

**AFRICAN UNION**

**الاتحاد الأفريقي**



**UNION AFRICAINE**

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## **LEGAL OPINION**

**ON THE LEGALITY IN THE CONTEXT OF INTERNATIONAL LAW,  
INCLUDING THE RELEVANT UNITED NATIONS RESOLUTIONS AND  
OAU/AU DECISIONS, OF ACTIONS ALLEGEDLY TAKEN BY THE  
MOROCCAN AUTHORITIES OR ANY OTHER STATE, GROUP OF STATES,  
FOREIGN COMPANIES OR ANY OTHER ENTITY IN THE EXPLORATION  
AND/OR EXPLOITATION OF RENEWABLE AND NON-RENEWABLE  
NATURAL RESOURCES OR ANY OTHER ECONOMIC ACTIVITY IN  
WESTERN SAHARA**

**BY**

**THE OFFICE OF THE LEGAL COUNSEL  
AND DIRECTORATE FOR LEGAL AFFAIRS OF  
THE AFRICAN UNION COMMISSION**

## A. INTRODUCTION

1. The Government of the Saharawi Arab Democratic Republic (SADR), through a letter dated 25 February 2015, addressed to the Chairperson of the Commission, Dr. Nkosazana Dlamini Zuma, requesting a legal opinion from the Office of the Legal Counsel (OLC) on “the illegality of the exploitation of the natural resources of Western Sahara by the Kingdom of Morocco, the occupying force, and any other entity, company or group.” The issue, as submitted, already presupposed the illegality of the exploitation of natural resources by the Kingdom of Morocco.
2. The Permanent Mission of Saharawi Arab Democratic Republic in a note verbale under reference number 44/2015 dated 03 April 2015, however, modified the issue to “the legality in the context of international law, including the relevant UN resolutions and OUA/AU decisions, of actions allegedly taken by the Moroccan authorities or any other State, group of States, foreign companies or any other entity consisting in the exploration and/or exploitation of renewable and non-renewable natural resources or any other economic activities in Western Sahara.”
3. It should be recalled that in February 2002, the UN Under-Secretary-General for Legal Affairs and Legal Counsel delivered a legal opinion to the United Nations Security Council on almost an identical issue, “the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and 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.”<sup>1</sup>
4. Since the issues concerning the Saharawi Republic are multidimensional, for purposes of this legal opinion, the OLC will restrict itself to the issue as contained in the note verbale from the Permanent Mission of SADR dated 03 April 2015.

## B. FACTUAL BACKGROUND<sup>2</sup>

5. The Territory of Western Sahara became a Spanish colony in 1884. During the time when the territory was a colony of Spain, it was known as Spanish Sahara.

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<sup>1</sup> The European Parliament Legal Service has also delivered legal opinions in respect of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco in 2006 and 2009. The unofficial copies of the opinions are available on the website. See <http://www.arso.org/LegalopinionUE200206.pdf> accessed on 22/04/15 at 10:00; <http://www.fisheiswhere.eu/a140x1077> accessed on 22/04/15 at 11:23 and Report on Legal Issues Involved in the Western Sahara Dispute: Use of Natural Resources available at <http://www.nycbar.org/pdf/report/uploads/20072089ReportonLegalIssuesInvolvedintheWesternSaharaDispute.pdf> accessed on 20/04/15 at 14:25

<sup>2</sup> The facts generally have been gathered from a number of Reports of the Commission on Western Sahara

6. The territory borders Morocco in the North, Mauritania in the South and East, Algeria in the East and the Atlantic Ocean in the West.
7. In 1963, Western Sahara was included on the list of non-self-governing territories under Article 73 of the UN Charter and Spain was the administering power.<sup>3</sup> The General Assembly had demanded that Spain should undertake immediate steps to guarantee the exercise of self-determination by the people of Western Sahara. This underscored the right to a referendum on self-determination under UN General Assembly Resolution 1514 (XV) adopted in 1960, The General Assembly has always maintained that the people of Western Sahara are entitled to the right to self-determination.
8. The International Court of Justice (ICJ) issued an advisory opinion on the status of Western Sahara on 16 October 1975 at the request of the UN General Assembly. In the opinion, the ICJ dismissed the sovereignty claims by Morocco and Mauritania. After the ICJ delivered its opinion, Spain entered into a secret agreement with Morocco and Mauritania (Madrid Accords) which purported to authorize Spain's withdrawal from the Territory of Western Sahara and permit the occupation by Morocco and Mauritania.
9. On 31 October 1975, Morocco invaded Western Sahara on the pretext of claiming the territory, despite the ICJ's advisory opinion on the issue, that clearly stated that there were no legal ties between either Morocco or Mauritania with the Western Sahara. In response to the ICJ Advisory Opinion, King Hassan II of Morocco in November 1975 ordered a "Green March" of over 350,000 Moroccans into Western Sahara, disregarding a formal call from the Security Council to put an end forthwith to the declared march into Western Sahara"<sup>4</sup>.
10. As a result of pressure, Spain negotiated a secret settlement on 14 November, 1975 with Morocco and Mauritania, under the Madrid Tripartite Accords, which resulted in Spain's withdrawal from what was then called the Spanish Sahara on 26 February 1976.
11. Spain withdrew after it had notified the Secretary-General of the UN. This was immediately followed by a unilateral proclamation of the Saharawi Arab Democratic Republic (SADR) by the Polisario Front on 27 February 1976 filling the legal and administrative vacuum that Spain unilaterally created when it withdrew from its colony without finishing the process of decolonization that the UN entrusted it with.
12. Before Spain's withdrawal as the administering power, the General Assembly had demanded that Spain should undertake immediate steps

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<sup>3</sup> UNGA Resolution 2072 (XX) of 17 December 1965

<sup>4</sup> (UN Security Council Resolution 379 (1975))

to guarantee the exercise of self-determination by the people of Western Sahara.<sup>5</sup>

13. Following the Madrid Accords, Moroccan and Mauritanian armed forces invaded Western Sahara. This invasion led to a war by Moroccan and Mauritanian forces on the one hand against the Polisario Front, on the other. The Polisario Front is a liberation movement fighting for the independence of Western Sahara. Mauritania withdrew its forces in 1979 and renounced its sovereignty claims. Mauritania also decided to recognize SADR as the legitimate authority in Western Sahara.<sup>6</sup> The war between Morocco and the Polisario Front continued until it reached a stalemate in 1988. Later that year, the United Nations and the Organization of African Unity persuaded the parties to agree to a ceasefire and a settlement plan. Under the settlement plan, the issue of sovereignty over the Territory of Western Sahara would have to be settled by a referendum.
14. The war stopped in 1991 and the UN Mission for the Referendum of Western Sahara (MINURSO) was established by UN Security Council resolution 690 of 29 April 1991. The referendum was planned to take place within 6 months and the Saharawi people were to choose between independence or integration with Morocco. The referendum has not been held up to now.

## **C. THE STATUS OF THE WESTERN SAHARA/SADR**

### **i) African Union**

15. The SADR<sup>7</sup> became a Member State of the Organization of African Unity (OAU) in 1982. It should be recalled that membership to the OAU was open to any independent sovereign African State.<sup>8</sup> The admission of SADR to the membership of OAU in 1982 signified that more than half of Member States of the OAU recognized Western Sahara as an independent sovereign African State.<sup>9</sup> It should also be recalled that one of the purposes of the OAU was to eradicate all forms of colonialism from Africa.<sup>10</sup> Accordingly, the SADR is one of the founders and a member of the African Union, the successor organization to OAU.
16. Notwithstanding the membership of SADR to both OAU and AU, there is recognition that the people of Western Sahara are not fully liberated. The SADR controls only a part of Western Sahara<sup>11</sup>. To this end, both

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<sup>5</sup> UNGA Resolutions 2229 (XXI) of 20 December 1966, and 2354 (XXII) of 19 December 1967

<sup>6</sup> A/34/427-S/13503, Annex I and II, Official Record of the Security Council, Thirty-Fourth Year, Supplement for July, August and September 1979.

<sup>7</sup> SADR was proclaimed by the Polisario Front on 27 February, 1976

<sup>8</sup> Article XXVIII (1) of the OAU Charter

<sup>9</sup> Admission is based on decision by simple majority of Member States. See Article XXVIII (2)

<sup>10</sup> Article II (1) (d) of the OAU Charter

<sup>11</sup> The rest is occupied by the Kingdom of Morocco

the OAU and AU have undertaken efforts to conduct a referendum for self-determination of the people of Western Sahara. A year after the admission of SADR as member of the OAU, the Assembly of Heads of State and Government of the OAU urged the Kingdom of Morocco and the Polisario Front “to undertake direct negotiations with a view of bringing about a ceasefire to create the necessary condition for a peaceful and fair referendum for self-determination of the people of Western Sahara, a referendum without any administrative or military constraints...”<sup>12</sup> The right of the people of Western Sahara to a referendum for self-determination has been discussed regularly and reaffirmed by the Assembly of the African Union.<sup>13</sup>

17. It should be noted that in the plan of action adopted at the AU Special Session on the Consideration and Resolution of Conflicts in Africa, held in Tripoli, Libya in August 2009, the Assembly of the African Union resolved to support the efforts of the UN to overcome the impasse on Western Sahara. The Assembly also recalled relevant UN Security Council resolutions which called for direct negotiations without preconditions and in good faith, which would provide for the self determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the UN<sup>14</sup>.
18. The debate on the referendum for the right to self-determination of the people of Western Sahara reached its climax during the celebration of the 50<sup>th</sup> Anniversary of the African Union in May 2013. The Executive Council reiterated the call to the two parties, namely, the Kingdom of Morocco and Polisario Front, to undertake direct negotiations, with a view of achieving a just, lasting and mutually acceptable political solution, which would provide for the self-determination of the people of Western Sahara.<sup>15</sup> The Assembly of the African Union also reiterated the call of the United Nations Security Council to the parties.<sup>16</sup>
19. The Peace and Security Council of the African Union at its 496<sup>th</sup> meeting held in Addis Ababa, Ethiopia on 27 March 2015 recalled that the Western Sahara remained an issue in the completion of the decolonization process of Africa and urged the UN Security Council to take all necessary decisions to ensure progress in search for a solution to the conflict in Western Sahara and appealed for an enhanced and coordinated international action towards the early organization of a

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<sup>12</sup> Resolution AHG/Res.104 (XIX) adopted in June, 1983.

<sup>13</sup> See AU Special Session of the Assembly on the Consideration and Resolution of Conflicts, Tripoli, Libya; Assembly/AU/Dec.559 (XXIV) adopted in January 2015; EX.CL/Dec.758 (XXII) adopted in January 2013

<sup>14</sup> Progress Report of the Chairperson of the Commission on the situation in Western Sahara (EX.CL/788 (XXIII)-Rev-1

<sup>15</sup> Paragraph 3 of EX.CL/Dec.773 (XXIII). The same call was repeated by the Assembly in Assembly/AU/Dec.559 (XXIV).

<sup>16</sup> Assembly/AU/Dec.559 (XXIV).

- referendum for the self-determination of Western Sahara, in compliance with relevant OAU/AU decisions and UN resolutions.<sup>17</sup>
20. As can be seen from the above, the African Union has continued to call for a referendum of self-determination of the people of Western Sahara within the acknowledged principles of international law.
21. It should be noted that the African Union considers Western Sahara to be under colonial occupation by Morocco.<sup>18</sup> The occupation is against the spirit of the founding objectives and principles of both the OAU and the AU.
- ii) United Nations**
22. The SADR is not a member of the UN.
23. As far back as 1963, the Territory of Western Sahara<sup>19</sup> was listed among Non-Self-Governing Territories as recognized in the UN General Assembly resolution 1514 (XV) of 14 December 1960 that contained the Declaration on the Granting of Independence to Colonial Countries and Peoples. It should be recalled that under Resolution 1514 (XV), the General Assembly, declared inter alia, that all peoples have the right to self-determination, and that by virtue of that right, they should freely determine their political status and freely pursue their economic, social and cultural development.<sup>20</sup> In this regard, the right of the people of Western Sahara to a referendum for self-determination has been reaffirmed by both the General Assembly and the UN Security Council as well as by the International Court of Justice.<sup>21</sup>
24. Chapter XI of the UN Charter deals with Non-Self-Governing Territories. Article 73 of the Charter provides that Member States of the UN which have or assumed responsibilities for the administration of Non-Self-Governing Territories must recognize the principle that the interests of the inhabitants of these territories are paramount, and must accept as a sacred trust the obligation to promote to the utmost, the well-being of the inhabitants of these territories. In addition, Article 73 (e) requires the administering Power to transmit to the UN Secretary General, statistical and other information of a technical nature relating to economic, social and educational conditions in the Non-Self-Governing Territory.

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<sup>17</sup> Paragraph 7 (i) and (ii) of Communique for the 496<sup>th</sup> PSC Meeting, PSC/PR/COMM/1. (CDXCVI)

<sup>18</sup> SOLEMN DECLARATION ON THE 50<sup>th</sup> ANNIVERSARY OF THE OAU/AU ( Assembly/AU/Decl.3.(XXI) ), adopted by the twenty first AU Summit held from 26-27 May 2013 in Addis Ababa , Ethiopia

<sup>19</sup> Then Spanish Sahara

<sup>20</sup> Paragraph 2 of UNGA Resolution 1514 (XV)

<sup>21</sup> See UNGA Resolution 2983 (XXVII) on the Question of Spanish Sahara adopted on 14 December 1972; UNGA resolution 61/123 adopted on 14 December 2006 on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories; UNSC Resolution 1979 (2011) adopted on 27 April 2011; ICJ Advisory Opinion on Western Sahara of 16 October 1975

25. However, from the UN perspective, Western Sahara does not have any administering power, as Spain had withdrawn from the territory on 26 February 1976.<sup>22</sup>
26. In the implementation of Article 73 of the Charter, the UN General Assembly elaborated some principles that must be adhered to, namely that:
- a) All States should comply with the resolutions of the General Assembly on the activities of foreign economic and financial interests and *to refrain from helping to perpetuate the colonial situation in the Territory by means of investments (emphasis added)*.<sup>23</sup> States must therefore avoid any economic activity that adversely affects the interests of the peoples of the Non-Self-Governing Territories.<sup>24</sup> Accordingly, investments that may constitute an obstacle to the liberation of a territory should not be promoted by States.<sup>25</sup>
  - b) The territory of a colony or other Non-Self-Governing Territory, has under the UN Charter, a status separate and distinct from the territory of the state administering it and that the separate and distinct status shall exist until the right to self-determination has been fully exercised.<sup>26</sup>
  - c) Sovereignty over natural resources is a basic constituent of the right to self-determination.<sup>27</sup>
  - d) Natural resources are a heritage of the peoples of the non-self-governing territories and that exploitation and plundering of the marine and other natural resources of Non-Self-Governing

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<sup>22</sup> <http://www.un.org/en/decolonization/nonselvgovterritories.shtml> accessed on 20/4/15 at 10:00 hrs. It is indicated that on 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory. In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonization which remained to be completed by the people of Western Sahara.

<sup>23</sup> UNGA Resolution 2983 (XXVII) on the Question of Western Sahara, paragraph 6

<sup>24</sup> UNGA resolution 61/123 adopted on 14 December 2006 on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories

<sup>25</sup> Article 16 (2) of the Charter of Economic Rights and Duties of States

<sup>26</sup> UNGA Resolution 2625 (XXV) on the Declaration on Principles of International Relations and Cooperation among States in accordance with the Charter of the United Nations, paragraph on the principle of equal rights and self-determination of peoples

<sup>27</sup> UNGA Resolution 1314 (XIII) on the Recommendations concerning International respect for the right of peoples and nations to self-determination; UNGA Resolution 1803 (XVII) on the Permanent Sovereignty over natural resources, preambular paragraph 2; UNGA48/46 (1993) on the Activities of foreign and other economic interests which impede the implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples in Territories under Colonial domination; UNGA resolution 49/40 (1994) on the Activities of foreign and other economic interests which impede the implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples in Territories under Colonial domination

Territories, in violation of the relevant resolutions of the UN , is a threat to the integrity and prosperity of the Non-Self-Governing Territories.<sup>28</sup>

27. In addition, Resolution III of the UN Conference on the Law of the Sea, took into account the provisions of the Charter of the UN, in particular Article 73 and declared that:

**In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention *shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development (emphasis added)***<sup>29</sup>

#### D. MOROCCO AND THE STATUS OF WESTERN SAHARA

28. Despite the fact that it occupies a large part of the Territory of Western Sahara, Morocco has never acquired the status of an administering Power of the territory in terms of Article 73 of the UN Charter. The UN list of non-self-governing territories confirms that after the withdrawal and abandonment of responsibilities by Spain on 26 February 1976, Western Sahara has not had any other administering power.<sup>30</sup> Morocco has also never complied or purported to comply with the requirements of Article 73 of the UN Charter, in particular the transmission of statistical and other information.
29. With regard to Morocco's claims of sovereignty over the Territory of Western Sahara. It should be recalled that on 16 October 1975, the International Court of Justice (ICJ) issued an Advisory Opinion denying the claims of Morocco and Mauritania and affirming the right of the Saharawi to self-determination under international law. One of the issues on which the Court was requested to provide an Advisory Opinion by the UN General Assembly was the legal ties between Western Sahara and both Morocco and Mauritania.<sup>31</sup> The ICJ found that both Morocco and Mauritania never displayed any effective and exclusive activity in Western Sahara.<sup>32</sup> Both countries therefore failed to establish any tie to territorial sovereignty over the Territory of Western Sahara. The Court concluded that it had "not found legal ties of such a nature as might

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<sup>28</sup> UNGA resolution 61/123 adopted on 14 December 2006 on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories, paragraph 7; UNGA resolution 48/46 (1993); UNGA resolution 49/40 (1994)

<sup>29</sup> [http://www.un.org/depts/los/convention\\_agreements/texts/final\\_act\\_eng.pdf](http://www.un.org/depts/los/convention_agreements/texts/final_act_eng.pdf) accessed on 24/04/15 at 15:36

<sup>30</sup> <http://www.un.org/en/decolonization/nonselvgovterritories.shtml> accessed on 20/4/15 at 10:00 hrs

<sup>31</sup> UNGA Resolution 3292 (XXIX, UN Doc. A /9631 (1974)

<sup>32</sup> ICJ opinion at 49 and 68



affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the people of the Territory.”<sup>33</sup> Accordingly, the UN Security Council called upon Morocco to withdraw from Western Sahara when<sup>34</sup> it occupied the Territory on 31<sup>st</sup> October 1975.

30. It should be noted, as indicated by the UN Legal Counsel in his opinion to the Security Council<sup>35</sup>, that “the Madrid Agreement did not transfer sovereignty over the Territory, nor confer upon any of the signatories the status of an administering power, a status which Spain alone could not have unilaterally transferred”.
31. In its resolution of 28 April 2015, the UN Security Council called upon the parties “to continue negotiations under the auspices of the UN Secretary-General without preconditions and in good faith, with a view to achieving a just, lasting, and mutually acceptable political solution, which will provide for the self-determination of the people of the Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations...”<sup>36</sup>
32. It should be noted that the issue of Western Sahara is dealt with by the Fourth Committee of the UN General Assembly, which addresses issues relating to decolonization.

## **E. RELEVANT INSTRUMENTS ON THE ISSUE OF EXPLORATION OR EXPLOITATION OF NATURAL RESOURCES FROM WESTERN SAHARA**

### **i) International and Regional Instruments**

33. Several international and regional instruments have recognized the right of peoples to self-determination and the right of peoples to permanent sovereignty over their natural resources. These include the following :
34. **Convention IV respecting the Laws and Customs of War on Land and its Annex, the Hague Convention of 1907:** Under the Convention and other rules of international humanitarian law, the occupying Power may not change the legal, institutional and political status of the occupied territory. This is because occupation is only a temporary status and the occupying Power should not introduce permanent changes in the occupied territory. The occupying power, may however, take measures to restore and ensure public order and safety in the occupied territory.<sup>37</sup> , Article 47 of the Convention also formally forbids pillage.

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<sup>33</sup> ICJ opinion at 60

<sup>34</sup> UN Security Council Resolution 379 (1975 )

<sup>35</sup> Paragraph 6 of the Legal Opinion

<sup>36</sup> UNSC Resolution 2218 (2015)

<sup>37</sup> Article 43 of the IV Hague Convention

35. It should be noted that the UN General Assembly characterized Morocco as the occupying Power in Western Sahara in 1979 and 1980.<sup>38</sup> However, Morocco denies the applicability of such law as it considers Western Sahara under its own sovereignty even though this claim had been dismissed by the ICJ.
36. **The 4<sup>th</sup> Geneva Convention of 1949:** Article 33 of the Convention prohibits pillage of natural resources.
37. **The two International Covenants on Civil and Political Rights and on Economic, Social and Cultural of 1966 (entered into force in 1976):** Article 1 of both Covenants provides that all peoples have a right to self-determination and to freely determine their political status and to freely pursue their economic, social and cultural development. In addition, the Article provides that all peoples also have a right to freely dispose of their natural wealth.<sup>39</sup> Accordingly, States Parties to the Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, must promote the realization of the right of self-determination and respect that right, in conformity with the provisions of the Charter of the United Nations<sup>40</sup>
38. **UN Charter of Economic Rights and Duties of States of 1974:** Article 16 (2) provides that *“No state has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force”*
39. **The African Charter on Human and Peoples’ Rights of 1981:** Article 20 of the African Charter on Human and Peoples’ Rights provides that:
- All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.**
40. Article 21 provides that all peoples shall freely dispose of their wealth and natural resources and that in case of spoliation, the dispossessed people shall have the right to the lawful recovery of their property as well as to an adequate compensation
41. **UN Convention on the Law of the Sea of 1982:** While Western Sahara is not a Party to the UN Convention on the Law of the Sea, Resolution III of the UN Conference on the Law of the Sea declared that “in the case of territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory

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<sup>39</sup> The same is contained in Article 1 of the International Covenant on Economic, Social and Cultural Rights

<sup>40</sup> Article 1 (3) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

under colonial domination, provisions concerning rights and obligations under the Convention shall be implemented for the benefit of the people of the territory...”

ii) **The case law of the International Court of Justice:**

42. *In the case of Democratic Republic of Congo (DRC) v Uganda (Armed Activities on the Territory of the Congo)*, the ICJ dealt with the question of natural resource exploitation and made reference to Articles 43 and 47 of the Hague Convention and Article 33 of the 4<sup>th</sup> Geneva Convention of 1949 relating to the prohibition of pillage. The ICJ also observed that both DRC and Uganda are both Parties to the African Charter on Human and Peoples’ Rights. The Court then referred to Article 21 (2) of the African Charter which provides that “in case of spoliation the dispossessed people shall have the right to the law full recovery of its property as well as to an adequate compensation”. The Court concluded that the occupying Power is internationally responsible for acts of looting, plundering, and exploitation of natural resources in the occupied territories.
43. There were other two cases in which it was argued that the principle of permanent sovereignty over natural resources was violated but the ICJ never issued any judgment on the merits.<sup>41</sup>

**F. LEGAL OPINION BY THE UN UNDER-SECRETARY FOR LEGAL AFFAIRS AND LEGAL COUNCIL, 12 FEBRUARY 2002**

44. As already indicated in paragraph 3 of this opinion, the UN Under-Secretary for Legal Affairs and Legal Counsel delivered a legal opinion at the request of the UN Security Council. The request was made on 13 November, 2001 and the issue that he was asked to address was “the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and 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.”<sup>42</sup>
45. The UN Legal Counsel after examining Article 73 of the UN Charter, the resolutions of the UN General Assembly and practices States noted that “while the legal nature of the core principle of permanent sovereignty over natural resources, as a corollary to the principle of territorial sovereignty or the right to self-determination, is indisputably part of customary international law, its exact legal scope and implications are still debatable”<sup>43</sup>

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<sup>41</sup> In the case of East Timor v Portugal, the Court concluded that it lacked jurisdiction while in the Nauru Phosphate Case, the Parties reached a settlement following a judgment on preliminary objections.

<sup>42</sup> Paragraph 1 of the Legal Opinion

<sup>43</sup> Paragraph 14 of the Legal Opinion

46. The Legal Counsel then analyzed the issue of mineral resource exploitation by analogy and concluded that mineral resources exploitation in Non-Self-Governing Territories is not illegal per se, but illegal if it is conducted in disregard of the needs and interests of the people of that territory.<sup>44</sup> Regrettably, under this approach, the UN Legal Counsel did not consider the question of whether Morocco should be considered as an occupying or administering Power of Western Sahara under provisions of the UN Charter. The UN Legal Counsel also did not consider any UN Security Council and General Assembly resolutions relating to the status or occupation of Morocco of Western Sahara.
47. Using the analogy of mineral resource activities conducted in Non-Self-Governing Territories, the UN Legal Counsel concluded that:

**...the contracts for oil reconnaissance and evaluation do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued. The conclusion is, therefore, that while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, *if further exploitation and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would in violation of the international law principles applicable to mineral resource activities in Non-Self-Government Territories (emphasis added)***

48. The former UN Legal Counsel has acknowledged in his latter presentations on the matter that Morocco does not have the status of administering Power with respect to Western Sahara. He has indicated that matters concerning the status of Western Sahara are sensitive.<sup>45</sup> He has also decried statements by Morocco claiming sovereignty over Western Sahara as being incompatible with UN Security Council resolutions and the 1975 ICJ Advisory Opinion.<sup>46</sup>

## **G. LEGAL ANALYSIS**

49. The first issue to be addressed is whether Morocco can explore and exploit renewable and non-renewable natural resources in the Territory of Western Sahara.
50. The issue can only be fully addressed first by analyzing the status of Morocco on Western Sahara. Western Sahara is a Non-Self-Governing Territory under Article 73 of the UN Charter. As a Non-Self-Governing Territory, Western Sahara retains its separate and distinct status until

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<sup>44</sup> Paragraph 21 of the Legal Opinion.

<sup>45</sup> See the Legality of exploring and exploiting natural resources in Western Sahara, paper presented by Ambassador Hans Corell, former UN Legal Counsel

<http://www.unisa.ac.za/contents/faculties/law/docs/14corell.pdf> accessed on 27 April 2015 at 07:55

<sup>46</sup> See <http://www.judicialmonitor.org/current/specialcommentary.html> accessed on 24/04/15 at

the right to self-determination by its people has been fully exercised through a referendum. It should be recalled that Morocco has never acquired the status of administering Power over the Territory of Western Sahara in terms of Article 73 of the UN Charter.

51. In addition, the ICJ, in its Advisory Opinion of 1975 on Western Sahara dismissed any sovereignty claims over Western Sahara by both Morocco and Mauritania.
52. It should be recalled that as indicated in Article II (d) of the OAU Charter , one of the objectives of the Organization of the African Unity was to rid the continent from the vestiges of colonialism.
53. The UN, the African Union and all Member States of the UN have never recognized the sovereignty claims of Morocco over Western Sahara nor approved Morocco's occupation of Western Sahara.
54. Regarding the political settlement on Western Sahara, the UN and the OAU/AU have recognized the unquestionable and inalienable right of the people of Western Sahara to a referendum for self-determination. Accordingly, both the UN and the AU has called on the two parties to reach a solution which will provide for the self-determination of the people of Western Sahara.
55. Furthermore, the UN, the AU and the ICJ have recognized the permanent sovereignty of the people of Western Sahara over their natural resources. The natural resources of Western Sahara are owned by the people of Western Sahara. The natural resources of Western Sahara forms part of the heritage of the people of Western Sahara.
56. The right of Self-determination and the right of people and sovereignty over their natural resources are peremptory norms (Jus Cogens) and Erga Omnes rights under international law as defined in article 53 of The Vienna Convention on the Law of Treaties of 1969<sup>47</sup>, and as States cannot derogate from these norms.
57. Accordingly, Morocco has no legal right under the UN Charter and international law to occupy or govern the Territory of Western Sahara. It should be recalled that the UN Security Council called upon Morocco to withdraw from the Territory of Western Sahara after it had occupied the territory soon after the ICJ's Advisory Opinion. In this regard, Morocco has no right to explore and exploit any natural resources, renewable or non-renewable located in the occupied territories of Western Sahara or to enter into agreements with third parties concerning those resources.
58. In addition, any exploration and exploitation of the natural resources by Morocco in Western Sahara seriously undermines the efforts and

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<sup>47</sup> “...a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” article 53 of the Vienna convention on the law of Treaties .

negotiations, for a peaceful settlement, which have been ongoing for over four decades. The exploration and exploitation also undermines both the UN and AU principles and resolutions/decisions particularly the right of the people of Western Sahara to self-determination through a referendum and the right over their natural resources.

59. Member States of the UN are under an obligation from the UN Charter and other UN Resolutions to refrain from helping to perpetuate or to legitimize the colonial situation by means of investments or exploitation of natural resources in the Non-Self-Governing Territory.
60. In view of the foregoing, any exploration and exploitation of natural resources by Morocco, any other State, group of States, or foreign companies engaged by Morocco in Western Sahara is illegal since they violate international law and resolutions of the UN and the AU. The exploitation of natural resources is also a threat to the integrity and prosperity of the people of Western Sahara. In this regard, foreign companies and any other State or group of States entering into arrangements of agreements/contracts with Morocco for exploitation of natural resources in Western Sahara are aiding and abetting an illegal situation and such agreements/contracts are invalid.<sup>48</sup>
61. Both the UN Security Council and the AU Peace and Security Council should exercise their responsibilities and put pressure on Morocco to ensure that the illegal exploration and exploitation of Western Sahara natural resources should cease until a just, lasting solution is achieved by the parties through a referendum for self-determination.
62. The second issue deals with the circumstances under which exploration or exploitation of the natural resources of Western Sahara should take place. It is only on this point that we agree with the opinion of the former UN Legal Counsel which he delivered to the UN Security Council. Western Sahara is a Non-Self-Governing Territory and therefore all activities must be undertaken in strict compliance with the provisions of Article 73 of the UN Charter as elaborated by various resolutions of the UN Security Council and the General Assembly. An extra margin of caution should be applied if the State concerned is not the administering Power over the territory as in the case of Morocco.
63. It should be recalled that the former Legal Counsel of the UN had concluded thus:

**...if 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 international law principles applicable to mineral resource activities in Non-Self-Governing Territories.**

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<sup>48</sup> See UNSC Resolution 276 (1979) where the UN Security Council declared the continued presence of South African in Namibia illegal and that consequently all acts taken by the Government of South Africa were illegal and invalid

64. We reiterate the fact that only the people of Western Sahara, as a Non-Self-Governing Territory, have the right to permanent sovereignty over their natural resources. To be legal, economic activities for exploration and exploitation of natural resources in Western Sahara must benefit the people of Western Sahara and respect their wishes. The people of Western Sahara and their legitimate representatives (Polisario Front)<sup>49</sup> and Saharawi Republic Government should not only be consulted but must directly be involved in any arrangement or agreement regarding the exploitation or exploration of natural resources in their territory.
65. In this regard, if Morocco has entered into agreements for the exploration and exploitation of natural resources in Western Sahara, the UN Security Council should ensure that Morocco scrupulously accounts for such activities and transfer all benefits that have accrued to the people of Western Sahara through a transparent and independent mechanism supervised by the UN and AU. There might be need for the UN and AU to appoint a Joint independent panel to verify Morocco's account.

## **H. CONCLUSIONS AND RECOMMENDATIONS**

66. From the analysis above, it is evident that both the UN and AU must exercise their responsibilities and put pressure on Morocco to comply with principles of the UN and relevant international law on the right to self-determination and exploitation of natural resources. The uncertainty that has marked the issue of Western Sahara for over four decades cannot be allowed to continue.
67. Morocco is not an administering Power over Western Sahara's territory under Article 73 of the UN Charter. Morocco also does not have sovereignty over Western Sahara; therefore Western Sahara question remains a pending issue of decolonization and should therefore be resolved in accordance with UN General Assembly resolution 1514 (XV) of 14 December 1960 on the Granting of Independence to Colonial Countries and Peoples.
68. Morocco has no right to explore and exploit any natural resources, renewable or non-renewable located in the occupied territories of Western Sahara or to enter into agreements /contracts with third parties concerning these resources.
69. Thus, AU through the African Union Commission and other relevant organs must appeal to the UN Security Council to ensure that exploration and exploitation of natural resources in Western Sahara is undertaken under the following framework:

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<sup>49</sup> UNGA resolution 34/37 (1979)

- a) Morocco should not enter into any agreements with any other State, group of States or foreign companies for exploration or exploitation of renewable or non-renewable natural resources over the Territory of Western Sahara. In this regard, Agreements entered into by Morocco should be limited exclusively to its territory internationally recognized under its sovereignty (which does not include Western Sahara);
  - b) Any exploration or exploitation of natural resources in Western Sahara must be for the benefit of the people of Western Sahara and in accordance with their wishes;
  - c) Accordingly, the people of Western Sahara and their legitimate representatives<sup>50</sup> must not only be consulted but they must consent and effectively participate in reaching any agreement that involves the exploitation of natural resources in the Territory of Western Sahara.
  - d) Morocco and any other entity should be held accountable for agreements/contracts entered into for exploration and/or exploitation of renewable or non-renewable natural resources in the Territory of Western Sahara and ensure that all benefits accrue to the people of Western Sahara in accordance with international law. In this regard, the UN and AU should consider appointing a joint independent panel to verify Morocco's account.
70. The UN Security Council and AU Peace and Security Council must also inform all Member States of the UN and AU accordingly that any agreements/contracts for the exploration and/or exploitation of renewable or non-renewable natural resources over Western Sahara in disregard of the interests and wishes of the people of Western Sahara without consultations with their legitimate representatives violates principles of international law on self-determination and exploitation of natural resources in Non-Self-Governing Territories, such agreements/contracts are null and therefore illegal.
71. Since Saharawi Republic (SADR) is a Member State of the African Union, all Member States of the African Union must bear in mind the principles and objectives of the African Union particularly on the need to defend the sovereignty and territorial independence of SADR. The African Union concerns on the illegal exploration and exploitation of natural resources in Western Sahara must be transmitted by the African Union Commission and other relevant AU organs and offices to other international, regional organizations and partners. Therefore, the issue should be included in the agenda for discussion with the partners involved in the illegal exploration and/or exploitation of renewable or non-renewable natural resources in Western Sahara.



72. Member States of the UN and their companies are under obligation according to international law, UN Charter and other UN resolutions to refrain from helping in the perpetuation or legitimization of the colonial situation in Western Sahara by means of investments or exploration and/or exploitation of renewable or non-renewable natural resources and other economic activities in the Non-Self-Governing Territory, and should therefore refrain from entering into agreements/contracts with Morocco as the occupying Power in accordance to the UNGA Resolution 2711 of 1970.
73. The UN, the AU and the ICJ have recognized the unalienable right of the Saharawi people to self-determination and their permanent sovereignty over their natural resources. The latter are owned by the people of Western Sahara and form part of their heritage. UN Member States should make the necessary political and legal arrangements and inform their companies about the legal status of Western Sahara and the illegality of exploration and/or exploitation of renewable or non-renewable natural resources and other economic activities in this territory.
74. Any exploration and exploitation of renewable or non-renewable natural resources by Morocco, any other State, group of States or foreign companies in Western Sahara is contrary to the UN Charter, customary international law and therefore illegal as it violates international law.
75. The exploitation and exploration of renewable or non-renewable natural resources in the current situation of occupation is also a threat to the integrity and prosperity of the people of Western Sahara and to the peace and stability in the North Africa. This is in accordance to the UNGA Resolution 2983(XXVII) of 1972.
76. The UN should assume its political and legal responsibilities and protect the Sahrawi's renewable or non-renewable natural resources as it did in East Timor and Namibia till the people of the territory express their will and chose their destiny through a free and fair referendum.
77. All States or foreign companies shall refrain from importing Saharawi's products or investing in the occupied areas of Western Sahara as these activities are in violation of international law.
78. Any exploration and exploitation of natural resources by Morocco is illegal as it violates international law and resolutions of the UN and the AU relating to the right to self-determination and permanent sovereignty of the people of Western Sahara over their natural resources. In addition, the exploration and exploitation seriously undermines the efforts and negotiations for a just and peaceful settlement over Western Sahara.
79. The African Union Commission should elaborate a comprehensive strategy aimed at Morocco, any other State, group of States or foreign Companies involved in the illegal exploration or exploitation of Western

Sahara's renewable or non-renewable natural resources in compliance with the AUPSC communiqué 496 adopted in 27 March 2015.