

**Security Council**

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Letter dated 9 October 2015 from the Permanent Representative of Zimbabwe to the United Nations addressed to the President of the Security Council

I have the honour to transmit to you herewith the legal opinion issued by the Office of the Legal Counsel of the African Union on the legality, in the context of international law, including the relevant resolutions of the General Assembly and the Security Council and decisions of the Organization of African Unity/African Union, 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 (see annex).

I should be grateful if you would have the present letter and its annex circulated as a document of the Security Council.

(*Signed*) Frederick Musiiwa Makamure **Shava**
Ambassador and Permanent Representative
of the Republic of Zimbabwe
Representative of the current Chair of the African Union



Annex to the letter dated 9 October 2015 from the Permanent Representative of Zimbabwe to the United Nations addressed to the President of the Security Council

Legal opinion on the legality in the context of international law, including the relevant United Nations resolutions and Organization of African Unity/African Union 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

A. Introduction

1. The Government of the Saharawi Arab Democratic Republic, through a letter dated 25 February 2015 addressed to the Chairperson of the Commission, Nkosazana Dlamini Zuma, requested a legal opinion from the Office of the Legal Counsel 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 the Saharawi Arab Democratic Republic in a note verbale dated 3 April 2015,¹ however, modified the issue to “the legality in the context of international law, including the relevant resolutions of the United Nations and decisions of the Organization of African Unity/African Union, 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 Under-Secretary-General for Legal Affairs and United Nations Legal Counsel delivered a legal opinion to the Security Council on an almost identical issue, namely, “the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly, 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”.²

4. Since the issues concerning the Saharawi Arab Democratic Republic are multidimensional, for the purposes of this legal opinion, the Office of the Legal

¹ Reference number 44/2015.

² S/2002/161; see also 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, available from www.arso.org/LegalopinionUE200206.pdf and www.fisheiswhere.eu/a140x1077; Association of the Bar of the City of New York, “Report on legal issues involved in the Western Sahara dispute: use of natural resources” (New York, 2011), available from www.nycbar.org/pdf/report/uploads/20072089ReportonLegalIssuesInvolvedintheWesternSaharaDispute.pdf.

Counsel will restrict itself to the issue as contained in the note verbale from the Permanent Mission of the Saharawi Arab Democratic Republic dated 3 April 2015.

B. Factual background³

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.

6. The territory borders Morocco to the north, Mauritania to the south and the east, Algeria to the east and the Atlantic Ocean to the west.

7. In 1963, Western Sahara was included on the list of Non-Self-Governing Territories under Article 73 of the Charter of the United Nations, and Spain was the administering Power.⁴ 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 General Assembly resolution 1514 (XV) of 14 December 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 issued an advisory opinion on the status of Western Sahara on 16 October 1975, at the request of the General Assembly. In the opinion, the Court dismissed the sovereignty claims by Morocco and Mauritania. After the Court delivered its opinion, Spain entered into a secret agreement with Morocco and Mauritania (Madrid Accords) which purported to authorize the withdrawal of Spain 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 advisory opinion of the International Court of Justice on the issue that clearly stated that there were no legal ties between either Morocco or Mauritania and Western Sahara. In response to the advisory opinion, King Hassan II of Morocco, in November 1975, ordered a “Green March” of more than 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.⁵

10. As a result of pressure, Spain negotiated a secret settlement with Morocco and Mauritania on 14 November 1975, under the tripartite Madrid Accord, which resulted in the withdrawal of Spain from what was then called Spanish Sahara on 26 February 1976.

11. Spain withdrew after it had notified the Secretary-General. This was immediately followed by a unilateral proclamation of the Saharawi Arab Democratic Republic 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 with which the United Nations had entrusted it.

³ The facts generally have been gathered from a number of reports of the Commission for Western Sahara.

⁴ General Assembly resolution 2072 (XX) of 16 December 1965.

⁵ Security Council resolution 379 (1975).

12. Before the withdrawal of Spain as the administering Power, the General Assembly had demanded that Spain should undertake immediate steps to guarantee the exercise of self-determination by the people of Western Sahara.⁶

13. Following the Madrid Accord, 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 the Saharawi Arab Democratic Republic as the legitimate authority in Western Sahara.⁷ 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 United Nations Mission for the Referendum in Western Sahara was established by Security Council resolution 690 (1991) of 29 April 1991. The referendum was planned to take place within six months, and the Saharawi people were to choose independence or integration with Morocco. The referendum has not been held to date.

C. Status of Western Sahara and the Saharawi Arab Democratic Republic

1. African Union

15. The Saharawi Arab Democratic Republic⁸ became a State member of the Organization of African Unity in 1982. It should be recalled that membership was open to any independent sovereign African State.⁹ The admission of the Saharawi Arab Democratic Republic as a member of the Organization in 1982 signified that more than half of its member States recognized Western Sahara as an independent sovereign African State.¹⁰ It should also be recalled that one of the purposes of the Organization was to eradicate all forms of colonialism from Africa.¹¹ Accordingly, the Saharawi Arab Democratic Republic is one of the founders and a member of the African Union, the successor organization to the Organization of African Unity.

16. Notwithstanding the membership of the Saharawi Arab Democratic Republic in both the Organization of African Unity and the African Union, there is recognition that the people of Western Sahara are not fully liberated. The Saharawi Arab Democratic Republic controls only a part of Western Sahara.¹² To this end, both the Organization and the African Union have undertaken efforts to conduct a referendum for self-determination of the people of Western Sahara. A year after the admission of the Saharawi Arab Democratic Republic as member of the Organization, the

⁶ General Assembly resolutions 2229 (XXI) of 20 December 1966 and 2354 (XXII) of 19 December 1967.

⁷ [A/34/427-S/13503](#), annexes I and II.

⁸ The Saharawi Arab Democratic Republic was proclaimed by the Polisario Front on 27 February 1976.

⁹ Article XXVIII (1) of the Charter of the Organization of African Unity.

¹⁰ Admission is based on decision by simple majority of member States; see Article XXVIII (2).

¹¹ Article II (1) (d) of the Charter of the Organization of African Unity.

¹² The rest is occupied by the Kingdom of Morocco.

Assembly of Heads of State and Government of the Organization of African Unity 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 conditions for a peaceful and fair referendum for self-determination of the people of Western Sahara, a referendum without any administrative or military constraints”.¹³ 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.¹⁴

17. It should be noted that in the plan of action adopted at the special session of the African Union on the consideration and resolution of conflicts in Africa, held in Tripoli in August 2009, the Assembly of the African Union resolved to support the efforts of the United Nations to overcome the impasse with regard to Western Sahara. The Assembly also recalled relevant 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 United Nations.¹⁵

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 fiftieth anniversary of the founding of the Organization of African Unity/African Union in May 2013. The Executive Council of the African Union reiterated the call to the two parties, namely, the Kingdom of Morocco and Polisario Front, to undertake direct negotiations, with a view to achieving a just, lasting and mutually acceptable political solution, which would provide for the self-determination of the people of Western Sahara.¹⁶ The Assembly of the African Union also reiterated the call of the Security Council to the parties.¹⁷

19. The Peace and Security Council of the African Union, at its 496th meeting, held in Addis Ababa on 27 March 2015, recalled that Western Sahara remained an issue in the completion of the decolonization process of Africa, urged the Security Council to take all necessary decisions to ensure progress in search of a solution to the conflict in Western Sahara and appealed for an enhanced and coordinated international action towards the early organization of a referendum for self-determination of the people of Western Sahara, in compliance with relevant decisions of the Organization of African Unity/African Union and resolutions of the United Nations.¹⁸

20. As can be seen from the above, the African Union has continued to call for a referendum for self-determination of the people of Western Sahara within the acknowledged principles of international law.

¹³ Resolution of the Organization of African Unity, AHG/Res.104 (XIX) adopted in June 1983.

¹⁴ See special session of the Assembly of the African Union on the consideration and resolution of conflicts in Africa, held in Tripoli in August 2009; decision of the Assembly, Assembly/AU/Dec.559 (XXIV) adopted in January 2015; decision of the Executive Council of the African Union, EX.CL/Dec.758 (XXII) adopted in January 2013.

¹⁵ Progress report of the Chairperson of the Commission on the situation in Western Sahara, EX.CL/788 (XXIII)-Rev.1.

¹⁶ Decision on the first progress report of the chairperson of the commission on the situation in Western Sahara, EX.CL/Dec.773 (XXIII), para. 3. The same call was repeated by the Assembly of the African Union in decision Assembly/AU/Dec.559 (XXIV).

¹⁷ Assembly of the African Union decision Assembly/AU/Dec.559 (XXIV).

¹⁸ Communiqué of the Peace and Security Council of the African Union adopted at its 496th meeting on 27 March 2015, PSC/PR/COMM/1 (CDXCVI), para. 7 (i) and (ii).

21. It should be noted that the African Union considers Western Sahara to be under colonial occupation by Morocco.¹⁹ The occupation is against the spirit of the founding objectives and principles of both the Organization of African Unity and the African Union.

2. United Nations

22. The Saharawi Arab Democratic Republic is not a member of the United Nations.

23. As long ago as 1963, the Territory of Western Sahara²⁰ was listed among the Non-Self-Governing Territories as recognized in 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 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.²¹ 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 Security Council, as well as by the International Court of Justice.²²

24. Chapter XI of the Charter of the United Nations deals with Non-Self-Governing Territories. Article 73 of the Charter provides that States Members of the United Nations which have or assume responsibilities for the administration of Non-Self-Governing Territories recognize the principle that the interests of the inhabitants of these territories are paramount and 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 Secretary-General statistical and other information of a technical nature relating to economic, social and educational conditions in the Non-Self-Governing Territory.

25. However, from the perspective of the United Nations, Western Sahara does not have any administering Power, as Spain withdrew from the territory on 26 February 1976.²³

26. In the implementation of Article 73 of the Charter of the United Nations, the 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 “*refrain from helping to perpetuate the colonial situation in the Territory by means of*

¹⁹ Solemn declaration on the fiftieth anniversary of the founding of the Organization of African Unity/African Union, Assembly/AU/Decl.3.(XXI), adopted by the twenty-first summit of the African Union, held in Addis Ababa on 26 and 27 May 2013.

²⁰ Then known as Spanish Sahara.

²¹ General Assembly resolution 1514 (XV), para. 2.

²² See General Assembly resolutions 2983 (XXVII) and 61/123 and Security Council resolution 1979 (2011); see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12.

²³ See www.un.org/en/decolonization/nonselfgovterritories.shtml. 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.

investments”.²⁴ (emphasis added) States must therefore avoid any economic activity that adversely affects the interests of the peoples of the Non-Self-Governing Territories.²⁵ Accordingly, investments that may constitute an obstacle to the liberation of a territory should not be promoted by States;²⁶

(b) The territory of a colony or other Non-Self-Governing Territory has, under the Charter of the United Nations, 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;²⁷

(c) Sovereignty over natural resources is a basic constituent of the right to self-determination;²⁸

(d) Natural resources are a heritage of the peoples of the Non-Self-Governing Territories and that the exploitation and plundering of the marine and other natural resources of Non-Self-Governing Territories, in violation of the relevant resolutions of the United Nations, is a threat to the integrity and prosperity of the Non-Self-Governing Territories.²⁹

27. In addition, resolution III of the Third United Nations Conference on the Law of the Sea took into account the provisions of the Charter of the United Nations, 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*.³⁰ (emphasis added)

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 Charter of the United Nations. According to the list of Non-Self-Governing Territories, after the withdrawal and abandonment of responsibilities by Spain on 26 February 1976, Western Sahara has not had any other administering Power.³¹ Morocco has also never complied or purported to comply with the requirements of Article 73, in particular the transmission of statistical and other information.

29. With regard to the claims of Morocco of sovereignty over the Territory of Western Sahara, it should be recalled that on 16 October 1975 the International Court

²⁴ General Assembly resolution 2983 (XXVII).

²⁵ General Assembly resolution 61/123.

²⁶ Article 16 (2) of the Charter of Economic Rights and Duties of States, proclaimed by the General Assembly in its resolution 3281 (XXIX).

²⁷ General Assembly resolution 2625 (XXV), section on the principle of equal rights and self-determination of peoples.

²⁸ General Assembly resolutions 1314 (XIII), 1803 (XVII), preambular para. 2, 48/46 and 49/40.

²⁹ General Assembly resolutions 61/123, para. 7, 48/46 and 49/40.

³⁰ See www.un.org/depts/los/convention_agreements/texts/final_act_eng.pdf.

³¹ See www.un.org/en/decolonization/nonselvgovterritories.shtml.

of Justice issued an advisory opinion denying the claims of Morocco and Mauritania and affirming the right of the Saharawi people to self-determination under international law. One of the issues on which the Court was requested to provide an advisory opinion by the General Assembly was the legal ties between Western Sahara and both Morocco and Mauritania.³² The Court found that both Morocco and Mauritania never displayed any effective and exclusive activity in Western Sahara.³³ 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 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”.³⁴ Accordingly, the Security Council called upon Morocco to withdraw from Western Sahara when it occupied the Territory on 31 October 1975.³⁵

30. It should be noted, as indicated by the United Nations Legal Counsel in his opinion to the Security Council, 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”.³⁶

31. In its resolution 2218 (2015) of 28 April 2015, the Security Council called upon the parties “to continue negotiations under the auspices of the 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”.³⁷

32. It should be noted that the issue of Western Sahara is dealt with by the Fourth Committee of the General Assembly, which addresses issues relating to decolonization.

E. Relevant instruments on the issue of exploration or exploitation of natural resources from Western Sahara

1. 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, including those mentioned below.

34. **Convention IV respecting the Laws and Customs of War on Land and its annex (Hague Convention of 1907)**: under the Convention and other rules of international humanitarian law, the occupying Power may not change the legal, institutional or political status of the occupied territory. This is because occupation is only a temporary status and the occupying Power should not introduce permanent

³² General Assembly resolution 3292 (XXIX).

³³ See Advisory Opinion, *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 49 and 68.

³⁴ *Ibid.*, p. 60.

³⁵ Security Council resolution 379 (1975).

³⁶ [S/2002/161](#), para. 6.

³⁷ Security Council resolution 2218 (2015), para. 7.

changes in the occupied territory.³⁸ The occupying Power may, however, take measures to restore and ensure public order and safety in the occupied territory. Article 47 of the Convention also formally forbids pillage.

35. It should be noted that the General Assembly characterized Morocco as the occupying Power in Western Sahara in 1979 and 1980. However, Morocco denies the applicability of such law as it considers Western Sahara under its own sovereignty even though this claim has been dismissed by the International Court of Justice.

36. **Fourth Geneva Convention of 1949**: article 33 of the Convention prohibits pillage of natural resources.

37. **International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights of 1966 (entered into force in 1976)**: article 1 of both Covenants provides that all peoples have a right to self-determination, 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.³⁹ 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 to self-determination and respect that right, in conformity with the provisions of the Charter of the United Nations.⁴⁰

38. **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. **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 its property as well as to an adequate compensation.

41. **United Nations Convention on the Law of the Sea of 1982**: while Western Sahara is not a party to the United Nations Convention on the Law of the Sea, resolution III of the Third United Nations Conference on the Law of the Sea 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”.

³⁸ See Hague Convention of 1907, article 43, in Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915).

³⁹ International Covenant on Economic, Social and Cultural Rights, contained in General Assembly resolution 2200 (XXI), article 1 (2).

⁴⁰ *Ibid.*, article 1 (3).

2. Case law of the International Court of Justice

42. In the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the International Court of Justice dealt with the question of natural resource exploitation and made reference to articles 43 and 47 of the Hague Convention of 1907 and article 33 of the Fourth Geneva Convention of 1949 relating to the prohibition of pillage. The Court also observed that both the Democratic Republic of the Congo 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 lawful 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 two other cases in which it was argued that the principle of permanent sovereignty over natural resources was violated, but the International Court of Justice did not issue any judgment on the merits.⁴¹

F. Legal opinion by the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, 12 February 2002

44. As indicated in paragraph 3 of this opinion, the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel delivered a legal opinion at the request of the 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".⁴²

45. The United Nations Legal Counsel, after examining Article 73 of the Charter of the United Nations, the resolutions of the General Assembly and the practice of 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".⁴³

46. The United Nations Legal Counsel then analysed the issue of mineral resource exploitation by analogy and concluded that mineral resource 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 the territory.⁴⁴ Regrettably, under this approach, the Legal Counsel did not consider the question of whether

⁴¹ In the *Case concerning East Timor (Portugal v. Australia)*, judgment of 30 June 1995, the International Court of Justice concluded that it lacked jurisdiction, while in the *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, judgment of 26 June 1992, the parties reached a settlement following a judgment on preliminary objections.

⁴² S/2002/161, para. 1.

⁴³ Ibid., para. 14.

⁴⁴ Ibid., para. 21.

Morocco should be considered as an occupying or administering Power of Western Sahara under the provisions of the Charter of the United Nations. The Legal Counsel also did not consider any Security Council or General Assembly resolutions relating to the status or occupation by Morocco of Western Sahara.

47. Using the analogy of mineral resource activities conducted in Non-Self-Governing Territories, the United Nations 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 principles of international law applicable to mineral resource activities in Non-Self-Government Territories.* (emphasis added)

48. The former United Nations 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.⁴⁵ He has also decried statements by Morocco claiming sovereignty over Western Sahara as being incompatible with Security Council resolutions and the 1975 advisory opinion of the International Court of Justice.⁴⁶

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 analysing the status of Morocco on Western Sahara. Western Sahara is a Non-Self-Governing Territory under Article 73 of the Charter of the United Nations. As a Non-Self-Governing Territory, Western Sahara retains its separate and distinct status until 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.

51. In addition, the International Court of Justice, 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 (1) (d) of the Charter of the Organization of African Unity, one of the objectives of the Organization was to rid the continent of the vestiges of colonialism.

⁴⁵ See Hans Corell, "The legality of exploring and exploiting natural resources in Western Sahara", in *Conference on Multilateralism and International Law with Western Sahara as a Case Study* (Pretoria, VerLoren van Themaat Centre, 2008). Available from www.unisa.ac.za/contents/faculties/law/docs/14corell.pdf.

⁴⁶ See Hans Corell, "The responsibility of the UN Security Council in the case of Western Sahara", *International Judicial Monitor* (Winter 2015). Available from www.judicialmonitor.org/current/specialcommentary.html.

53. The United Nations, the African Union and all States Members of the United Nations have never recognized the sovereignty claims of Morocco over Western Sahara or approved the occupation by Morocco of Western Sahara.

54. Regarding the political settlement on Western Sahara, the United Nations and the Organization of African Unity/African Union have recognized the unquestionable and inalienable right of the people of Western Sahara to a referendum for self-determination. Accordingly, both the United Nations and the African Union have called upon the two parties to reach a solution which will provide for the self-determination of the people of Western Sahara.

55. Furthermore, the United Nations, the African Union and the International Court of Justice 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 form part of the heritage of the people of Western Sahara.

56. The right to self-determination and the right of a people and its 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 1969,⁴⁷ and States cannot derogate from these norms.

57. Accordingly, Morocco has no legal right under the Charter of the United Nations and international law to occupy or govern the Territory of Western Sahara. It should be recalled that the Security Council called upon Morocco to withdraw from the Territory of Western Sahara, after it had occupied the territory a short time after the International Court of Justice issued its 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 negotiations for a peaceful settlement, which have been ongoing for more than four decades. The exploration and exploitation also undermines the principles and resolutions and decisions of both the United Nations and the African Union, particularly the right of the people of Western Sahara to self-determination through a referendum and the right over their natural resources.

59. United Nations Member States are under an obligation from the Charter and resolutions of the United Nations 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, by any other State, group of States or foreign companies engaged by it in Western Sahara is illegal as it violates international law and resolutions of the United Nations and of the African Union. The exploitation of natural resources is also a threat to the integrity and prosperity of the people of Western Sahara. In this

⁴⁷ “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”, United Nations, *Treaty Series*, vol. 1155, No. 18232, article 53.

regard, foreign companies and any other State or group of States entering into agreements/contracts with Morocco for the exploitation of natural resources in Western Sahara are aiding and abetting an illegal situation, and such agreements/contracts are invalid.⁴⁸

61. Both the Security Council and the Peace and Security Council of the African Union should exercise their responsibilities and put pressure on Morocco to ensure that the illegal exploration and exploitation of natural resources in Western Sahara ceases until a just, lasting solution is achieved by the parties through a referendum for self-determination.

62. The second issue is under what circumstances 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 United Nations Legal Counsel which he delivered to the 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 Charter of the United Nations as elaborated by various resolutions of the 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 United Nations Legal Counsel 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 principles of international law applicable to mineral resource activities in Non-Self-Governing Territories.

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 the 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)⁴⁹ and the Government of the Saharawi Arab Democratic Republic should not only be consulted but must be directly 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 Security Council should ensure that Morocco scrupulously accounts for such activities and transfers all benefits that have accrued to the people of Western Sahara through a transparent and independent mechanism supervised by the United Nations and the African Union. There might be a need for the United Nations and the African Union 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 United Nations and the African Union must exercise their responsibilities and put pressure on Morocco to

⁴⁸ See Security Council resolution 276 (1970), in which the Council declared that the continued presence of South African authorities in Namibia was illegal and that consequently all acts taken by the Government of South Africa were illegal and invalid.

⁴⁹ See General Assembly resolution 34/37 (1979).

comply with the principles of the United Nations 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 more than four decades cannot be allowed to continue.

67. Morocco is not an administering Power over Western Sahara's territory under Article 73 of the Charter of the United Nations. Morocco also does not have sovereignty over Western Sahara. The question of Western Sahara remains a pending issue of decolonization and should therefore be resolved in accordance with General Assembly resolution 1514 (XV) of 14 December 1960 containing the Declaration 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, the African Union, through the African Union Commission and other relevant organs, must appeal to the Security Council to ensure that exploration and exploitation of natural resources in Western Sahara is undertaken under the following framework:

(a) Morocco should not enter into any agreements with any other State, group of States or foreign companies for the 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 representatives⁵⁰ 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 the 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 United Nations and the African Union should consider appointing a joint independent panel to verify Morocco's account.

70. The Security Council and the Peace and Security Council of the African Union must also inform all States Members of the United Nations and those of the African Union 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, violate the principles of international law on self-determination and exploitation of natural resources in

⁵⁰ The Polisario Front. See General Assembly resolution 34/37 (1979).

Non-Self-Governing Territories, and such agreements/contracts are null and therefore illegal.

71. Since the Saharawi Arab Democratic Republic is a State member of the African Union, all States members of the African Union must bear in mind the principles and objectives of the African Union, particularly with regard to the need to defend the sovereignty and territorial independence of the Saharawi Arab Democratic Republic. The concerns of the African Union on the illegal exploration and exploitation of natural resources in Western Sahara must be transmitted by the African Union Commission and other relevant African Union organs and offices to other international and regional organizations and partners. The issue should therefore 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. States Members of the United Nations and their companies are under an obligation, according to international law, the Charter and resolutions of the United Nations, to refrain from helping in the perpetuation or legitimization of the colonial situation in Western Sahara by means of investments or the 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 with resolution 2711 (XXV) of 14 December 1970.

73. The United Nations, the African Union and the International Court of Justice 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. United Nations 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 Charter of the United Nations, customary international law and is therefore illegal as it violates international law.

75. The exploitation and exploration of renewable or non-renewable natural resources in the current situation (occupation) is also a threat to the integrity and prosperity of the people of Western Sahara and to peace and stability in North Africa. This is in accordance with General Assembly resolution 2983 (XXVII) of 14 December 1972.

76. The United Nations should assume its political and legal responsibilities and protect the renewable or non-renewable natural resources of the Saharawi people, as it did in East Timor and Namibia, until 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 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 United Nations and the African Union 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 on Western Sahara.

79. The African Union Commission should elaborate a comprehensive boycott strategy that targets Morocco, any other State, group of States or foreign companies involved in the illegal exploration or exploitation of the renewable or non-renewable natural resources of Western Sahara, in compliance with the communiqué of the Peace and Security Council of the African Union adopted at its 496th meeting on 27 March 2015.
