

*One of the most forgotten and protracted conflicts in the world is the situation in Western Sahara, sometimes referred to as Africa's last colony. The issue has been dealt with in numerous resolutions by the United Nations General Assembly and the Security Council. The parties involved must find a solution. But they need the support of other actors. The international community, and particularly the European Commission, must live up to their responsibility and support the UN efforts towards a solution to the dispute.*

## Western Sahara — status and resources

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### The United Nations Trusteeship system and Western Sahara

The United Nations Trusteeship system was established through the UN Charter in 1945. Article 73 of the Charter lays down the fundamental principles applicable to Non-Self-Governing Territories. Members of the United Nations (UN) who assumed responsibilities for the administration of these territories have thereby recognised the principle that the interests of the inhabitants of these territories are paramount, and have accepted as a sacred trust the obligation to promote to the utmost the well-being of the inhabitants of these territories.

One such Non-Self-Governing Territory is Western Sahara in north-west Africa, bordered by Morocco, Mauritania and Algeria. Western Sahara was administered by Spain until 1976. In that year Spain relinquished its duties as administering power, and Morocco and Mauritania affirmed their claim to the territory. This claim was opposed by the Frente Popular para la Liberación de Saguia el-Hamra y de Río de Oro (Frente Polisario). In 1979, Mauritania renounced all claims to Western Sahara.

The United Nations has been seeking a settlement in Western Sahara since the withdrawal of Spain in 1976 and the ensuing fighting between Morocco and the Frente Polisario. In 1979, the Organization of African Unity (OAU) also became active in seeking a peaceful solution of the conflict.

The question of Western Sahara has been dealt with both by the General Assembly, as a question of decolonisation, and by the Security Council, as a ques-

tion of peace and security. The Council was first seized of the matter in 1975, and in its resolutions 377 (1975) of 22 October 1975 and 379 (1975) of 2 November 1975 it requested the Secretary-General to enter into consultations with the parties. Since 1988, in particular, when Morocco and Frente Polisario agreed, in principle, to the settlement proposals that the Secretary-General of the UN and the Chairman of the OAU had elaborated,<sup>1</sup> the political process aiming at a peaceful settlement of the question of Western Sahara has been on the agenda of the Council.

On 29 April 1991, the Security Council decided to establish the UN Mission for the Referendum in Western Sahara (MINURSO).<sup>2</sup> The implementation plan provided for a transitional period during which the Special Representative of the Secretary-General would have sole and exclusive responsibility over all matters relating to the referendum in which the people of Western Sahara would choose between independence and integration with Morocco. The UN High Commissioner for Refugees would carry out a repatriation programme for eligible Western Saharan voters living outside the territory. The transitional period was to begin with the coming into effect of a ceasefire on 6 September 1991 and end with the proclamation of the results of the referendum.

According to the settlement plan, the referendum should have taken place

in January 1992. However, it was not possible to proceed in keeping with the original timetable because of resumed hostilities.

Since then efforts have been made over the years to implement the agreement. The Secretary-General and his Special Representatives have continued efforts to find compromise solutions acceptable to both parties. This



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process has required a number of revisions to the implementation plan and the timetable. The primary function of MINURSO at that time was limited to verifying the ceasefire and cessation of hostilities.

In early 1997, the Secretary-General intensified the examination of the main contentious issues, including in a series of direct talks between the parties, held under the auspices of the Secretary-General's Personal Envoy. By September of the same year, the Secretary-General reported that all the agreements reached during the talks had taken effect.

In December 1997, the Secretary-General restarted the identification process which had been suspended. This process was completed, but the parties continued to hold divergent views on some crucial aspects of the implementation plan. The Secretary-Gen-

eral, through his Special Representative and later his Personal Envoy, continued consultations with the parties to seek a reconciliation of these views and to explore ways and means to achieve an early, durable and agreed resolution of their dispute over Western Sahara.

There have been some positive developments in recent years, in particular following UN-sponsored talks since 2007. The latest meeting was held in February 2010, but there is still no solution of the core substantive issues.

### Status of Western Sahara under international law

In 1963 Spanish Sahara, which had been a Spanish protectorate since 1884, was included in the list of Non-Self-Governing Territories under Chapter XI of the UN Charter.<sup>3</sup> Spain assumed its role as administering power, and the General Assembly reaffirmed that the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>4</sup> was applicable to Spanish/Western Sahara.

On 14 November 1975, a Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania (“the Madrid Agreement”), whereby the powers and responsibilities of Spain, as the administering Power of the Territory, were transferred to a temporary tripartite administration. The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer upon any of the signatories the status of an admin-

istering power; Spain alone could not transfer that authority unilaterally. The transfer of the administration of the territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory.

On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in Western Sahara and relinquished its responsibilities over the territory, thus leaving it in fact under the administration of both Morocco and Mauritania in their respective controlled areas. Following the withdrawal of Mauritania from the territory in 1979, Morocco has been the sole administrator of the Territory of Western Sahara. Morocco, however, is not listed as the administering Power of the Territory in the United Nations list of Non-Self-Governing Territories. The argument can be made that Western Sahara in reality is occupied by Morocco.

### Mineral resources in Western Sahara

In January 2002, in my capacity as Under-Secretary-General for Legal Affairs and the Legal Counsel of the UN, I delivered a legal opinion relating to mineral resources in Western Sahara. The opinion was transmitted to the President of the Security Council in a letter dated 29 January 2002.<sup>5</sup>

What the members of the Council had asked for was my opinion on “the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and



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agreements concerning Western Sahara, of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara.”

The Government of Morocco provided me with information pertaining to two contracts, concluded in October 2001. They concerned oil-reconnaissance and evaluation activities in areas offshore Western Sahara. One of the contracts was between the Moroccan Office National de Recherches et d'Exploitations Pétrolières (ONAREP) and the United States oil company Kerr McGee du Maroc Ltd. The other was between ONAREP and the French oil company TotalFinaElf E&P Maroc.

In order to be able to determine the legality of the contracts that were concluded by Morocco offshore Western Sahara it was necessary to analyse the status of the Territory of Western Sahara and the status of Morocco in relation to the Territory. Furthermore, it was necessary to analyse the principles of



PHOTO: UN PHOTO/MARTINE PERRET

A team from the UN Mission for the Referendum in Western Sahara (MINURSO) pass camels as they conduct a ceasefire patrol and monitor for illegal movements near the border with Mauritania.

international law governing mineral resource activities in Non-Self-Governing Territories. In this analysis, it was also necessary to examine provisions of the UN Charter, General Assembly resolutions pertaining to decolonisation in general, and economic activities in Non-Self-Governing Territories in particular. Needless to say, we also had to carefully analyse agreements concerning the status of Western Sahara.

With respect to the law applicable to mineral resource activities in Non-Self-Governing Territories, an analysis was made of Article 73 of the UN Charter. The conclusion was that the interests of the inhabitants of these territories are paramount.

Of particular interest were the General Assembly resolutions relating to the question of implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. These resolutions called upon the administering powers to ensure that all economic activities in the Non-Self-Governing Territories under

their administration did not adversely affect the interests of the peoples of such territories, but were instead directed towards assisting them in the exercise of their right to self-determination.

These resolutions also contained provisions designed to protect the “inalienable rights” of the peoples of those territories to their natural resources, and to establish and maintain control over the future development of those resources. The need to protect the peoples of Non-Self-Governing Territories from exploitation and plundering by foreign economic interests was also addressed. A distinction was made between economic activities that are detrimental to the peoples of these territories and those directed at benefiting them. The main issue identified was whether the principle of “permanent sovereignty” prohibits any activities related to natural resources undertaken by an administering power in a Non-Self-Governing Territory, or only those which are undertaken in disregard of

the needs, interests and benefits of the people of that territory.

The question became whether mineral resource activities in a Non-Self-Governing Territory by an administering power are illegal as such, or only if conducted in disregard of the needs and interests of the people of that territory. An examination of the relevant provisions of the Charter of the UN, General Assembly resolutions, the case law of the International Court of Justice and the practice of States led me to the conclusion that such activities would be illegal only in the latter situation.

Where resource exploitation activities are conducted in Non-Self-Governing Territories for the benefit of the peoples of those territories, they are considered compatible with the Charter obligations of the administering power and in conformity with the General Assembly resolutions and the principle of “permanent sovereignty over natural resources” enshrined therein.

The main clause of the final sentence of the legal opinion constitutes a very

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*Western Sahara is a neglected conflict. Humanitarian assistance is decreasing, there is little media attention, and lack of will on the part of the international community to find a solution along the lines that the UN has outlined.*

clear message with respect to the legality of the activities in question: “[I]f further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.” From this sentence follows that Morocco would have to engage in proper consultations with persons authorised to represent the people of Western Sahara before such activities would be allowed.<sup>6</sup>

### Other resources

As I observed in an address delivered in Pretoria in December 2008,<sup>7</sup> the material analysed in the process of preparing the legal opinion had led me to the conclusion that what is said in the legal opinion about mineral resources applies also to other resources, be they renewable or non-renewable.

A prominent renewable resource in Western Sahara is fishing. An important question is therefore how the revenues from the fishing in the waters off Western Sahara benefit the people of the territory.

In 2006, the European Commission concluded a Fisheries Partnership Agreement with Morocco. That agreement applies in the “Moroccan fishing zones”, which is said to mean the waters falling within “the sovereignty or jurisdiction of the Kingdom of Morocco” (Article 2). The expression “or jurisdiction” refers to the Moroccan Exclusive Economic Zone. It is obvious that it is also used to indicate the waters belonging to Western Sahara, as there is no distinction made in the agreement with respect to the waters adjacent to Western Sahara.

It is clear that any jurisdiction over those waters is subject to the limitations that follow from the rules on self-determination, which means that the Commission has an obligation to ascertain that the people of Western Sahara had been consulted, had accepted the agreement and the manner in which the profits from the activity was to benefit them. An examination of the Agreement actually leads to a different conclusion. Let me reiterate what I said in this context in Pretoria:

“The Protocol to the Agreement refers to ‘Morocco’s resources’ (Article 4). With respect to the financial contribution, the Protocol says that subject to

Article 6 of the Protocol ‘the Moroccan authorities shall have full discretion regarding the use to which this financial contribution is put’. [...]

The protocol also mentions ‘the Moroccan fishing industry’ (Article 8). The Annex mentions the ‘Moroccan Atlantic zone’ (Chapter III), ‘Moroccan seamen’ (Chapter VII) and ‘Moroccan ports’ (Chapters VIII B and X). In Appendix 4 the limits of Moroccan fishing zones are indicated. Apart from some small-scale fishing between 34° 18’ N and 35° 48’ N off the coast of Morocco, the rest is indicated by ‘The entire Atlantic’ (apart from a limited area) for tuna fishing and ‘South of 29° 00’ for demersal fishing and industrial pelagic fishing. What does ‘South of 29° 00’ mean? A tiny area southwards to 27°-28° N where the waters of Western Sahara commence, or all the waters southwards to where the waters of Mauretania meet at about 21° N?”<sup>8</sup>

In all the pages of the agreement there is not one word about the fact that Morocco’s “jurisdiction” is limited by the international rules on self-determination. It is obvious that an agreement of this kind that does not make a distinction between the waters adjacent to Western Sahara and the waters adjacent to the territory of Morocco violates international law.

The fisheries agreement is now (October 2010) up for a renewal. It has been suggested to me that the European Commission is of the opinion that it is for Morocco to see to it that the agreement is implemented in a manner that the interests of the Saharawi are taken into consideration. In view of the circumstances, in particular the political dispute over many years between Morocco and the Frente Polisario, this position is simply not acceptable. An honourable actor in the international arena must demonstrate a higher standard. This applies in particular to Europe where actions by States should be based on the Charter of the UN and modern treaties on human rights, such as the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As it appears from the foregoing, some of the provisions of the existing fisheries agreement do not meet the legal standards that one would expect from Europe of today.

### Concluding remarks

It is important that a solution to the dispute over Western Sahara can be found. The talks will hopefully bear fruit. But in order to find a solution it is imperative that other actors do not behave in a manner that in fact risks undermining the efforts by the UN to find a solution. A particular responsibility rests with the members of the European Commission and in particular Spain. By relinquishing its “sacred trust” in 1975 Spain bears a heavy responsibility for the existing situation.

As I suggested in Pretoria, the business community can also make a contribution to the search for a solution of the situation by acting in conformity with the principles of Corporate Social Responsibility.<sup>9</sup>

Finally, let me also in this context reiterate that I have no other interest in this matter than the rule of law and that the Member States of the United Nations respect the norms that the Organisation itself has established. The legal opinion and the views expressed in this article are the result of my siding with the law to the best of my understanding. 🌿

1 UN Doc. S/21360.

2 Resolution 690 (1991) and UN Doc. S/22464, containing an implementation plan and a timetable.

3 UN Doc. A/5514, annex III.

4 General Assembly resolution 1514 (XV).

5 UN doc. S/2002/161.

6 As was done by the United Nations in East Timor with respect to the so-called Timor Gap Treaty. See UN Doc. S/2002/161, para. 20.

7 The legality of exploring and exploiting natural resources in Western Sahara. Address at a Conference in Pretoria in 2008 hosted by the South African Department of Foreign Affairs and the University of Pretoria. In: *Multilateralism and International Law with Western Sahara as a Case Study*. Ed. N. Botha, M. Olivier and D. van Tonder. University of South Africa Press (2010) (p. 231-247).

8 In the FAO Statistics the minimum latitude for Western Sahara is 20° N and the maximum latitude is 27° N. Correspondingly, the minimum latitude for Morocco is 27° N. The fact that fishing takes place in the waters off Western Sahara was confirmed by Commissioner Borg in an answer to Parliamentary questions on 9 April 2008. E-1073/2008. See <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-1073&language=IT>

9 Op. cit. in note 7, pages 243-245.