally recognized boundaries of Western Sahara, and shall not serve as precedent for any argument that such boundaries have changed or been altered.”

⁸ See paragraph 146 of the opinion : The “recognition [of the Polisario Front] as a national liberation movement by a number of States, as the representative of the people of Western Sahara by the UN General Assembly, its membership in the African Union international organization, the conclusion of agreements with the Islamic Republic of Mauritania and the Kingdom of Morocco and its undertaking to respect the Geneva Conventions of 12 August 1949 on the protection of victims of war, made in accordance with Article 96(3) of the Additional Protocol relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, tend to militate in favor of recognition of the legal personality which international law confers on national liberation movements”.

The CJEU then cites UNSC Resolution 380 (1975) on Western Sahara, in which it “calls upon Morocco immediately to withdraw from the territory of Western Sahara” (§ 31).

Finally, the CJEU refers to the UNGA Resolution 34/37 on the question of Western Sahara, in which it “deeply deplores the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco” and “urges Morocco to join in the peace process and to terminate the occupation of the territory of Western Sahara” (§ 35).

Therefore, the CJEU considers that Morocco illegally occupies in Western Sahara. In this respect, it is worth mentioning that the CJEU describes the wall of sand across Western Sahara “as constructed and guarded by the Moroccan army” (§ 37).

Since the adhesion of the Polisario Front to the 1949 Geneva Convention on 21 June 2015⁹, there is no doubt that international humanitarian law applies to the illegal military occupation of Western Sahara by the Kingdom of Morocco. In its legal opinion, the African Union also considers Western Sahara an occupied territory (S/2015/786, § 34, § 42).

The Kingdom of Morocco recognizes that Western Sahara is not part of the Kingdom

In adhering to the African Union on 31st January 2017, the Kingdom of Morocco has implicitly admitted that Western Sahara is not part of the Kingdom and recognized the existence of the Sahrawi Arab Democratic Republic, a founder-member of the African Union.

Article 3 of the African Union Charter lists the objectives of the Union: paragraph (b) reads “defend the sovereignty, territorial integrity and independence of its Member States”.

Article 4 (b) sets out one of the principles of the African Union which is “the respect of borders existing on achievement of independence”.

According to Article 26 of the Vienna Convention on the Law of Treaties, entitled ‘*Pacta sunt servanda*’, ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’

Paragraph 1 of Article 31 of the Convention, entitled ‘*General rule of interpretation*’ reads that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”; while paragraph 3 (b) of the same article says that there shall be taken into account, together with the context any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

Recommendation

In this context, the American Association of Jurists calls upon the UN Council on Human Rights and the UN High-Commissioner for Human Rights to make every effort to ensure that the Saharawi people can freely exercise their inalienable right to self-determination in the coming months.

⁹ https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/150626-GENEVE_en.pdf