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30 de junio a 17 de julio de 2020

Tema 3 de la agenda

**Promoción y protección de todos los derechos humanos,
civiles, políticos, económicos, sociales y culturales,
incluido el derecho al desarrollo**

Nota verbal de fecha 17 de julio de 2020 dirigida al Presidente del Consejo de Derechos Humanos y a la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos por la Misión Permanente de Sudáfrica ante la Oficina de las Naciones Unidas en Ginebra

La Misión Permanente de la República de Sudáfrica ante la Oficina de las Naciones Unidas en Ginebra y otras organizaciones internacionales con sede en Suiza saluda atentamente al Presidente del Consejo de Derechos Humanos y a la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, y tiene el honor de señalar a su atención la correspondencia adjunta del Frente Polisario relativa a la responsabilidad de los Estados por las actividades económicas ilegales de empresas transnacionales y de otra índole en el Territorio No Autónomo del Sáhara Occidental (véase el anexo).

La Misión Permanente de la República de Sudáfrica tiene el honor de solicitar que la presente nota verbal y su anexo* se publiquen como documento del 44º período de sesiones del Consejo de Derechos Humanos y se distribuyan a todos los Estados miembros del Consejo, en relación con el tema 3 de la agenda.

* Se reproduce como se recibió, en el idioma en que se presentó únicamente.



Annex to the note verbale dated 17 July 2020 from the Permanent Mission of South Africa to the United Nations Office at Geneva addressed to the President of the Human Rights Council and to the Office of the United Nations High Commissioner for Human Rights

A Spanish protectorate since 1884, Spanish Sahara was included in 1963 in the list of Non-Self-Governing Territories under Chapter XI of the Charter (A/5514, annex III). Since then, UN General Assembly Resolution 1514 (XV), which contains the “Declaration on the Granting of Independence to Colonial Countries and Peoples” fully applies to Western Sahara.

UN General Assembly Resolution 2625 (XXV) entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations” provides that the territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the administering Power (not mentioning an occupying Power) and that such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

The Frente Popular de Liberación de Saguía el Hamra y Río de Oro (Frente Polisario), recognized by the UN General Assembly in Resolution 34/37 as the representative of the people of Western Sahara, denounces the language adopted by the Moroccan delegation in referring to the Non-Self-Governing Territory as the “Moroccan Sahara” or the “Southern provinces” and defining the Frente POLISARIO as a supposed separatist movement; the Kingdom of Morocco should not confuse its illegal annexation of a portion of Western Sahara with sovereignty over the Territory.

Indeed, in its 1975 Advisory Opinion,¹ the International Court of Justice concluded that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco. In November 1975, the UN Security Council in Resolution 380 called upon Morocco to immediately withdraw from the Territory of Western Sahara all the participants in the march. In November 1979, the UN General Assembly in Resolution 34/37 deeply deplored the aggravation of the situation resulting from the continued occupation of Western Sahara by the Kingdom of Morocco.

In the framework of the ongoing discussion on the issue of human rights and transnational corporations and other business enterprises, bearing in mind Article 1 of the International Covenant on Economic, Social and Cultural Rights, the Frente Polisario recalls that in its statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights,² the Committee on Economic, Social and Cultural Rights stressed that “States parties have the primary obligation to respect, protect and fulfil the Covenant rights of all persons under their jurisdiction in the context of corporate activities undertaken by State-owned or private enterprises.”

Furthermore, in its General comment No. 24 (2017) on State obligations under the Covenant in the context of business activities,³ the Committee underscores that States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused.

The Committee also specifies that the extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can

¹ Western Sahara, Advisory Opinion, I.C.J. Reports 1975.

² E/C.12/2011/1.

³ E/C.12/GC/24 (July 2017).

exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective. The Committee further asserts that a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event.

The Frente Polisario also recalls that the annually adopted resolution of the UN General Assembly entitled “Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories”,⁴ calls upon all Governments that have not yet done so to take legislative, administrative or other measures in respect of their nationals and the bodies corporate under their jurisdiction that own and operate enterprises in the Non-Self-Governing Territories that are detrimental to the interests of the inhabitants of those Territories, in order to put an end to such enterprises.

Article 41 (2) of the International Law Commission’s draft articles on the Responsibility of States for Internationally Wrongful Acts provides that “no State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (like the core humanitarian norms embedded in the 1907 Hague Convention and the 1949 Fourth Geneva Convention), nor render aid or assistance in maintaining that situation”.

As early as 1970, in the aforementioned Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, it was confirmed that State territories shall not be the object of military occupation or acquisition by another State resulting from the threat or use of force, nor shall territorial acquisition be recognized as legal. This obligation of non-recognition was repeated in, among others, the 1974 Definition of Aggression,⁵ the 1975 Helsinki Final Act of the Conference of Security and Co-operation in Europe,⁶ and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.^{7, 8}

All UN Member States must recognize that they are legally obliged to cease trading with illegal settlements in occupied territories. The duty of non-recognition applies to occupation by the threat of force. It is the status of core humanitarian norms in international law, either as *jus cogens* obligations or as *erga omnes* obligations, that gives way to the application of the duty of non-recognition and non-assistance.⁹

The Frente Polisario also calls the attention of the Human Rights Council’s members to the study published in 2015 by the Directorate-General for External Policies of the European Parliament¹⁰ which states that the Moroccan aggression, occupation and annexation of Western Sahara constitute a serious breach of international law and that the occupied territory of Western Sahara is not a part of the Kingdom of Morocco, which has no legal title or claim on the territory. The study recalls that all States are under an obligation not to recognise an illegal situation resulting from annexation and not to render aid or assistance in maintaining this illegal situation.

In its most recent decisions related to the applicability of the European Union/Morocco agreements, the Court of Justice of the European Union constantly reaffirmed that Western Sahara cannot be considered a part of the Kingdom of Morocco and therefore that the agreements were not applicable to Western Sahara and that, considering the legal status of the Non-Self-Governing Territory of Western Sahara, the development of any economic

⁴ A/RES/74/94 (13/12/2019).

⁵ UNGA Res. 3314 (XXIX), 14 December 1974, at Art. 5.

⁶ 1975 Conference on Security and Co-operation in Europe (CSCE) (Helsinki Final Act), 14 ILM 130, at IV.

⁷ GA Res. 42/22, 18 November 1987.

⁸ Tom Moerenhout – The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories – International Humanitarian Legal Studies 3 (2012), p.358.

⁹ *Ibid.*, p. 383.

¹⁰ Occupation/annexation of a territory: Respect for international humanitarian law and human rights and consistent EU policy (EP/EXPO/B/DRÖL/FWC/2013-08/Lot8/05 – June 2015-PE534.995).

activity in the Territory requires the prior, free and informed consent of the representative of the people of Western Sahara.

Despite those judgments, the European Commission and the European Parliament decided to violate the European Union's Treaty and the Principles of the Union's external action by signing new agreements with the Kingdom of Morocco that cover the Occupied Non-Self-Governing Territory of Western Sahara.

The Frente Polisario, while denouncing the persistent illegal occupation and annexation of part of Western Sahara by the Kingdom of Morocco and the persistent illegal plundering of the natural resources of the Territory, as well as the development of economic activities which affect the interests of the Sahrawi people, calls upon the members of the Human Rights Council to implement OP5 of the annually-adopted resolution entitled "Universal realisation of the right of peoples to self-determination", which reads "Requests the Human Rights Council to continue to give special attention to violations of human rights, especially the right to self-determination, resulting from foreign military intervention, aggression or occupation" and to establish the mandate of a Special Rapporteur on the situation of human rights in the Occupied Western Sahara.

I would be most grateful if you would bring the present letter to the attention of the members of the Human Rights Council.

Geneva, 17 July 2020

Ms. Omeima Abdeslam

Representative of the Frente Polisario to the United Nations
and other International Organisations in Geneva
