

Unofficial translation made by WSRW, of the Status Report issued by the Research Department of the Bundestag on 18 March 2019.

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Status Report *International law aspects of the conflict of Western Sahara*

Research Services of the German Federal Parliament (Deutscher Bundestag)

2.6 On the question of Morocco's annexation and occupation of the territory of Western Sahara

The general opinion is that Morocco has annexed and occupied the part of Western Sahara that is under its control. An annexation is generally understood to be "the unilateral act of a state by which the latter makes foreign territory its own against the will of the state concerned".³⁵ One speaks of occupation by a state if it effectively exercises control over a foreign territory without the will of the sovereign.³⁶ The International law of occupation is applicable if an area is *de facto* under the control of another state.³⁷ Article 42 of the Hague Convention of 1907³⁸ forms the starting point for the legal examination.³⁹

In his opinion the Advocate General has described the two successive territorial acquisitions of parts of Western Sahara by Morocco in 1976 and 1979 as annexations in the preliminary ruling at the CJEU on the Fisheries Agreement.⁴⁰

The fact that Western Sahara is occupied by Morocco was also "moreover generally recognised".⁴¹ Similarly, a 2015 study commissioned by the European Parliament on annexations and occupations of territories, in relation to the situation in Western Sahara, states that Morocco has annexed and occupied the part of the territory under its control.⁴²

In a resolution adopted in 1979, the UN General Assembly 'deeply deplored' for the first time the worsening situation due to the continued occupation of Western Sahara and the expansion of the occupation to the territory left by Mauritania and in 1980 reiterated its concern about the continuing occupation.⁴³ As far as it can be seen, the UN Security Council resolutions adopted on Western Sahara do not make explicit reference to annexation and occupation by Morocco, but consistently emphasize the right to self-determination of the Sahrawi population.⁴⁴

Following the Advocate General's reasoning, Morocco is to be classified as an occupying power, according to the criteria laid down by the ICJ for the so-called *jus in bello*, since it administers the previously annexed territories in a structured manner and has established an effective rule over large parts of the Western Sahara and continues to exercise it.⁴⁵ There is also the opinion in the literature, that the rule and control exercised by Morocco over the majority of the territory of Western Sahara - reinforced by its *de jure* incorporation into its own territory - is sufficient for the application of the international law of occupation.⁴⁶

Finally, the assumption of an occupation of Western Sahara by Morocco is also not contradicted by the fact that Art. 42 of the Hague Convention assumes a hostile army. At least with regard to the application of international humanitarian law in the Fourth Geneva Convention (1949), and the Additional Protocol (I) (1977), it does not matter whether it is actually the *military* that exercises the power.⁴⁷ Also a certain consolidation of the status is not contrary to the application of the law of occupation as long as the occupation has not ended.⁴⁸ Thus good reasons support the assumption that Morocco has annexed the part of the Western Sahara under its control and continues to occupy it.

3. International criminal law and international humanitarian law

According to the German Federal Government, a "considerable number of Moroccan citizens [...] has settled in the territories of Western Sahara" and "in the meantime, also people of the second generation are living [lived] on site"⁴⁹. Exact numbers are not available to the federal government.⁵⁰ Moreover, according to the federal government, Morocco engages in projects in the political, economic and cultural domain, including infrastructure development, in order to strengthen Western Sahara's ties to Morocco.⁵¹

It is questionable whether such measures by the Moroccan government, and, in particular, the specific support for the settlement of Moroccan citizens in the territory of Western Sahara, are relevant under international criminal law or international humanitarian law.

3.1 The Rome Statute

To start with, an infringement of Art. 8(1)(b)(viii) (*sic*) of the Rome Statute comes into consideration.⁵² This provision of international criminal law punishes the "transfer by the occupying Power, directly or indirectly, of parts of its own civilian population into the territory it occupies," as a war crime. However, an individual criminal liability of Moroccan decision-makers under this norm can only be considered if the Rome Statute is also applicable to Morocco.

Although Morocco signed the Rome Statute in 2000, it has not yet ratified it.⁵³ This means that for Morocco a violation of Article 8(1)(b)(viii) of the Rome Statute can be discarded for the lack of applicability.

3.2 Additional Protocol (I) to the Geneva Conventions

To the point that the Moroccan Government specifically encourages Moroccan citizens to migrate to the territory of Western Sahara - for example by offering their citizens a financial aid or tax incentives - an infringement of the prohibition of "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" laid down in Art. 85(4)(a) AP I in conjunction with Art. 49(6) GC IV seems to be conceivable.

Since Morocco has ratified the 4th Geneva Convention (GC IV)⁵⁴ and the Additional Protocol (I) of 1977 (AP I)⁵⁵, there are no concerns regarding its applicability.⁵⁶

Article 85(4)(a) AP I reads as follows:

(4) In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully (*sic*) and in violation of the Conventions or the Protocol:

a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in

violation of Article 49 of the Fourth Convention;

Article 49(6) GC IV, to which the above-mentioned Article of CP I refers, reads:

“The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.”

The provision of the Additional Protocol (I) is to be understood as supplementing the "grave breaches" already listed in Art. 147 of the GC IV by adding the fact of transfer of a part of the civilian population to the occupied territory already standardized in Art. 49(6) GC IV.⁵⁷

3.2.1 International armed conflict

According to Article 1(3) AP I, the Additional Protocol is applicable in the situations described in the Fourth Geneva Convention (Art. 2 GC IV). These are the so-called international armed conflicts, which involve (exclusively) parties to the Convention. At the insistence of the states, which were formerly under colonial rule, Article 1(4) AP I, indeed equates “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination [...]” with international armed conflicts.⁵⁸ This provision ensures that the Additional Protocol is also applicable if a territory is still in a state of decolonization, as it is the case for Western Sahara.

3.2.2 "Occupying power"

As already noted, Morocco exercises de facto rule and control over large parts of Western Sahara and is therefore to be regarded as an occupying power (see 2.6). An "occupation" according to Art. 49(6) GC I does not require circumstances beyond those defined in Article 42 of the Hague Conventions of 1899 and 1907, and is therefore applicable in the case of Western Sahara.⁶⁰

3.2.3 "Transfer"

The alleged difference between Article 85(4)(a) AP I (“transfer”) and Article 49(6) GC IV (“to deport”) is based on an inconsistent German translation and does not exist in the authentic English version. In both cases it uses the word ‘transfer’. Contrary to what this term may initially suggest, this does not only refer to actual, physical "transport" of compatriots to settlement areas of the occupied territory according to general understanding.⁶¹ Instead, this standard is based on a broader interpretation, which is substantiated by the particular danger of reinforcing the temporary status of occupation through such settlement activities.⁶²

In the commentary "The 1949 Geneva Conventions - A Commentary" (Clapham et al., 2015) it explicitly says:

„A transfer may be also brought about by subtler methods, in particular by promises of higher earnings, by tax incentives, by investment in infrastructure, and by other means capable of inducing persons to establish themselves in an environment that is originally alien to them. From the perspective of the intended protection of the population in an occupied territory, such “soft” strategies must also be deemed to be included in the scope of the prohibition”.⁶³

The fact that a "transfer" does not only include direct settlement initiatives of a government, but also indirect control measures that promote and facilitate migration into the occupied territory, becomes also apparent in the genesis of the more recent, almost identical provision in Article 8(1)(b)(viii) of the Rome Statute (cf. 3.1). It is based on Article 8(4)(a) AP I and merely clarifies additionally that not

only "direct" but also "indirect" ('directly or indirectly') transfers are accounted for.⁶⁴ Such indirect measures of the occupying power can include for example financial incentives, grants or also tax exemptions.⁶⁵

Should the Moroccan Government therefore, for example, offer its citizens financial incentives to migrate to the territory of Western Sahara, this would be regarded as "transfer" in terms of Art. 85(4)(a) AP I or "deport [transfer]" in terms of Art. 49(6) GC IV. This would also include infrastructure projects of the Moroccan government in Western Sahara. It should be noted that it would have to involve the long-term residence of the respective persons and that their center of life should be located there. Make-shift accommodation such as tents or caravans, however, would be included in the regulation.⁶⁶

3.2.4 "Part of the population"

Furthermore, the Moroccan settlers must be a "part of the population" of Morocco. This characteristic is also to be understood in a broader sense. In this respect, the identical provision in Art. 8(1)(b)(viii) of the Rome Statute can be consulted, as this is based on Art. 85(4)(a) AP I (see point 3.2.3.). In this sense, according to general opinion, there is no need for a certain minimum number of persons, but rather a settlement by a few people is already sufficient.⁶⁷

3.3 Result

It can thus be stated that the Moroccan government's policy of settlement of Moroccan citizens in the territory of Western Sahara 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 law⁶⁸.

35 *Kau* (Fn. 33), S. 189, Rn. 140.

36 *Benvenisti*, *The International Law of Occupation*, 2. Auflage, 2012, S. 43.

37 *Bothe*, *The Administration of Occupied Territory*, in: Clapham et al. (Hrsg.), *The 1949 Geneva Conventions. A Commentary*, 1. Auflage (2015), Chapter 69, S. 1456;

38 Abkommen, betreffend die Gesetze und Gebräuche des Landkriegs vom 18. Oktober 1907, Anlage: Ordnung der Gesetze und Gebräuche des Landkriegs (Haager Landkriegsordnung), abgedruckt im BGBl. 1910, S. 107.

Authentische englische Fassung: Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18. October 1907, abrufbar unter: <https://ihl-databases.icrc.org/ihl/INTRO/195>.

39 *Benvenisti*, *Occupation, Belligerent*, in: MPEPIL (letzter Stand: Mai 2009), Rn. 4; abrufbar unter: <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e359>.

40 Schlussanträge Wathelet (Fn. 20), Rn. 175, 178, 182, 194.

41 Vgl. ebd. Rn. 247 und insb. die dazugehörige Fußnote 223 mit einem umfangreichen Verweis auf Fundstellen in der Literatur, abrufbar unter: <https://eur-lex.europa.eu/legalcontent/DE/TXT/PDF/?uri=CELEX:62016CC0266&from=LV>.

42 *Wrange* (Fn. 22), S. 40.

43 VN-Generalversammlung, GA Res. 34/37, 21.11.1979, abrufbar unter: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/A_RES_34_37.pdf.

„Deeply deplores the aggravation of the situation resulting from *the continued occupation* of Western Sahara by Morocco and the extension of that *occupation* to the territory recently evacuated by Mauretania (Hervorh. vom Bearb.)“

VN- Generalversammlung, GA Res. 35/19, 11.11.1980, abrufbar unter: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_35_19.pdf

„Again declares that it is deeply at the aggravation of the situation deriving from the **continued occupation** of Western Sahara by Morocco and from the **extension of that occupation** to the part (...) (Hervorhebungen vom Verfasser).“

44 Vgl. auch *Bothe* (Fn. 37), S. 1459; siehe z.B. VN-Sicherheitsrat, Resolution 244 (2018), S/Res/244/18, 31.10.2018, abrufbar unter: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2440.pdf.

Vgl. aber kritisch *Dawidowicz* (Fn. 20), S. 264.

45 Schlussanträge Wathelet, C-266/16 (Fn. 20), Rn 248, 249. 46 *Dawidowicz* (Fn. 20) S. 272; Simon (Fn. 2), S. 262.

47 *Benvenisti*, *Occupation, Belligerent* (Fn. 39), Rn. 37.

48 Vgl. Speziell auf die Anwendung von Artikel 49 VI GK IV bezogen *Tomuschat*, *Prohibition of Settlements*, in: *Clapham et al.* (Hrsg.), *The 1949 Geneva Conventions. A Commentary*, 1. Auflage (2015), Chapter 73, S. 1560.

49 Antwort der Bundesregierung auf die große Anfrage der Fraktion Bündnis 90/Die Grünen (BT-Drs. 17/11453), 15.5.2015, BT-Drs. 17/13602, Frage 18, abrufbar unter: <http://dipbt.bundestag.de/doc/btd/17/136/1713602.pdf>. 50 Ebd.

51 Antwort der Bundesregierung (Fn. 49), Frage 19.

52 Römisches Statut des Internationalen Strafgerichtshofes vom 17. Juli 1998, abgedruckt im BGBl 2000 II, Nr. 35, S. 1394-1483, abrufbar unter:

https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D'bgbl200s1359b.pdf'%5D#_bgbl_%2F%2F%5B%40attr_id%3D%27bgbl200s1393b.pdf%27%5D_1551882208915.

53 *Treaties UN, Rome Statute of the International Criminal Court*, abrufbar unter:

<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf>.

54 Genfer Abkommen vom 12. August 1949 zum Schutze von Zivilpersonen in Kriegszeiten, abgedruckt im BGBl. 1954 II, Nr. 17, S. 917-971, abrufbar unter:

https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F%5B%40attr_id%3D'bgbl200s1359b.pdf'%5D#_bgbl

__%2F%2F*%5B%40attr_id%3D%27bgl254s0781.pdf%27%5D_1551883665114.

55 Zusatzprotokoll zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer internationaler bewaffneter Konflikte (Protokoll I), abgedruckt im BGBl. 1990 II, Nr. 47, S. 1551-1649, abrufbar unter:

https://www.bgbl.de/xaver/bgbl/start.xav?start=%2F%2F*%5B%40attr_id%3D'bgl200s1359b.pdf%5D#_bgl__%2F%2F*%5B%40attr_id%3D%27bgl290s1550.pdf%27%5D_1551883523199.

56 ICRC, State Parties to Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, abrufbar unter: <https://ihldatabases>.

[icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380);

ICRC, State Parties to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, abrufbar unter: <https://ihldatabases>.

[icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470](https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470).

57 International Committee of the Red Cross (ICRC), Protocol I (1977), Commentary of 1987, paras 3502 ff., <https://ihldatabases>.

[icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7BBCFC2D471A1EAAC12563CD00437805](https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=7BBCFC2D471A1EAAC12563CD00437805).

Siehe auch *Cottier/Baumgartner* in: Triffterer/Ambos (Hrsg.), Rome Statute of the International Criminal Court. A Commentary, 3. Auflage (2016), Art. 8, para 371 mit Fußnote 570.

58 Vgl. *Bugnion*, Adoption of the Additional Protocols of 8 June 1977: A milestone in the development of international humanitarian law, in: International Review of the Red Cross (2017), 99 (2), 785–796, 792.

59 *Milanovic*, The Applicability of the Conventions to „Transnational“ and “Mixed“ Conflicts, in: Clapham et al. (Hrsg.), The 1949 Geneva Conventions. A Commentary, 1. Auflage (2015), Chapter 2, S. 39.

60 *Tomuschat*, Prohibition of Settlements, in: Clapham et al. (Hrsg.), The 1949 Geneva Conventions. A Commentary, 1. Auflage (2015), Chapter 73, S. 1560.

61 *Tomuschat* (Fn. 60), S. 1563.

62 *Tomuschat* (Fn. 60), S. 1559, 1563.

63 *Tomuschat* (Fn. 60), S. 1563 (Hervorhebungen vom Verfasser).

64 Siehe *Cottier/Baumgartner* in: Triffterer/Ambos (Hrsg.), Rome Statute of the International Criminal Court. A Commentary, 3. Auflage (2016), Art. 8, para 373.

65 *Cottier/Baumgartner* (Fn. 64), Art. 8, para 383.

66 *Tomuschat* (Fn. 60), Chapter 73, S. 1564.

67 *Cottier/Baumgartner* (Fn. 64.), Art. 8, para 380.

68 *Tomuschat* (Fn. 60), S. 1566; *Cottier/Baumgartner* (Fn. 64), Art. 8, para 370.