

Tilburg University

The current EU-Morocco Fisheries  
Partnership Agreement through the  
Perspective of the Saharawi people right  
to Self-Determination & Permanent  
Sovereignty over Natural Resources

Exploitation of Natural Resources in  
Western Sahara

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Map No. 3691 Rev. 65 UNITED NATIONS  
March 2011 (Colour)

Department of Field Support  
Cartographic Section

Image source: <http://www.un.org/en/peacekeeping/missions/minurso/resources.shtml>

## **Chronology**

### **Spanish colonization**

- 1884 Spanish colonization of Western Sahara.
- 1947 Discovery of phosphate in the deserts of Western Sahara by a Spanish geologist.
- 1960 Adoption of UNGA Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples.

### **Western Sahara to be decolonized**

- 1963 Western Sahara included in the UN list of countries to be decolonized.
- 1973 Establishment of the POLISARIO Front.
- 1973 Spain begins to export phosphates.
- 13 December  
1974 UNGA resolution 3292 (XXIX) of 13 December 1974.
- May  
1975 UN fact finding mission visits Western Sahara.
- October  
1975 Advisory Opinion of the International Court of Justice. The Court finds that Western Sahara has the right to self-determination and referendum.
- 6 November  
1975 Moroccan Green March.
- 14 November  
1975 Madrid Tripartite Agreements between Spain, Morocco and Mauritania.

## **Moroccan and Mauritanian troops invade Western Sahara**

- November  
1975 Moroccan and Mauritanian troops invade the Western Sahara.
- 26 February  
1976 Spain officially announces its withdrawal from Western Sahara to the United Nations.
- 27 February  
1976 The Sahara Arab Democratic Republic (SADR) is proclaimed by POLISARIO.
- 1976-  
1977 POLASRIO and Moroccan troops in armed conflict.
- 11 December  
1976 UNGA resolution 3458A (XXX), and UNGA resolution 3453B (XXX).
- 1979 Mauritania withdraws from Western Sahara and recognizes the right of Western Sahara to self-determination.
- 1981-97 Moroccan troops construct a defense wall.
- 1984 SADR becomes a member of the OAU.
- 1991 MINURSO (UN Mission of the Referendum in Western Sahara) and ceasefire.

## **Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco**

- 28 April 2006 Conclusion of the EU-Morocco Fisheries Agreement between the European Community and Morocco, adopted by the Council of the European Union.



- 6 March 2007      Ratification of the EU-Morocco Fisheries Agreement by Morocco for a period of four years.
- 25 february 2011      Extension of the Protocol to the EU-Morocco Fisheries Partnership Agreement for a period of twelve months.
- 28 February 2011      Extension of the EU-Morocco Fisheries Agreement for a period of four years.

## List of abbreviations

EU	European Union
FPA	Fisheries Partnership Agreement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
MINURSO	United Nations Mission for the Referendum in Western Sahara
NSGT	Non-Self-Governing Territory
POLISARIO	Frente Popular para la Liberación de Saguia el Hamra y de Río de Oro
PSNR	Permanent Sovereignty over Natural Resources
SADR	Saharawi Arabic Democratic Republic
UN	United Nations
UNGA	United Nations General Assembly



## Chapter 1

A peaceful demonstration of an estimated 12 000 to 20 000 displaced Saharawi at the Gdeim Izik tent camp near Layoune, resulted in deadly clashes with Moroccan security forces in November 2010.<sup>1</sup> The protest preceded UN organized negotiations between Morocco and the *Frente Popular para la Liberación de Saguia el-Hamra Rio de Oro* (hereafter: POLISARIO) concerning a consultative referendum to be held on the status of Western Sahara. With this protest, the Saharawi people articulated their complaints about their social and economic living conditions in the Moroccan controlled part of Western Sahara.<sup>2</sup> The protest however was reported to conceal underlying problems. According to one of the demonstrators

'[...] the protest's focus on bread-and-butter issues was a deliberate calculation.' "The social issues hide the other issues," he said. "We keep it social because it is our only shield against Morocco's crackdown. We do not want to fly Polisario flags here, otherwise Morocco will find an excuse to storm the camp."<sup>3</sup>

The events illustrated, refer to the Saharawi people right to self-determination, the international status of Western Sahara and the facts on the ground. From the rule that facts do not automatically constitute international law, this thesis takes a critical look at the current EU-Morocco Fisheries Partnership Agreement (hereafter: EU-Morocco FPA) from the

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<sup>1</sup> Human Rights Watch , "Western Sahara: Beatings, abuse by Moroccan Security Forces" Publicized 26 November 2010 at: <http://www.hrw.org/news/2010/11/26/western-sahara-beatings-abuse-moroccan-security-forces> ; BBC News Africa "*Deadly clashes as Morocco breaks up Western Sahara camp*", publicized 9 November 2010 at: <http://www.bbc.co.uk/news/world-africa-1171040>; Reuters Africa "Feature Western Sahara protest camp tests Morocco's nerve" publicized 7 November 2010 at: <http://af.reuters.com/article/mauritaniaNews/idAFLDE6A506H20101107?pageNumber=4&virtualBrandChannel=0&sp=true>; The demonstration is said to have set-off the Arab Spring. See interview with Noam Chomsky in "New Europe: The theft of Western Sahara", available at: <http://fishelsewhere.eu/a180x1288>.

<sup>2</sup> Human Rights Watch , "Western Sahara: Beatings, abuse by Moroccan Security Forces" Publicized 26 November 2010 at: <http://www.hrw.org/news/2010/11/26/western-sahara-beatings-abuse-moroccan-security-forces>.

<sup>3</sup> Reuters Africa "Feature-Western Sahara protest camp tests Morocco's nerve" publicized 7 November 2010 at: <http://af.reuters.com/article/mauritaniaNews/idAFLDE6A506H20101107?pageNumber=4&virtualBrandChannel=0&sp=true>.

perspective of the Saharawi people right to self-determination.<sup>4</sup> With this Agreement, eleven Member States of the European Union (hereafter: EU) are provided with fishing opportunities located in what is defined to be the ‘Moroccan fishing zone’, meaning ‘the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco’.<sup>5</sup> In return for these fishing opportunities 144 400 000 million euro is contributed to Morocco.<sup>6</sup> The EU-Morocco FPA has become a controversial subject among the Saharawi people, diplomats, international lawyers and several human rights groups and others, for the Agreement consented into by Parties, includes the territorial waters of Western Sahara.<sup>7</sup> These waters have been under the *de facto* control of Morocco for more than thirty years. This is a result of the Moroccan and Mauritanian invasion into the territory in 1975.<sup>8</sup> In reaction to the military invasion and to

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<sup>4</sup> Raič 2002, p. 50-51, 53-54 on effective control; the agreement is often referred to as the EU-Morocco FPA. It is however an agreement between Morocco and the European Communities. The text of the EU-Morocco FPA is available at : <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf>. or [http://www.vest-sahara.no/files/dated/2008-05-15/fisheries\\_partnership\\_agreement\\_eu-morocco.pdf](http://www.vest-sahara.no/files/dated/2008-05-15/fisheries_partnership_agreement_eu-morocco.pdf).

<sup>5</sup> See Article 2 of the Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006 and Article 2(a) EU-Morocco FPA, published in the Official Journal of the European Union 29 May 2006, OJ L141/4, May 29, 2006. The Agreement was adopted pursuant to Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006. The text is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf>. or [http://www.vest-sahara.no/files/dated/2008-05-15/fisheries\\_partnership\\_agreement\\_eu-morocco.pdf](http://www.vest-sahara.no/files/dated/2008-05-15/fisheries_partnership_agreement_eu-morocco.pdf)

<sup>6</sup> See Article 2 Protocol of the EU-Morocco FPA, published in the Official Journal of the European Union 29 May 2006, OJ L141/4, May 29, 2006. The Agreement was adopted pursuant to Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006. The text is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf>. or [http://www.vest-sahara.no/files/dated/2008-05-15/fisheries\\_partnership\\_agreement\\_eu-morocco.pdf](http://www.vest-sahara.no/files/dated/2008-05-15/fisheries_partnership_agreement_eu-morocco.pdf) .

<sup>7</sup> See S/2011/249, Report of the Secretary-General on the situation concerning Western Sahara 2011 available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/286/60/PDF/N1128660.pdf?OpenElement>; Toby Shelley in *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, p. 17; See Letter POLISARIO to Mrs. Damanaki dated 16 November 2010; See Corell in *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, p. 242; Denial of Self-Determination and Utilisation of Natural Resources by an Illegal Occupier of Territory: the Role of Non-Recognition in such Instances in the Light of the East Timor Case and the Situation in Western Sahara, by Clive R. Symmons 2008, p. 329; See P. San Martin, EU-Morocco Fisheries Agreement: the Unforeseen Consequences of a Very Dangerous Turn”: <http://www.gees.org.articulo/2601>, at p. 2; Toby Shelley in *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, p. 17-18. The author refers to the current EU-Morocco FPA as constituting a backdoor recognition of the status quo in Western Sahara; <http://nos.nl/artikel/197094-polisario-inval-kamp-werd-bloedbad.html>; <http://www.bbc.co.uk/news/world-africa-11710400>.

<sup>8</sup> Clive R. Symmons 2008, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal*

prevent the establishment of a *fait accompli*, the Saharawi people's independence movement and legitimate representative POLISARIO engaged into armed conflict with the Moroccan and Mauritanian invasion troops.<sup>9</sup> It thereby acted upon the Saharawi people's political aspirations to achieve sovereign statehood. The territory is recognized as the Saharawi Arab Democratic Republic (hereafter: SADR) by Timor Leste and several Member States of the African Union.<sup>10</sup> The SADR is however, not a Member of the United Nations (hereafter: UN).<sup>11</sup> Today, the Kingdom of Morocco upholds its territorial claims regarding Western Sahara and continues to occupy almost the entire territory of Western Sahara, while Mauritania withdrew hers in the late 1970s.<sup>12</sup> The Western Sahara territory spreads over 266.000 square kilometres and is located in the Northern part of Africa, bordering the Atlantic Ocean to its West, the Kingdom of Morocco in the North, Algeria in the North East and Mauritania in the South and South East of the territory.<sup>13</sup> For thousands of years this territory has been inhabited by the nomadic tribes of the Saharawi people.<sup>14</sup> Its natural resources have been and continue to be the object of desire in the eyes of many of the territory's surrounding rulers, for not only did the surface of its desert sands hide what might be –among other minerals and oil - the world's largest deposits of phosphate.<sup>15</sup> In addition to that, Western

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*Occupier of Territory*, p. 328-329.

<sup>9</sup> Hodges 1983, p. 238.

<sup>10</sup> Jensen 2005, p. 30; *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, Uppsala 2006, p. 15; this article is available at: <http://www.afrika.no/Detailed/6070.html>.

<sup>11</sup> Jensen 2005, p. 33; *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, Uppsala 2006, p. 4.

<sup>12</sup> Hodges 1983, p. 242-243; Jensen 2005, p. 32.

<sup>13</sup> Pazzanita 1996, p. xi; *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, Uppsala 2006, p. 4; J. Smith in *The Plundering of the Sahara: Corporate criminal and civil liability for the taking of natural resources from Western Sahara*, p. 1 available at: <http://arso.org/PlunderingoftheaharaSmith.pdf>.

<sup>14</sup> Pazzanita 1996, p. xi; Hodges 1983, p. 3-15; Mercer 1976, p. 69-75.

<sup>15</sup> Haugen 2007, p. 77; Toby Shelley in *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, p. 17; J.J.P. Smith in *The Plundering of the Sahara: Corporate criminal and civil liability for the taking of natural resources from Western Sahara*, p. 3, available at: <http://arso.org/PlunderingoftheaharaSmith.pdf>; Mercer 1976, p.184-195; See Hagen 2010, *The Role of Natural Resources in the Western Saharan conflict and the interests involved, in Multilateralism and International Law with Western Sahara as a Case Study*.

Saharan territorial waters hold Africa's richest fisheries waters.<sup>16</sup> The Saharawi people right to self-determination is recognized in numerous United Nations General Assembly (hereafter: UNGA) resolutions and by the International Court of Justice (hereafter: ICJ).<sup>17</sup> The UN have continued to regard Western Sahara to be an Article 73 UN Charter Non-Self-Governing Territory (hereafter: NSGT) since 1963 under responsibility of the *de jure* Administering Power Spain, despite Moroccan invasion and occupation of the territory in 1975.<sup>18</sup> Today, Western Sahara remains the last 'self-determination unit' of the African continent, awaiting the closure of its process of decolonization through an act of self-determination by the Saharawi people.<sup>19</sup> Taking into consideration these facts, the central question of this thesis is therefore:

*To what extent has the current EU-Morocco FPA been concluded and implemented conform the Saharawi people right to self-determination?*

In order to assess this question, the following sub-questions need to be addressed:

1. *'What does the EU-Morocco FPA entail?'*
2. *'What does the Saharawi people right to self-determination entail?'*
3. *'What does the status of Article 73 UN Charter NSGT - according to international law - imply in relation to the exploration and exploitation of natural resources?'*
4. *'Which entity is according to international law obliged to safeguard the interests of non-self-governing people in relation to the current EU-Morocco FPA?'*
5. *'Is Morocco entitled to enter into an agreement which affects the natural resources of the NSGT Western Sahara?'*
6. *'What are the legal consequences for the current EU-Morocco FPA in the event that the Agreement is found not to be concluded in accordance with the Saharawi people right to self-determination?'*

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<sup>16</sup> Hodges 1983, p. 122; Haugen 2007, p. 74.

<sup>17</sup> See ICJ Advisory Opinion on Western Sahara, ICJ Reports 1975, p. 12; See Hodges 1983, p. 372; See Joffé 1987, in The International Court of Justice, and the Western Sahara dispute, in War and Refugees The Western Saharan Dispute, p.16-30; See Crawford 2006, p. 644-647.

<sup>18</sup> UNGA 2072 (XX) of 16 December 1965; UNGA 2229 (XX) of 20 December 1966; See ICJ Advisory Opinion Western Sahara, ICJ Reports 1975, p. 12.

<sup>19</sup> See for actual information of the 16 remaining Non-Self-Governing Territories in the meaning of Article 73 UN Charter <http://www.un.org/en/decolonization/index.shtml>.

7. *‘What third State obligations exist regarding the Saharawi people right to self-determination in relation to agreements which affect the natural resources of Western Sahara?’*

In order to address these issues, Chapter 2 of this thesis consists of an overview of the current EU-Morocco FPA, examining the manner in which the territorial waters of Western Sahara are included into the agreement. The extent of the Saharawi people right to self-determination will be addressed in a compilation of Chapter 3 and 4. Chapter 3 provides an overview of the law of self-determination of peoples, referring to the evolution of the principle of self-determination of peoples; its implementation through Article 73 UN Charter concerning NSGTs and the principle of permanent sovereignty over natural resources (hereafter: PSNR). Against the background of this legal framework, a historical outline of events leading to the current status of the Saharawi people and the territory of Western Sahara are reconstructed and analysed in Chapter 4. Chapter 4 furthermore reflects on both the legal relationships between Spain-Western Sahara, Western Sahara-Morocco, and the role of the United Nations. Chapter 5 discusses the central question of this thesis, taking into consideration the applicable legal regime, in regard to the legal relationship between Morocco and Western Sahara. Finally, Chapter 6 of this thesis provides for the concluding remark.



## Chapter 2

### The Main Features of the 2007 EU-Morocco FPA

#### §1. Introduction

In order to clarify as to what extent the current EU-Morocco FPA was concluded and implemented in accordance with the Saharawi people right to self-determination and PSNR, an examination of the agreement itself is imperative. It is especially necessary to determine whether and how the agreement at issue covers Western Sahara territorial waters. This Chapter therefore not only consists of a general survey on the contents, history and the current implementation of the agreement concerned. It also addresses the question whether and in what form reference is made to the Saharawi people.

#### §2. History of the EU-Morocco FPA

The genesis of bilateral agreements concerning fishing opportunities in Western Sahara waters between Morocco and Spain can be found in the 1974 Madrid Tripartite Agreements.<sup>20</sup> These Agreements however, made no reference to Western Sahara itself.<sup>21</sup> The first bilateral Spanish-Moroccan agreement concerning the fishing in Western Sahara waters, was ratified by Spain in February 1978.<sup>22</sup> The establishment of Spanish-Moroccan fisheries agreements

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<sup>20</sup> See Hodges 1983, p. 224; See Smith in *The Plundering of the Sahara: Corporate criminal and civil liability for the taking of natural resources from Western Sahara*, p. 4, available at: <http://arso.org/PlunderingoftheaharaSmith.pdf>; The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: fishing too south?, by Enrico Milano, p. 7. Larosch 2007, p. 7; Shelley 2004, p. 74; Leite 2006, p. 13. According to Leite, Western Sahara was ceded to both Morocco and Mauritania by Spain with the signing of the Madrid Tripartite Accords on 14 November 1974. 'Under the terms of the tripartite agreement, Spain withdrew from Western Sahara in 1976, in return for 35 % of the phosphate mines and fishing rights in Saharan waters for ten years, thereby renegeing on its pledge to oversee a referendum on self-determination in Sahara and ensure a peaceful transferral of power. Neither the UN nor the Organization of African Unity challenged the legality of the tripartite agreement.' Hannikainen 2007, in *The Case of Western Sahara from the Perspective of Jus Cogens*, in p. 66; E. Hagen 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 253.

<sup>21</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 327; Shelley 2006, in *Natural resources and the Western Sahara in The Role of Natural Resources in Decolonization*, p. 18.

<sup>22</sup> Eduardo Trillo de Martín-Pinillos, in *Spain as Administering Power of Western Sahara*, in *International Law and the Question of Western Sahara* p. 84; Hannikainen 2007, in *The Case of Western Sahara from the*

continued in the 1980s and led to unceasing tensions, when POLISARIO made clear that it had not agreed to the fishing in the territorial waters of Western Sahara.<sup>23</sup> It is stated furthermore, that after Spain became a Member of the EU in 1986, these fishing rights that were provided for by the Madrid Tripartite Agreements, became part of EU practice in 1988.<sup>24</sup> In the 1990's a fishery protocol was established between Morocco and the EU for the period of 1 December 1995 to 30 November 1999. In 2002, the former legal adviser to the UN Security Council, *Corell* submitted his legal opinion 'concerning the legality in the context of international, including relevant resolutions of the Security Council and the General Assembly of the UN, 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 exploitation of mineral resources in Western Sahara.' The former advisor concluded that '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.' As the European Commission took into account this legal advice, 2005 witnessed the negotiations for a renewed fishing agreement between the European Commission and Morocco.<sup>25</sup> These negotiations led to the concluding of the present EU-Morocco FPA.<sup>26</sup>

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*Perspective of Jus Cogens, in Multilateralism and International Law with Western Sahara as a Case Study*, p. 69.

<sup>23</sup> Hodges 1983, p. 125; Milano 2006, in *The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: fishing too south?* in *Anuario de Derecho Internacional*, p. 7.

<sup>24</sup> Shelley 2004, p. 74; See Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 327; Hannikainen 2007, in *The Case of Western Sahara from the Perspective of Jus Cogens*, in *International Law and the Question of Western Sahara*, p. 69.

<sup>25</sup> See Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 327; Shelley 2004, p. 18; See Milano 2006, in *The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco: fishing too south?*, in *Anuario de Derecho Internacional*, p. 7.

<sup>26</sup> See in this perspective the Legal Opinion to the Security Council of 12 February 2002 by Corell. United Nations Security Council, 12 February 2002 S/2002/161. The Legal Opinion has played a substantive role in the considerations of the Legal Service of the European Union in the question whether the current EU-Morocco FPA breaches principles of international law. The Legal Service adopted the perspective that Morocco is a *de facto* administering Power of Western Sahara. The legality of the EU-Morocco FPA in this perspective is dependent upon the manner in which Morocco is willing to implement the agreement. See in this perspective Brus 2007, p. 206-207. This author describes the Corell perspective as 'a pragmatic choice that is in line with the status of Western Sahara as a Non-Self-Governing Territory, in contrary to the

### §3. Contents and duration of the current EU-Morocco FPA

The current EU-Morocco FPA, currently in effect, concerns the FPA between the European Community and Morocco, adopted by the Council of the European Union. This Agreement, stipulates the allocation of fishing opportunities by Morocco to EU-vessels. The EU-Morocco FPA consists of the Agreement itself, the Protocol and the Annex. The EU-Morocco FPA was concluded on 28 April 2006 and ratified by Morocco on 6 March 2007 for a period of 4 years.<sup>27</sup> The Protocol to the Agreement was set to expire on 27 February 2011, but was extended on 25 February for a period of twelve months.<sup>28</sup> The Agreement itself was extended for another period of four years on 28 February 2011 until 27 February 2015.<sup>29</sup> The FPA provides for certain financial contributions by the EU to Morocco in return for the issuing of fishing licences for EU-vessels in the “Moroccan fishing zone”.<sup>30</sup> Eleven EU Member States are provided with fishing opportunities, namely Spain, Portugal, Italy, France, Germany, Lithuania, Latvia, the Netherlands, Ireland, Poland and the United Kingdom.<sup>31</sup>

### §4. Purpose of the EU-Morocco FPA

Article 1 of the EU-Morocco FPA describes the four purposes of the Agreement.<sup>32</sup> The Agreement aims to guarantee the conservation and the sustainable exploitation of fisheries

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‘much more sensitive’ choice to classify Morocco as Occupying Power ‘from a political point of view.’ See also Chapaux 2007, p. 223; See also the address by Corell on the UN 2002 legal opinion available at the Western Sahara Resource Watch at: <http://www.wsrw.org/a105x982> or <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>; Symmons 2009, p. 328.

<sup>27</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 328.

<sup>28</sup> This information is available at:

[http://ec.europa.eu/fisheries/cfp/international/agreements/morocco/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/agreements/morocco/index_en.htm).

<sup>29</sup> This information is available at:

[http://ec.europa.eu/fisheries/cfp/international/agreements/morocco/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/international/agreements/morocco/index_en.htm).

<sup>30</sup> See Article 2(a) of the EU-Morocco FPA.

<sup>31</sup> See Article 2 of the Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006 and Article 2(a) EU-Morocco FPA, published in the Official Journal of the European Union 29 May 2006, OJ L141/4, May 29, 2006. The Agreement was adopted pursuant to Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006. The text is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf>. or [http://www.vest-sahara.no/files/dated/2008-05-15/fisheries\\_partnership\\_agreement\\_eu-morocco.pdf](http://www.vest-sahara.no/files/dated/2008-05-15/fisheries_partnership_agreement_eu-morocco.pdf)

<sup>32</sup> See Article 1 of the EU-Morocco FPA, published in the Official Journal of the European Union 29 May 2006, OJ L141/4, May 29, 2006. The Agreement was adopted pursuant to Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006. The text is available at: <http://eur->

resources and the development of the Moroccan fisheries sector. It therefore aims at establishing the principles, rules and procedures governing economic, financial, technical and scientific cooperation in the fisheries sector with a view to introducing responsible fishing in Moroccan fishing zones. The second purpose of the EU-Morocco FPA is the establishment of the principles, rules and procedures governing the conditions concerning access by Community fishing vessels to Moroccan fishing zones. The third aim of the agreement is the creation of arrangements for policing fisheries in Moroccan waters. These are established with a view to ensuring that the above rules and conditions are complied with. The agreement furthermore stipulates, that the measures for the conservation and management of fish stocks are effective, and that illegal, undeclared or unregulated fishing is prevented. The fourth and final aim of the FPA under discussion is the establishment of the principles, rules and procedures governing the conditions in respect of partnerships between companies. These are aimed at developing, in the common interest, economic and related activities in the fisheries sector.<sup>33</sup>

*§5. Area of Application “the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco”.*

As has been noted before, Article 2(a) of the current EU-Morocco FPA provides that “Moroccan fishing zone” means “the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco.”<sup>34</sup> With this formulation, not only the waters under Moroccan sovereignty are referred to, but also the waters of Western Sahara.<sup>35</sup> Morocco has controlled

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[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf](http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf). or [http://www.vest-sahara.no/files/dated/2008-05-15/fisheries\\_partnership\\_agreement\\_eu-morocco.pdf](http://www.vest-sahara.no/files/dated/2008-05-15/fisheries_partnership_agreement_eu-morocco.pdf).

<sup>33</sup> See Article 1 EU-Morocco FPA, published in the Official Journal of the European Union 29 May 2006, OJ L141/4, May 29, 2006. The Agreement was adopted pursuant to Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006. The text is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf>.

<sup>34</sup> See Article 2(a) EU-Morocco FPA, published in the Official Journal of the European Union 29 May 2006, OJ L141/4, May 29, 2006. The Agreement was adopted pursuant to Council Regulation (EC) No. 764/2006 (OJ L 141, May 29, 2006. The text is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:141:0004:0037:en:pdf>. or [http://www.vest-sahara.no/files/dated/2008-05-15/fisheries\\_partnership\\_agreement\\_eu-morocco.pdf](http://www.vest-sahara.no/files/dated/2008-05-15/fisheries_partnership_agreement_eu-morocco.pdf) ; See Brownlie 2008, p.105-106 for a description of the terms ‘sovereignty’ and ‘jurisdiction’.

<sup>35</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal*

84% of the Western Sahara territory since 1975, including its territorial waters.<sup>36</sup> The coordinates of the fisheries zones have been stipulated in Appendix 4 of the EU-Morocco FPA. This section of the Agreement is titled “Limits of the Moroccan Fishing Zones Coordinates of Fishing Zones”. It should be noticed that the 27.4 o line constitutes the maritime border between the territorial waters of Western Sahara and the waters falling within the sovereignty of the Kingdom of Morocco.<sup>37</sup> The current EU-Morocco FPA latitude co-ordinates give fishing fleets access to waters south of the 27.4 o line. The agreement therefore allocates fishing opportunities to EU-vessels in the territorial waters of Western Sahara. In 2008 the European Commission stated that fishing by EU-vessels in Western Sahara waters has taken place according to the agreement at issue.<sup>38</sup> In contrast to the opinion of the European Commission, it has been put forward by one author that the current EU-Morocco FPA constitutes the implied recognition of Moroccan rule over Western Sahara contrary to the principle of non-recognition.<sup>39</sup>

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*Occupier of Territory*, p. 328. Islands of Las Palmas Case of 23 January 1925, 4 april 1928, Volume II pp. 829-871.

<sup>36</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 328.

<sup>37</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 329; See J.J.P. Smith in *The Plundering of the Sahara: Corporate criminal and civil liability for the taking of natural resources from Western Sahara*. Available at: <http://arso.org/PlunderingoftheaharaSmith.pdf> and *The maritime jurisdiction of the Western Sahara and the duty of states to preserve Saharan fisheries resources pending self-determination*. Available at: <http://www.arso.org/JSmithmaritjurisdiction102002.pdf>.

<sup>38</sup> Hagen 2010, in *The role of natural resources in the Western Saharan Conflict, and the interests involved, in Multilateralism and International Law with Western Sahara as a Case Study*, p. 253; The opinion of the European Commission is based upon the Corell Opinion. See *EU Commission admits fishing in occupied Western Sahara*. This article was published in 2008 and is available at: <http://www.wsrw.org/a128x770/>; See in this respect also Legal Opinion of the Legal Service of the European Commission of 13 July 2009 regarding the Unilateral declaration of EEZ by the SADR. This Legal Opinion has been published at <http://www.fishelsewhere.eu/a140x1077/>; See also Balboni, in *The EU's approach towards Western Sahara*, available at <http://www.saharawi.org/tesi/saharaocc1.pdf>.

<sup>39</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 328-329; See Letter POLISARIO to Mrs. Damanaki dated 16 November 2010; See Corell in *The Legality of Exploring and Exploiting Natural Resources in Western Sahara*, p. 242; See P. San Martin in *EU-Morocco Fisheries Agreement: the Unforeseen Consequences of a Very Dangerous Turn*, p. 2 available at <http://www.gees.org/articulo/2601>; Toby Shelley in *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, p. 17-18. The

§6. *Controversy: reactions of the EU-Members*

The including of the territorial waters of Western Sahara in this Agreement raised controversy, not only with the Saharawi people, but also with several Member State delegates to the EU.<sup>40</sup> Sweden, after entering into the negotiations decided not to become party to the Fisheries Partnership Agreement, arguing that acting upon the Agreement would lead to a breach of international law.

‘The Swedish Government’s position on the status of Western Sahara is crystal clear: Western Sahara is not part of Morocco and Morocco has no legal title or claim to Western Sahara. The people of Western Sahara have a right to self-determination, which, in this case, can be fulfilled by the creation of a fully sovereign state, if they so choose. The situation for the people of Western Sahara is unacceptable and it is of greatest importance that the conflict is soon peacefully resolved.’<sup>41</sup>

Accordingly, Sweden did not become party to the current EU-Morocco FPA. It is stated furthermore that Ireland expressed the same concern, and like Finland and the Netherlands made a Declaration before the EU Council in which it requested ‘for close scrutiny to be kept on the Agreement.’<sup>42</sup> The Irish Delegation was in favour of the conclusion of the Agreement on the basis that the Agreement

‘does not prejudice the long-standing position of the EU on the status of Western Sahara’ (i.e. the right to self-determination); that it saw as important the Joint Committee set up under the treaty (Article 10) as supposedly

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author refers to the current EU-Morocco FPA as constituting a backdoor recognition of the status quo in Western Sahara; See Shaw 2008 p. 468-470; Malancuk 2004, p. 152; Brownlie 2008, p. 513; Talmon 2006, p. 124. This Article is available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=900579](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900579); an example of the concrete interpretation of the duty of non-recognition which was set out by the ICJ in its 1970 Advisory Opinion of the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council 276 (1970) ICJ Reports 1971, p. 16. See ICJ Legal Consequences Construction of a Wall in the Occupied Palestinian Wall, ICJ Reports 2004, para. 87; See also Report of the ILC, 53<sup>rd</sup> session of 23 April-10 August 2001 available at: <http://untreaty.un.org/ilc/sessions/53/53sess.htm>. See also <http://www.harvardilj.org/articles/1-50.pdf>.

<sup>40</sup> Magnus Schöldtz and Pål Wrange 2006, in *Swedish foreign policy on the Western Sahara conflict*, in *The Western Sahara Conflict The Role of Natural Resources* p. 22.

<sup>41</sup> Magnus Schöldtz and Pål Wrange 2006, in *Swedish foreign policy on the Western Sahara conflict*, in *The Western Sahara Conflict, The Role of Natural Resources in Decolonization*, p. 22.

<sup>42</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 330.

ensuring that “the Agreement is implemented to the benefit of all of the people concerned and in accordance with the principles of international law”. Lastly, Ireland interpreted the advice of the EU’s legal service as being “that the agreement does not entail a de jure recognition of Morocco’s legal rights in respect of the [Western Sahara] area”.<sup>43</sup>

According to one author, several amendments to the draft EU-Morocco FPA were proposed, for instance that financial contribution from the EU should be used for the development of the Saharawi people who rely on fishing in Moroccan and Western Saharan waters. Another amendment entails the proposal that a yearly report on the implementation of the EU-Morocco FPA must be required. It was also put forward by delegates that the sole approval of the Agreement should be ‘subject to its implementation in accordance with international law’. Another amendment articulates that in case of evidence that the manner in which EU-Morocco FPA is used, contravenes international obligations, the Commission should intervene by taking immediate steps to suspend the treaty. The latter being what one author interprets as ‘an obvious reference to the relationship between Morocco and its control over the waters of Western Sahara’.<sup>44</sup> While its territorial waters are included in this agreement, the agreement itself does not make any reference to neither Western Sahara nor the Saharawi people.<sup>45</sup> In reaction to the concluding of the 2007 EU-Morocco and the extension of its Protocol in 2011, which explicitly includes and provides fishing opportunities to EU-vessels in Western Sahara waters without the consent of the Saharawi people, and without benefit to

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<sup>43</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 330.

<sup>44</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 330; T. Shelley in *The Western Sahara Conflict, The Role of Natural Resources in Decolonization*, p. 18.

<sup>45</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 328. The author refers to the Legal Opinion of the Legal Service who determined that the EU-Morocco FPA ‘could be legal if based on the following elements: namely, the acknowledgement of Morocco as the *de facto* administering power of Western Sahara; the understanding (based on the UN Corell opinion) that “the exploitation activities in Non-Self-Governing Territories violate the principles of international law if they disregard the interests and wishes of the people” therein; that the *de facto* administration of Morocco in Western Sahara is therefore under an obligation “to comply with the rights of the people of Western Sahara”; and that this does not mean that the Agreement, as such, is contrary to the principles of international law, as at that stage it could not be prejudged that “Morocco [would] not comply with its obligations under international law vis-à-vis the people of Western Sahara”.’

the Saharawi people,<sup>46</sup> POLISARIO launched an international campaign against the agreement.<sup>47</sup>

### §7. Conclusion

The 2007 FPA between the European Community and Morocco, adopted by the Council of the European Union, in which Morocco allocates fishing opportunities to EU-vessels explicitly includes Western Sahara waters. Article 2(a) which defines the Moroccan fishing zone explicitly as ‘waters falling under the sovereignty or jurisdiction of the Kingdom of Morocco.’ It has therefore been put forward, that the current EU-Morocco FPA constitutes a certain level of recognition of Moroccan rule over Western Sahara contrary to the principle of non-recognition.<sup>48</sup> Furthermore, the 27.4 o line constitutes the maritime border between the territorial waters of Western Sahara and the waters falling within the sovereignty of the Kingdom of Morocco.<sup>49</sup> The current EU-Morocco FPA latitude co-ordinates give fishing fleets access to waters south of the 27.4 o line.<sup>50</sup> Appendix 4 concerning the “Limits of the Moroccan Zones” stipulates the various co-ordinates of the Moroccan fishing zone and several of them apply generally below 30 o 40’, or of 29 o 00’, thereby including Western Sahara territorial waters.<sup>51</sup> The Saharawi people have not been consulted and have not

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<sup>46</sup> E. Hagen 2010, in *Multilateralism and International law with Western Sahara as a Case Study*, p. 252-254.

<sup>47</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 329 . According to the author POLISARIO furthermore stated that ‘military leaders of the Moroccan army would be the main beneficiaries’ of the current EU-Morocco FPA.<sup>47</sup> Furthermore, the Saharawi people do not benefit from this agreement; See “Western Sahara president urges help from the UN to stop the EU”. This article is available at: <http://www.fishelsewhere.eu/a140x1267>; See “Bastagli: Europe turns its back on the Arab Spring’s forgotten nation” available at: <http://fishelsewhere.eu/a140x1343>. For actual information see Western Sahara Resource Watch at [www.wsrw.org](http://www.wsrw.org); Fish Elsewhere at [www.fishelsewhere.eu](http://www.fishelsewhere.eu).

<sup>48</sup> Brownlie 2008, p. 513 ; Shaw 2008, p. 468-470; Cassese 2005, p.241-245; Talmon; Dissenting Opinion Dissenting Opinion in the *Case Concerning East Timor*; Clive R. Symmons in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 328.

<sup>49</sup> Symmons 2009, p. 329.

<sup>50</sup> Symmons 2009, p. 329.

<sup>51</sup> See map Western Sahara, p. v.; EU-Morocco FPA, Appendix 4 Limits of the Moroccan Fishing Zones Coordinates of Fishing Zones; See *Milano 2006, in The New Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, Fishing too South?* in *Anuario de Derecho Internacional..* This article is available at: [http://www.fishelsewhere.eu/files/dated/2009-12-15/milano\\_fisheries\\_agreement\\_2006.pdf](http://www.fishelsewhere.eu/files/dated/2009-12-15/milano_fisheries_agreement_2006.pdf); Symmons 2009, *Denial of Self-Determination and Utilisation of Natural Resources by an Illegal Occupier of Territory: the*



consented into this agreement. The agreement itself does not refer to either the Saharawi people nor Western Sahara. The question therefore rises whether this Agreement is concluded and implemented in accordance with the Saharawi people right to self-determination. The extent of the Saharawi people right to self-determination will therefore be elaborated upon in a compilation of Chapter 3 and 4.

## Chapter 3

### The extent of the Saharawi people right to self-determination

General aspects of the principle of self-determination of peoples, non-self-governing territories and the principle of permanent sovereignty over natural resources

#### §1. Introduction

The assessment of the question as to what extent the 2007 EU-Morocco FPA is concluded and implemented in accordance with the Saharawi people right to self-determination, requires the determination of the exact extent of this right. This Chapter therefore introduces a tripartite legal framework. This framework reflects on the legal origins of (1) the Saharawi people right to self-determination, (2) the international status of Western Sahara and (3) the Saharawi people right to PSNR. For this purpose paragraph 2 consists of an overview of the principle of self-determination of peoples and its evolution into the law of external and internal self-determination of peoples. Paragraph 3 entails a description of the specific implementation of the principle of self-determination through Article 73 UN Charter regarding NSGTs. In this respect, light will be shed on UN decolonization practice which resulted in the crystallization of the right to external self-determination of peoples. Finally, a description of the principle of PSNR is provided in paragraph 4. PSNR is the economic constituent of the right to self-determination of peoples.

#### §2. Self-determination of peoples

##### §2.1. Introduction

This paragraph contains a general overview of the contents, emergence, scope and status of the principle of self-determination of peoples in contemporary international law. Hereby, the general doctrine concerning the principle of self-determination will be set out. In addition thereto, light will be shed on the specific rules concerning external and internal self-determination that evolved from this principle. This section furthermore consists of an overview of the specific customary rules regarding State rights and obligations in relation to self-determination of peoples.

##### §2.2. Defining the right to self-determination of peoples

The *principle* of self-determination constitutes one of the cornerstones of modern international law. According to one author, the principle of self-determination of peoples prescribes to States the scheme that should be adopted in reaching decisions regarding

peoples.<sup>52</sup> Put differently, the principle stipulates the requirement that States decisions concerning peoples should be decided through ‘a free and genuine expression of the will of the peoples concerned.’<sup>53</sup> Implementation of this principle has resulted in the crystallization of rules regarding (1) external and (2) internal self-determination of peoples. In this respect it should be noted that a legal entitlement of peoples to external self-determination, concerns the entitlement of a people to choose its international form of self-government, resulting in the international legal status of its territory.<sup>54</sup> These may manifest in (1) independent statehood (2) free association with an existing State (3) integration into an existing State, or (4) any other political status the concerning people desire.<sup>55</sup> According to one author, subject to this rule are colonial peoples, peoples under foreign occupation and peoples subjected to racial discrimination who are ‘denied full access to government in a sovereign State.’<sup>56</sup> Internal self-determination of peoples refers to the entitlement of a people to exercise self-government, pursue its economic, social and cultural development within the framework of an existing State.<sup>57</sup> Modern international law concerning legal entitlements to external as well as internal self-determination thus requires ‘the free and clear choice by the population of the territory or country through a plebiscite, referendum, or through elections, in other words, a democratic process of determining the will of the people.’<sup>58</sup> The objective of the right to self-determination has been described by one author as ‘the protection, preservation, strengthening and development of the cultural, ethnic and or historical identity of a collectivity, that is, of a people.’ In the opinion of this author it is through the exercise of the right to self-determination that a people’s freedom and existence is guaranteed.<sup>59</sup> In this perspective, another author has submitted that the right to self-determination of peoples is closely linked to human rights in general, but to the right to life in particular. It is stated, that this right refers specifically to the

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<sup>52</sup> Cassese 2005, p. 62.

<sup>53</sup> ICJ Western Sahara(1975), ICJ Reports, p. 12.

<sup>54</sup> Crawford 2006, p. 621.

<sup>55</sup> This subject will be elaborated upon in §3.

<sup>56</sup> Cassese 2005, p. 62. Peoples under *apartheid* are also included to be subject to this rule.; UNGA res 1541 (XV) of 15 December 1960; See UNGA res 2625 (XXV) of 24 October 1970.

<sup>57</sup> Cassese 2005, p. 62. ICJ Reference re Secession of Quebec (1998) 2 S. R. C. R. 217, The Supreme Court of Canada.

<sup>58</sup> Beigbeder 1994, p.18.

<sup>59</sup> Raič 2002, p. 223.

right not to be subjected to genocide.<sup>60</sup> The right to self-determination of peoples is considered to be a collective human right.<sup>61</sup> The reception and implementation of this principle by the international community is considered hereafter.

### *§2.3. Emergence of the principle of self-determination of peoples*

The concept of self-determination originates from the principle of nationality, and emerged during the turmoil of the 18<sup>th</sup> century French and American revolutions.<sup>62</sup> The principle of nationality consisted of the political demand that each nation should be recognized the right to form its own sovereign state.<sup>63</sup> In the 20<sup>th</sup> century the principle of self-determination became the centrepiece of Lenin's 1917 Declaration on the Rights of Peoples of Russia. His 1917 Declaration on the Rights of Peoples of Russia articulated the basic principles of equal rights and sovereignty of the peoples of Russia; the right of the peoples of Russia to free self-determination which included the right of secession and the creation of independent states.<sup>64</sup> Although self-determination was according to Lenin a sole political tool to establish socialism, his thinking nonetheless brought about 'the continued Soviet insistence on the liberation and emancipation of colonized peoples', during the first decades of decolonization since the establishment of the United Nations.<sup>65</sup> Wilson's perspective on self-determination of peoples is well known by his speech on the Fourteen Points of 8 January 1918. Wilson's ideas on self-determination of peoples derived from democratic political thought.<sup>66</sup> During the era of the League of Nations, self-determination remained however, solely a political claim. This became evident in the case concerning the Aaland Islands.<sup>67</sup> The Aaland Islands case concerned a dispute between Sweden and Finland in relation to the desire of the Aaland Islands inhabitants to be reunited to the Kingdom of Sweden.<sup>68</sup> A formal request by the

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<sup>60</sup> Cristescu 1981, p. 114, and p. 124.

<sup>61</sup> Simma 2002, p. 53.

<sup>62</sup> Ninčič 1970, 219; Cassese 1995, p. 11; Crawford 2006, p. 108; See Malanczuk 2004, p. 11-12 on the Peace of Westphalia.

<sup>63</sup> Ninčič 1970, p. 213.

<sup>64</sup> Ninčič 1970, p. 220.

<sup>65</sup> Raič 2002, p. 184.

<sup>66</sup> Raič 2002, p. 184.

<sup>67</sup> Crawford 2006, p. 108-112; Raič 2002, p. 198.

<sup>68</sup> Raič 2002, p. 198; Philip Marshall Brown in *The Aaland Islands Question*, *The American Journal of International Law*, Vol. 15, No. 2 (April 1921), pp. 268-272, p. 268. Published by: The American Society of International Law, available at: <http://www.jstor.org/stable/2187689> Accessed: 29/09/2011.

Government of Sweden to the Government of Finland was submitted in November 1918, in order ‘to arrange for a plebiscite to decide on the political fate of the islands.’<sup>69</sup> The Finnish Government declared in reaction to this request that:

‘In opposing the Swedish Government’s proposal to submit the question of the future status of the islands to a plebiscite of the population, [it] is following the principles according to which several territorial questions were decided by the Peace Conference, in cases of conflict, as here, between the wishes of a minority and the economic and military security of a nation.’<sup>70</sup>

The Council of the League of Nations was then requested by the inhabitants of the Aaland Islands and by the Swedish Government to decide in this matter. The issue was then considered by Commission of Jurists and the Commission of Rapporteurs. It became evident that self-determination had not become part of customary international law.<sup>71</sup> The arguments put forward by the Commission of Jurists were based upon the fact that although self-determination had left its impact in political thought during the Great War, it had not been included into the Covenant of the League of Nations. Furthermore, the recognition of the principle of self-determination in several international treaties had not been found sufficient as to consider the principle ‘on the same footing as a positive rule of the Law of Nations.’ In 1920, international customary law did not recognize ‘the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish.’ It was stated that ‘the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by another method is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.’<sup>72</sup> The Commission of Jurists qualified the inhabitants of the Aaland Islands to constitute a minority. It considered that political autonomy under Finish sovereignty could effectively preserve and protect the Aaland Islanders culture. The separation of minority such as the inhabitants of the Aaland Islands, which forms part of a State and its incorporation into another State should

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<sup>69</sup> Philip Marshall Brown in *The Aaland Islands Question*, *The American Journal of International Law*, Vol. 15, No. 2 (April 1921), pp. 268-272, p. 268. Published by: The American Society of International law, available at: <http://www.jstor.org/stable/2187689> Accessed: 29/09/2011.

<sup>70</sup> Philip Marshall Brown in *The Aaland Islands Question*, *The American Journal of International Law*, Vol. 15, No. 2 (April 1921), pp. 268-272, p. 268. Published by: The American Society of International law, available at: <http://www.jstor.org/stable/2187689> Accessed: 29/09/2011.

<sup>71</sup> Raič 2002, p. 184.

<sup>72</sup> Report of the Commission of Jurists, LNOJ, Spec. Supp., No. 3, 1920, pp. 3-19, at p. 5.; Raič 2002, p. 198.

only be considered as a last resort. That is in the case that the State concerned ‘lacks either the will or the power to enact and apply just and effective guarantees.’<sup>73</sup> The last resort situation was found not to apply to the inhabitants of the Aaland Islands.<sup>74</sup>

#### *§2.4. UN Charter and the principle of self-determination of peoples*

After the Second World War the Allied Powers came together to establish an international organization which goal is to maintain peace and security in the world. The UN were thus established at the San Francisco Conference of 1945.<sup>75</sup> The principle of equal rights and self-determination of peoples was included to the UN Charter.<sup>76</sup> Constituting one of the main purposes of the UN as stipulated in paragraph 2 of Article 1, the principle forms the basis of the development of friendly relations among nations.<sup>77</sup> In this respect, the Charter stipulates that appropriate measures be taken to strengthen universal peace. In order to achieve peaceful and friendly relation among nations, certain conditions of stability and well-being have to be created according to Article 55 of the UN Charter. This Article again, emphasises that friendly relations among nations be based on respect for the principle of equal rights and self-determination of peoples, international economic and social co-operation. In addition thereto, a reference to the principle of self-determination of peoples is made in Chapter XI and XII of the UN Charter. It should be noted that, in connexion to the Chapter XI Administering Powers, it was implicitly expressed at the San Francisco Conference that the aim of the sacred trust entails ‘the principle that the goal which should be sought is that of obtaining the universal application of the principle of self-determination.’<sup>78</sup> Mention of the principle of self-determination of peoples has also been made in the formulation of Article 76 paragraph *b* of Chapter XII of the UN Charter. It provides that one of the objectives of the trusteeship system is to promote the progressive development of the *inhabitants* of the Trust Territories towards “self-government or independence,” taking into account the freely expressed wishes of the peoples concerned. The principle of self-determination of peoples therefore provides the fundament on which Chapter XI and XII UN Charter regarding NSGTs and the International

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<sup>73</sup> Report of the Commission of Rapporteurs, LN Doc. B7.21/68/106, 1921, pp 22-23; Raič 2002, p. 199.

<sup>74</sup> Report of the Commission of Rapporteurs, LN Doc. B7.21/68/106, 1921, pp 22-23; Raič 2002, p. 199.

<sup>75</sup> Cassese 2005, p. 39-45; Tomuschat 2008, p. 22-24; History of the United Nations available at: <http://www.un.org/en/aboutun/history/1941-1950.shtml>.

<sup>76</sup> Ninčič 1970, p. 244.

<sup>77</sup> See Article 1 paragraph 2 of the UN Charter; Simma 2002, p. 48-51; See Brownlie 2008, p. 580.

<sup>78</sup> Cristescu 1981, p. 3, para. 24.

Trustee System has been drafted upon.<sup>79</sup> The method of implementing the principle of self-determination of peoples through Chapter XI of the UN Charter will be elaborated upon in §3.

### *§2.5. Recognition of the right to self-determination of peoples in the (1966) Human Rights Covenants*

During the 1950's the UNGA promoted the right to self-determination in several of its resolutions.<sup>80</sup> It has been put forward that at the time of the adoption of UNGA 1514 (XV) *Declaration on the Granting of Independence to Colonial Countries and Peoples*, the right to external self-determination of colonial peoples had already become part international customary law.<sup>81</sup> Another perspective is that the crystallization of the political claim of self-determination of peoples into a legal entitlement provided for in Article 1 paragraph 2 of the UN Charter, was initialised by this resolution, creating instant customary international law.<sup>82</sup> This resolution explicitly provides that all peoples have the right to self-determination and that by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>83</sup> The right to self-determination of peoples was recognized and included into the ICCPR and the ICESCR in 1966.<sup>84</sup> In 1970 self-determination and equal rights of peoples became part of the UNGA resolution 2625 (XXV) *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.<sup>85</sup> The legal entitlement to self-determination of peoples in NSGTs and Trust Territories ultimately led to the dismantling of colonialism throughout the world. Internal self-determination (concerning

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<sup>79</sup> Goodrich 1969, p. 451 ; Raič 2002, p. 200 ; Subrata Roy Chowdhury 1977, *The Status and Norms of Self-Determination in Contemporary International Law* p. 79 ; Simma 2002, p. 1090.

<sup>80</sup> UNGA res 637A (VII) of 16 December 1952; Brownlie 2008, p. 580. Raic, p. 215. UNGA resolution of 16 December 1952. UNGA resolution of 27 November 1953. Resolution 1188 (XII) of 1957. Raic also describes that prior to the adoption of UNGA 1514 (XV) 'some thirty Non-Self-Governing and Trust Territories achieved independence'. Therefore UNGA 1514 (XV) reflected an existing rule of customary international law.

<sup>81</sup> Raič 2002, p. 215; Brownlie 2008, p. 581.

<sup>82</sup> Cassese 1995, p. 69, on instant State practice in relation to the crystallization of the right to self-determination in the context of decolonization; See ICJ North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), ICJ, 20 February 1969, p. 4, para. 74; ICJ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States ICJ of America), Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, par. 186.

<sup>83</sup> UNGA res 1514 (XV) of 14 December 1960.

<sup>84</sup> Cristescu 1981, p. 8.

<sup>85</sup> Tomuschat 1995, p. 1-2.

the political, economic, social and cultural individual human rights within the framework of a State) has become the subject of both the Human Rights Covenants. Although the right to self-determination of peoples is considered to be a collective human right, it was recognized and included to both the ICCPR and the ICESCR.<sup>86</sup> Its inclusion to the Human Rights Covenants was introduced by the Soviet Union and accepted by the UNGA motivated by its assumption of the UNGA that the right of self-determination is ‘a pre-condition for the exercise of all other individual human rights.’<sup>87</sup> According to one author

‘It was maintained that the right to self-determination stood above all other rights and formed the corner-stone of the whole edifice of human rights. It was impossible for an enslaved people to enjoy to the full economic, social and cultural rights which the Commission on Human Rights would wish to embody in the covenant. The covenant would be devoid of all meaning if it did not include the right to self-determination.’<sup>88</sup>

Article 1 of both the ICCPR and ICESCR realized a new and independent legal basis for the right to (internal) self-determination of peoples.<sup>89</sup> Article 1(1) of the common Human Rights Covenants has two applications. The first application of the right to self-determination of peoples concerns the requirement that the people in question ‘choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves.’ This form of self-determination is explained by several authors as internal self-determination. ‘Internal self-determination presupposes that all members of a population be allowed to exercise those rights and freedoms which permit the expression of the popular will. Thus, internal self-determination is best explained as a manifestation of the totality of rights embodied in the Covenant, with particular reference to: freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association (Article 22), the right to vote (Article 25b); and, more generally, the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25a).’<sup>90</sup> Thus, internal self-determination of peoples entails the manifestation of civil and political rights within the context of an existing State. Derogation of Article 1(1) is permitted through Article

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<sup>86</sup> See UNGA 545 (VII) of 5 February 1952, concerning the “Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination.”; Cristescu 1981, paragraph 33, p.5; Cassese 1995, p. 51.

<sup>87</sup> Simma 2002 p. 53; Cassese 1995, p. 47.

<sup>88</sup> Cristescu 1981, p. 5, para. 32.

<sup>89</sup> Simma 2002, p. 53.

<sup>90</sup> Cassese 1995, p. 47.



4. Derogation is permitted in a direct or indirect manner. The second interpretation of Article 1(1) entails the requirement that a domestic political institutions within a State must be free from outside interference.<sup>91</sup>

*§2.6. Customary State rights and duties regarding the right to self-determination of peoples*

The adoption of the right to self-determination of peoples in UNGA resolutions that followed, resulted in its reception in international customary law.<sup>92</sup> Consequently, certain State rights, as well as positive and negative duties evolved in customary international law.<sup>93</sup> The *Colonial Declaration* and the *Declaration on Friendly Relations* articulate firstly certain State duties regarding States that oppress colonial peoples or peoples under military occupation entitled to self-determination. Secondly, they entail certain third State obligations in relation to self-determination of peoples. The first State duty entails the obligation of a State oppressing a people entitled to the external right to self-determination ‘to allow the free exercise of self-determination’.<sup>94</sup> This particular State duty has been stipulated in UNGA 1514 (XV) paragraph 4, which states that ‘All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.’ In addition thereto, the *Friendly Declaration* also stipulates that

“Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence”,

and furthermore

“Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-

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<sup>91</sup> Cassese 1995, p. 47.

<sup>92</sup> See ICJ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 101-103, paras. 191-193); See UNGA 1514 (XV) of 14 December 1960; See UNGA 1541 (XV) of 15 December 1960; See UNGA res (XXV) of 24 October 1970.

<sup>93</sup> Cassese 2005, p. 62.

<sup>94</sup> Cassese 2005, p. 62.

determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.”<sup>95</sup>

This means that States are under the duty to refrain from any forcible action which deprives the peoples of their right to self-determination and freedom. This negative duty has been stipulated in Principle 1, paragraph 7 and Principle 5 paragraph 5.<sup>96</sup> The ICJ has reaffirmed in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the principle of self-determination pursuant to which the negative State duty to refrain from any forcible action which deprives peoples their right to self-determination. The Court continued with considering that Article 1 common to the ICESCR and the ICCPR reaffirms the right of all peoples to self-determination. And furthermore that this Article obligates the States parties to promote the realisation of that right and to respect it, in conformity with the provisions of the UN Charter.<sup>97</sup> The State duty to promote the right to self-determination of peoples has been stipulated in the *Friendly Relations Declaration*. The *Friendly Relations Declaration* stipulates that it is every State’s duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.<sup>98</sup> Third State obligations concern the duty to refrain from sending troops, aiding and abetting oppressor States and assisting the State in denying self-determination. On the other hand they are ‘legally authorized to support peoples entitled

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<sup>95</sup> UNGA resolution 2625 (XX) 1970. Note: More concrete emphasize and elaboration on the right to self-determination and the prohibited use of force must be placed here. This is important in order to link this Chapter and Chapter 4 to the doctrine of Symmons in Chapter 6, which consists of the emerging or existing rule of customary international law of the State duty of non-recognition of a situation derived from the forceful denial of self-determination of peoples including the right to permanent sovereignty over natural resources. An important introduction has already been set out by Promenace in ‘Self-determination in Law and Practice’, p. 48. The author describes the right to self-determination in relation to the prohibited use of force as stipulated in Article 2(4) of the UN Charter. Promenace explains how the customary rule of international regarding self-determination of peoples and the prohibited use of force emerged, even though the UN Chapter did not anticipate for such a rule to come into existence.

<sup>96</sup> UNGA res 2625 (XXV) of 24 October 1970; Subrata Roy Chowdhury 1984, in *The Status and Norms of Self-Determination in Contemporary International Law*, p. 82; Cassese 2005, 62. Crawford 2006, p. ; Raič 2002, p. 218. It should be noted in this respect that according to Raič, that ‘States have repeatedly emphasized the obligation to respect the right of self-determination as a fundamental premise for the maintenance of the international legal order.’; Malanczuk 2004, p. 336-338.

<sup>97</sup> ICJ Reports (2004), 136 at 171-172; Brownlie 2008, p. 581.

<sup>98</sup> UNGA res 2625 (XXV) of 24 October 1970.

to self-determination, by granting them any assistance short of dispatching armed troops'.<sup>99</sup> In the event self-determination is denied by a State, third States are also entitled to claim respect for the principle from the State which denies a people entitled to self-determination this right.<sup>100</sup> Finally, third States are entitled to submit matters concerning the forcible denying of self-determination to the UN.<sup>101</sup>

### *§2.7. Prohibition of acquisition of territory by means of force and the State duty of non-recognition*

Contemporary international law regarding the modes of acquisition of territory changed with the adoption into the UN Charter of the principle of self-determination of peoples and the prohibition of the threat or use of force in international relations codified in Article 2(4) UN Charter.<sup>102</sup> This is reflected in the 1970 UNGA *Declaration on Friendly Relations* which expresses that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal.' In other words, acquisition of territory by means of the threat or use of force does not result in legal title to or sovereignty over the concerned territory. To the contrary, from customary international law stems the State duty of non-recognition.<sup>103</sup> The doctrine therefore mirrors the non-recognition of a *de facto* situation in contrast to the principle of effectiveness.<sup>104</sup> It is stated furthermore, that a State obligation of non-recognition in case of denial of self-determination by the use of force has emerged in international law, and exceeds to permanent sovereignty over natural resources.<sup>105</sup> As the State duty of non-recognition is embedded in international customary law, it thus exists independently from the

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<sup>99</sup> Cassese 2005, p. 62.

<sup>100</sup> Cassese 2005, p. 62.

<sup>101</sup> Cassese 2005, p. 62.

<sup>102</sup> See Article 1 paragraph UN Charter. See Article 2 paragraph 4 UN Charter; See Malanczuk 2004, p. 152; Cassese 2004, p. 62; Browlie 2008, p 582.

<sup>103</sup> Malanczuk 2004, p. 152.; Shaw 2008, p. 468-470. According to the author the ratio of the doctrine of non-recognition The ratio of can be found also in the Latin expression *ex injura jus non oritur* which means that legal rights cannot derive from an illegal situation. The doctrine furthermore stipulates that 'a factual situation will not be recognized because of strong reservations as to the morality or legality of the actions that have been adopted in order to bring about the factual situation.'; Symmons 2009, p. 153; V. Gowland-Debbas 1990, p. 287.

<sup>104</sup> See Malanczuk 2004, p. 152-153. The author describes the principle of non-recognition and the principle of effectiveness.

<sup>105</sup> Symmons 2009, p. 153; V. Gowland-Debbas 1990, p. 287.

adoption of a UN Security Council resolution stipulating such duty.<sup>106</sup> According to one author, the State duty of non-recognition aims to bring an end to an illegal situation. In other words, the duty of non-recognition<sup>107</sup> is stated to create a collective response in order to protect the fundamental interests of the international community.<sup>108</sup>

### *§2.8. The right to self-determination of peoples reflected in international humanitarian law*

The emergence of the right to self-determination of peoples left its mark in international humanitarian law (hereafter: IHL).<sup>109</sup> The ‘struggles of peoples fighting against colonial domination, alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’, were categorized as international armed conflicts.<sup>110</sup>

### *§2.9. Internal, external self-determination and State secession.*

The distinction between internal and external self-determination are to be taken into consideration with regard to the ‘safeguarding clause’.<sup>111</sup> The safeguarding clause refers to the safeguarding of the territorial integrity or political unity of sovereign and independent

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<sup>106</sup> Brownlie 2008, p. 513;

<sup>107</sup> Talmon 2006, p. 124.

<sup>108</sup> Talmon 2006, p. 123. The author states furthermore that ‘Norms of jus cogens are thus not at the disposal of the injured State; it cannot unilaterally negotiate away the interests of the international community in ensuring a just and appropriate settlement.’<sup>108</sup>

<sup>109</sup> Cassese 2004, p. 62

<sup>110</sup> See Article 1 paragraph 4 1977 Additional Protocol to the Geneva Convention and Article 2 of the 1949 Geneva Conventions; See Brownlie 2008, p. 582. L. Green 2008, p. 79-82. The author however notices that ‘neither the Protocol nor the Declaration on Friendly Relations makes any provision for determining what movement is seeking self-determination and thus qualifies as a national liberation movement. Nor does either instrument offer any assistance in ascertaining whether a country is self-governing or what constitutes a people.’ Reference is however made to the ICJ Greco-Bulgarian Communities case, where the ICJ refers to a ‘community’ as ‘a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.’; Cassese 2005, p. 62.

<sup>111</sup> See UNGA res 2625 of 24 October 1970, Principle 5, para. 7.

States.<sup>112</sup> In this respect it should be noted that modern international law has given priority to the creation of a new State only in the context of decolonization above the right of the existing State to maintain its territorial integrity.<sup>113</sup> Moreover, it has been put forward by one author, that a right to external self-determination does not apply in situations where the State government does indeed represent ‘the whole people of its territory without distinction of any kind’. The latter is explained as distinctions based upon race, creed or color.<sup>114</sup> It has been put forward however, that the safeguard clause, can be limited

“in the case of total denial to a particular group of people within the State any role in their own government, either through their own institutions or the general institutions of the state. At least it is arguable that, in extreme cases of oppression, international law allows remedial secession to discrete peoples within a State, and that the ‘safeguard clauses’ in the Friendly Relations Declaration and the Vienna Declaration recognize this, even if indirectly.”<sup>115</sup>

In contrary, when the exercise of internal self-determination of a people has been guaranteed, by their access to participation in government (based on equality) of the concerned State, this negates any claim to external self-determination.<sup>116</sup> In relation thereto one author however states that

“The effect of linking self-determination to decolonization in this sense was to deny a general right to secession of groups within a state. State practice and cases, such as Tibet, Katanga and Biafra, confirm that customary international law does not recognize the general legality of secession as a consequence of the principle of self-determination.”<sup>117</sup>

From this perspective, the principle of self-determination does not provide for a people to secede from an existing State. Renewed discourse on the scope of the right to external self-determination was initiated by the declaration of independence of Kosovo in 2008. While the ICJ determined that the declaration in itself did not contravene international law, it did not find

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<sup>112</sup> Cassese, 2006, p. 118.

<sup>113</sup> Kooijmans, 2002, p. 23.

<sup>114</sup> Crawford 2006, p. 118.

<sup>115</sup> Crawford 2006, p. 118-121.

<sup>116</sup> Van Genugten, 2006, p. 68-70.

<sup>117</sup> Malanzcuk 2004, p. 336.

“necessary, in the present case, to resolve the question whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State, or whether international law provides for a right of “remedial secession” and, if so, in what circumstances.”<sup>118</sup>

Therefore, the existence as well as the terms of a right to ‘remedial secession’ remain unclear.<sup>119</sup> A continuing right to self-determination within the framework of an existing State has, however, been codified in Article 1 paragraph 1 of the common ICCPR and ICESCR. It stipulates that ‘all the peoples *have* the right to self-determination’ and articulates the recognition of the right to self-determination of peoples as a permanent right.<sup>120</sup> Furthermore, the word ‘including’ in paragraph 3 of this Article, specifies the obligation of Administering Powers with respect to NSGTs. It refers also to the obligation that all parties to the ICCPR are obliged to respect and promote the right to self-determination with respect to their own population. Self-determination of peoples is therefore a continuing right which continues to apply outside the legal framework of decolonization.<sup>121</sup>

#### §2.10. *Uti possidetis*

Furthermore, the *uti possidetis* principle provides that automatic succession to boundaries overrides the principle of self-determination. This means that according to customary international law, the act of external self-determination by a people does not affect the boundaries between existing States. In other words, in the event that one of the last 16 remaining NSGTs gain or regain independence, these territories succeed to the boundaries

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<sup>118</sup> Malanzcuk 2004, p. 336; See ICJ Kosovo (2010), *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, on remedial succession at paras. 79-84; See Rynagaert and Sobrie in *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkazia*, p. 485. The authors state that “The scope of the right to external self-determination needs to be construed more narrowly in light of its uneasy coexistence with the principle of territorial integrity. This right therefore only comes to into being in exceptional situations. Frequently cited criteria in this regard are grave and repeated violations of human rights and the continuous negation of the right to internal self-determination. Secession then ‘remedies’ such violations.”

<sup>119</sup> See ICJ Kosovo (2010), *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, on remedial succession at paras. 79-84.; See S. Van Den Driest 2011, in *Kosovo’s onafhankelijkheidsverklaring en het Internationaal Gerechtshof: een onzeker precedent*, in *ArsArqui*, p.11-19.

<sup>120</sup> Raič 2002, p. 229.

<sup>121</sup> See Cassese 1995, p. 52; Simma 2002, p. 53-54.

which were already established during the colonial rule by the former colonial power. Decolonization practice is thus based upon the principle of this principle of *uti possidetis*. As a consequence, existing boundaries have artificially divided ethnic groups around the world.<sup>122</sup>

§2.11. *The status of the right to self-determination of peoples in current customary international law*

The right to self-determination of peoples has become part of *jus cogens*.<sup>123</sup> In other words, modern international law has included the right to self-determination of peoples to the rules highest in rank within the hierarchy of international law. *Jus cogens* are peremptory norms of general international law. Article 53 of the 1960 Vienna Conventions on the Law of Treaties holds the definition of peremptory norms of international law. The Article stipulates that a peremptory norm of general international law constitutes a norm from which no derogation is permitted. Modification of norms with *jus cogens* character only takes place by a subsequent peremptory norm of general international law. Another aspect of peremptory norms, described in this Article is that these particular norms must be accepted and recognized by the international community of States as whole. The Article furthermore articulates that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.<sup>124</sup> Currently, the following peremptory norms of general international law are considered to have a *jus cogens* character; the rights of the human person, including the prohibition of slavery and racial discrimination, the prohibition of aggression and genocide. The right to self-determination of peoples has been included to this list in the *ICJ Case Concerning East Timor*.<sup>125</sup> The ICJ considered in the *Barcelona Traction Case* that by their nature, peremptory norms are the concern of all States and that all States can be held to have a

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<sup>122</sup> Malanczuk 2004, p. 335; Malanczuk 2004, p. 162-163. See ICJ Rep, 1986, p. 566 para. 20-26 ICJ Burkino Faso v. Mali of 22 December 1986.

<sup>123</sup> Simma 2002, p. 62; Malanczuk 2004, p. 327; Raič 2002, p. 218-219; ICJ Case Concerning East Timor (1995), ICJ Rep. 1995, p. 90, at 102, para. 29; See also Report of the ILC, 53<sup>rd</sup> session of 23 April-10 August 2001, UN GAOR, 56<sup>th</sup> session for International Wrongful Acts Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001), pp 208, 284. Also available at: <http://untreaty.un.org/ilc/sessions/53/53sess.htm>.

<sup>124</sup> See the 1969 Vienna Convention on the Law of Treaties, United Nations, *Treaty Series*, vol. 1155, p. 331. Text available at: <http://www.ilsa.org/jessup/jessup11/basicmats/VCLT.pdf>.

<sup>125</sup> ICJ Case Concerning East Timor, ICJ Rep. 1995, p. 90, at 102, para. 29.

legal interest in their protection or *erga omnes*.<sup>126</sup> The ICJ considered in the *Case Concerning East Timor* that

“In the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971.)”<sup>127</sup>

Furthermore, customary international law entails the principle of non-recognition, which has been codified in the Draft Articles on State Responsibility.<sup>128</sup> In relation thereto, Article 41 stipulates that the recognition of a situation derived from a serious breach of a peremptory norm – such as the right to self-determination of peoples – constitutes an international wrongful act.<sup>129</sup> In this respect it should be mentioned also that Article 19 of the *Draft Articles on State Responsibility* described ‘a serious breach of an international obligation of essential importance for safeguarding of the right to self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination’.<sup>130</sup>

### §2.12. *Economic self-determination of peoples*

The concept of economic self-determination was introduced to the international community through UNGA resolution of 21 December 1952.<sup>131</sup> The concept was then adopted into a

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<sup>126</sup> ICJ Barcelona Traction Case, ICJ Reports 1970, p. 32, para 33 ; Kooijmans 2002, p. 18-19 ; Cassese 2004, p. 64; Brownlie 2008, p. 582 ; Pomerance 1982, p. 63-72.

<sup>127</sup> ICJ East Timor 1995, ICJ Case Concerning East Timor East, Judgment, ICJ Reports 1995, 102.

<sup>128</sup> Brownlie 2008, p. 513.

<sup>129</sup> Brownlie 2008 p. 513-514; See Shaw 2008 p. 468-470; Malanzcuk 2004, p. 152; See ICJ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, para. 87 available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>;

An example of the concrete interpretation of the duty of non-recognition was set out by the ICJ in its 1970 Advisory Opinion of the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council 276 (1970), ICJ Reports 1971, p.16; See also Report of the ILC, 53<sup>rd</sup> session of 23 April-10 August 2001 available at: <http://untreaty.un.org/ilc/sessions/53/53sess.htm>.

<sup>130</sup> Malanzcuk 2004, p. 327, p.59-60. The author refers to the controversy of this Article, at 199.

<sup>131</sup> UNGA res 626 (VII) of 21 December 1952; See also UNGA res 1314 of 12 December 1958, and UNGA res 1515 (XV), 15 of December 1960.



draft article in preparation of the Human Rights Covenants by the Third Committee of the General Assembly in 1955 stipulating

“The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”<sup>132</sup>

The UNGA adopted several resolutions in regard to the implementation of UNGA 1514 (XV) and the economic aspects of the right to self-determination of peoples.<sup>133</sup> The economical side of the right to self-determination has evolved relatively independent from political self-determination, through the concept of permanent sovereignty over natural resources.<sup>134</sup> Its existence as an independent principle was established with the 1962 *Declaration on Permanent Sovereignty over Natural Resources*. This subject will be elaborated on in §4. The right to economic self-determination of peoples has been recognized in paragraph 2 of the common Article 1 of the ICCPR and the ICESCR. This paragraph stipulates in reference to the minimum of the right to economic self-determination that ‘in no case may a people be deprived of its own means of subsistence.’ With this formulation, paragraph 2 of the common Article 1 ICCPR and ICESCR stipulates the duties for all States and the international community as a whole.<sup>135</sup>

‘The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.’<sup>136</sup>

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<sup>132</sup> UNGA res 1803(XVII) of 14 December 1962, “Permanent Sovereignty over Natural Resources, available at: <http://www2.ohchr.org/english/law/resources.htm>; See Brownlie 2008, p. 540.

<sup>133</sup> Cristescu 1981, p. 51-91.

<sup>134</sup> Daes 2004, United Nations Economic and Social Council, Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous peoples’ permanent sovereignty over natural resources. Final report of the Special Rapporteur, Erica-Irene A. Daes. E/CN.4/Sub.2/2004/30. 30 July 2004. Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Fifty-sixth session Item 5(b) of the provisional agenda

<sup>135</sup> See common Article 1 ICCPR and ICESCR.

<sup>136</sup> See common Article 1 ICCPR and ICESCR.

### **§3. External Self-Determination of Colonial Peoples: Implementation of Article 73 UN Charter and the Declaration concerning the Granting of Independence to Colonial Peoples and Countries**

#### *§3.1. Introduction*

This paragraph consists of a description of the historical context of Article 73 UN Charter; the sacred trust which entails the rights and obligations of Administering Powers in relation to the NSGTs; the manner in which Article 73 UN Charter was implemented by means of UNGA resolution 1514 (XV) and UNGA resolution 1541 (XV) of December 1960. The last subject of this paragraph addresses the development of rules concerning the undertaking of economic activities by Administering Powers of economic activities in NSGTs which they administer.

#### *§3.2. The UN and Chapter XI NSGTs*

The failure of the League of Nations to establish peaceful relations between nations and the horrors of the Second World War had made the Allies ‘desirous of peace’ that would last.<sup>137</sup> The vision of the establishment of an international organization which could promote peace and understanding among nations led to the establishment of the United Nations. It became clear to the Allies that ignoring the cause of unrest brought forward by non-self-governing peoples could constitute a threat to this desired peace.<sup>138</sup> Inspired by the 1941 Atlantic Charter, a statement brought forward by President Roosevelt and Churchill, designs for an international system to be applied to all dependent territories after the Second World War were created by the United States Department of State in 1942. According to one author these designs consisted of ‘a general declaration of principles applicable to all dependent territories; an international trusteeship system applicable to certain categories of territories; the development of regional agencies through which the general principles could be indirectly applied to other territories.’<sup>139</sup> It is stated that the drafters of the Article envisioned the mechanism to be set in motion immediately.<sup>140</sup> As a result the *Declaration Regarding Non-Self-Governing Territories* was included as Chapter XI of the UN Charter. Chapter XI applies

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<sup>137</sup> Sud 1965, p. 7.

<sup>138</sup> Sud 1965, p. 7.

<sup>139</sup> Goodrich 1969, p. 449.

<sup>140</sup> Kelsen 1964, p. 552-554; Goodrich 1969, p. 449.

to NSGTs, in contrast to Chapter XII and XIII regarding the trusteeship system.<sup>141</sup> The formulation of this *Declaration* was inspired by Article 22 and 23b of the Covenant of the League of Nations. These Articles articulated ‘the international concern for the welfare of the people in all dependencies and not only of the mandates.’<sup>142</sup> Article 22 of the Covenant of the League of Nations addresses the States which governed colonies and territories which were as a consequence of World War I no longer under the sovereignty of these States. The Article stipulates that the principle should be applied concerning the peoples in these territories, which were not yet able to stand by themselves, that ‘the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.’<sup>143</sup> Furthermore, according to Article 23(b) of the Covenant of the League of Nations Mandatory powers under the League of Nations were entrusted with the task of securing ‘the just treatment of inhabitants of territories under their control.’<sup>144</sup> This sacred trust was, however, extended in the UN Charter with the including of the *Declaration regarding Non-Self-Governing Territories* and the 1960 UNGA resolutions 1514 (XV) and 1541(XV).<sup>145</sup> Chapter XI UN Charter itself does not entail an explicit reference to the principle of self-determination of peoples. It is, however, assumed that the principle applies to non-self-governing peoples through the obligation of the Administering Powers to develop self-government in these territories, and thereby taking due account of the concerned peoples’ political aspirations in the NSGTs which they administer.<sup>146</sup> From the formulation of Article 73 UN Charter, it could be argued that NSGTs can also be qualified outside the context of decolonization.<sup>147</sup> The ICJ ruled in the *Namibia* case that the principle of self-determination of peoples was not only applicable to trust territories but to all NSGTs.<sup>148</sup> The UN practice of elaborating the interpretation of Article 73 UN practice was

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<sup>141</sup> Goodrich 1969, p. 448; UNGA Res. 9(I), Feb. 9, 1946; Simma 2002, p.1099-1114; See Wilde 2007, in *The Oxford Handbook on the United Nations*, p.149-159.

<sup>142</sup> Sud 1965, p. 6; Goodrich 1969, p. 450.

<sup>143</sup> Tomuschat 2008, p. 17-18; See Article 22 Covenant League of Nations.

<sup>144</sup> See the 1919 Covenant of the League of Nations. The text is available at:

<http://www.unhcr.org/refworld/publisher,LON,,,3dd8b9854,0.html>.

<sup>145</sup> Sud 1965, p. 7 ; Miguel 2008 in *Multilateralism and International law with Western Sahara as a Case study*, p. 199.

<sup>146</sup> Ninčič 1970, p. 228; Malanczuk 2004, p. 326.

<sup>147</sup> Crawford 2006, p. 610-612; Tomuschat 1995, p. 291, in *The United Nations at Age Fifty*; Cassese 1995, p. 90.

<sup>148</sup> ICJ *Namibia* (1971) , Legal Consequences for States of the Continued Presence of South Africa in Namibia

recognized by the ICJ to have become part of customary international law in the *Western Sahara Case*.<sup>149</sup>

### §3.3. *Rights and Obligations of Administering Powers in relation to the sacred trust*

The legal relationship between an Administering Power and its NSGT is prescribed by Article 73 UN Charter and the UNGA resolution 1514 (XV) and 1541 (XV). It should be noted that Article 73 UN Charter entails the agreement concluded between the Member States of the United Nations.<sup>150</sup> It imposes specific obligations upon the Member states administering NSGTs.<sup>151</sup> The *Declaration* articulates the recognition of Members of the UN which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government, the principle that the interests of the inhabitants of these territories are paramount. It furthermore states that by this *Declaration* the Members ‘accept as a sacred trust<sup>152</sup> the obligation to promote to the utmost, within the system of international peace and security’ which is established by the UN Charter ‘the well-being of the inhabitants of these territories.’ The sacred trust thus entails the obligation to

‘(a) ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuses;

(b) to develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

(c) to further international peace and security;

(d) to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes forth in this Article; and

(e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional consideration may require, statistical and other information of a technical nature relating to

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(South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16.

<sup>149</sup> See ICJ *Western Sahara* (1975), ICJ Reports, p. 12; Malanczuk 2004, p. 331; See Cassese 1996, in *The International Court of Justice and the right of peoples to self-determination*, in *Fifty Years of the International Court of Justice*, p. 356. This article is available at:

<http://ebooks.cambridge.org/chapter.jsf?bid=CBO9780511560101&cid=CBO9780511560101A032>.

<sup>150</sup> Kelsen 1964, p. 552-554.

<sup>151</sup> Kelsen 1964, p. 552-554.

<sup>152</sup> Kelsen 1964, p. 552-554.

economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.<sup>153</sup>

The sacred trust as stipulated in Article 73 UN Charter has a political as well as an economic aspect.<sup>154</sup> It entails the obligation for the Administering Power to develop self-government and to ensure the economic advancement of the people concerned. Another aspect is the just treatment and protection of the non-self-governing people against abuses which must be ensured by the Administering Power.<sup>155</sup> With the adoption of UNGA 1514 (XV) the obligations of Administering Powers under international law were, however, considerably extended.<sup>156</sup> It was articulated in this resolution that all peoples have the right to self-determination. From this resolution derived the obligation of Administering Powers to take immediate steps, in Trust and NSGTs or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.<sup>157</sup> The UNGA resolution 1541 (XV) adopted in the same year, entails twelve Principles guiding Members in determining whether or not an obligation exists to transmit the information stipulated by Article 73e of the Charter.<sup>158</sup> UNGA resolution 1541 (XV) contains the optional forms of self-government (1) independence (2) integration or (3) free association.<sup>159</sup> A fourth option was included which is ‘any other status.’ The economic obligations of Administering Powers towards the people of the NSGT which they administer were also addressed by the United Nations in relation to the principle of PSNR.<sup>160</sup> The

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<sup>153</sup> See Article 73 UN Charter.

<sup>154</sup> Miguel 2008, *Spain 's legal obligations as administering power of Western Sahara, in Multilateralism and International law with Western Sahara as a Case study*, p. 198.

<sup>155</sup> Simma 2002, p. 1090, para. 2.

<sup>156</sup> Cristescu 1978, *The Historical and Current Development of the Right to Self-Determination*, Study Prepared by the Special Rapporteur, UN Doc. E/CN.4/Sub.2/404 (Vol. 1), 3 July 1978, p. 8; Pomerance 1982, p. 9 ; Raič 2002, p. 200; See also Engers, in *From Sacred Trust to Self-determination* p. 91. The author states that ‘The notion of the duties of administering Powers has been replaced by the rights of the inhabitants.’

<sup>157</sup> UNGA res 1514 (XV) of 14 December 1960.

<sup>158</sup> Malanczuk 2004, p. 331.

<sup>159</sup> UNGA res 1541 (XV) of 15 December 1960.

<sup>160</sup> UNGA res 1803 (XVII) of 14 December 1962.

concept of PSNR was extended to NSGTs with the adoption of UNGA 1314 (XIII).<sup>161</sup> The economic obligation of Administering Powers regarding NSGTs under their administration was further developed in several UNGA resolutions that followed.<sup>162</sup> Firstly, the obligation of Administering Powers to take effective measures to safeguard and guarantee the inalienable rights of the peoples of NSGTs to their natural resources was established in UNGA resolution 48/46 in 1994.<sup>163</sup> This obligation was further elaborated in UNGA resolution 62/120, stipulating that the economic activities of Administering Powers should not ‘adversely affect the interests of the peoples.’<sup>164</sup> This was extended to marine activities through UNGA 62/113.<sup>165</sup> This subject will be elaborated on in §4. In the *Namibia* case the ICJ was requested its Opinion concerning the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970), i.e. the resolution declaring South African control over *Namibia* illegal.

“In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important development. These developments leave little doubt that *the ultimate objective of the sacred trust* was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it has faithfully to discharge its functions, may not ignore.”<sup>166</sup>

### §3.4. *Implementing the Declaration Regarding Non-Self-Governing Territories through the UN Declaration on the Granting of Independence to Colonial Peoples and Countries*

Anti-colonialism had set the trend in the early years post World War II. The Members of the newly established UN found inspiration in the concept of self-determination of peoples which

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<sup>161</sup> UNGA res 1314(XIII) of 12 December 1958.

<sup>162</sup> Miguel 2010, in *Spain’s legal obligations as administering power of Western Sahara*, in *Multilateralism and International law with Western Sahara as a Case Study*, p. 200.

<sup>163</sup> Miguel 2010, in *From Sacred Trust to Self-determination*, in *Multilateralism and International law with Western Sahara as a Case Study*, p. 200.

<sup>164</sup> Miguel 2010, in *From Sacred Trust to Self-determination*, in *Multilateralism and International law with Western Sahara as a Case Study*, p. 200.

<sup>165</sup> Miguel 2010, in *From Sacred Trust to Self-determination*, in *Multilateralism and International law with Western Sahara as a Case Study*, p. 200.

<sup>166</sup> ICJ *Namibia* (1971) , *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16.

had been incorporated into its Charter. The UN General Assembly summed up a selected group of 74 territories to be placed on the Special Committee's list of NSGTs, articulated in UNGA Resolution 66 (I) of 14 December 1946.<sup>167</sup> By 1960, the wave of liberation movements and the birth of new States during the era of decolonization, found its reflection in international law. The implementation of Article 73 UN Charter was clarified by the UNGA landmark resolution 1514 (XV) *Declaration on the Granting of Independence to Colonial Countries and Peoples*, and UNGA resolution 1541 (XV) of 14 and 15 December 1960. These were followed by the 1970 *Declaration on Friendly Relations*.<sup>168</sup> The *Declaration on the Granting of Independence to Colonial Countries and Peoples* holds the following interpretation of Article 73 UN Charter.

“ 1. The subjection of peoples to alien subjugation and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to (..) World peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all power to the peoples of those territories (...) in accordance with their freely expressed will (...) in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”<sup>169</sup>

The *Declaration on the Granting of Independence to Colonial Countries and Peoples* is an authoritative interpretation of the UN Charter, in contrast to a recommendation.<sup>170</sup> According to one author it was the adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples* that led to the change in status of the principle of self-

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<sup>167</sup> UNGA res 66 (I) of 14 December 1946; See Simma 2002, p. 1094.

<sup>168</sup> Brownlie 2008, p. 581.

<sup>169</sup> UNGA res 1514 (XV) December 1960.

<sup>170</sup> Brownlie 2008, p. 58.

determination into the right to self-determination of peoples.<sup>171</sup> The UNGA adopted the Declaration with 89 votes, no votes against it and 1 abstained. The ICJ determined in its Advisory Opinion that of great the interpretation of Article 73 of the UN Charter through the *Declaration on the Granting of Independence to Colonial Countries and Peoples* to be “an accurate statement of modern international law.”<sup>172</sup> In addition hereto, it should be mentioned that the UNGA anticipated on the possibility of the applying of international humanitarian law to situations where NSGTs are put under (belligerent) occupation of an Occupying Power.<sup>173</sup>

### §3.5. Defining a NSGT

A definition of an Article 73 UN Charter NSGT can be found in the 1960 UNGA resolution 1541 (XV).<sup>174</sup> This resolution entails the ‘Principles which should guide Member States in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter.’ This resolution was adopted by the UNGA in reaction to the reluctance of Portugal and Spain to submit information conform Article 73e UN Charter.

“*Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administrating it.”

Principle V furthermore stipulates that

“Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory

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<sup>171</sup> Kooijmans 2002, p. 16; Brownlie 2008, p. 15.

<sup>172</sup> ICJ Namibia (1971) , Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16.

<sup>172</sup> UNGA res 66 (I) of 14 December 1946; See Simma 2002 p. 1094.

<sup>173</sup> The applicability of the law of belligerent occupation to Non-Self-Governing Territories has been elaborated upon by Vincent Chapaux on in “The Question of the European Community-Morocco Fisheries Agreement” at p. 224-232.

<sup>174</sup> UNGA 1541(XV) of 15 December 1960.

The text is available at: <http://daccess-ods.un.org/TMP/8628758.19206238.html>.



concerned in a matter which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 *e* of the Charter.”<sup>175</sup>

This document furthermore consists of the three different forms of self-government which can be achieved by the people’s exercise right to self-determination in Principle VI.<sup>176</sup> Self-government can be achieved by the NSGT by (a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent state. A NSGT has a status apart in international law.<sup>177</sup> Free association with an independent State entails that the associated State has internal self-government, while the independent state with which it is associated is responsible for foreign affairs and defense.<sup>178</sup> Integration with an independent State. Integration means that the territory becomes part of an existing State.<sup>179</sup> The fourth mode of self-government was included in the 1970 *Friendly Relations Declaration*, which can be any other than political status than independence, free association or integration. As has been stated before, the exercise of the right to self-determination requires ‘a free and genuine expression of the will of the peoples concerned.’<sup>180</sup>

### §3.6. *Economic activities in NSGTs*

The legal regime concerning economic activities in NSGTs originates from the already mentioned UNGA *Declaration on the Granting of Independence to Colonial Peoples and Countries*.<sup>181</sup> These resolutions were adopted under the agenda items of ‘Implementation of the Declaration on the Granting of Independence to Colonial Peoples and Countries’ and ‘Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination.’ Under agenda item ‘Implementation of the Declaration on the

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<sup>175</sup> See UNGA res 2625 (XXV) of 24 October 1974.

<sup>176</sup> The UNGA adopted a resolution on this subject in 1953. This is UNGA 742 VII) of 27 November 1953, concerning the factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government. In its annex a list of factors is included, defining international status, internal self-government and factors indicative of the attainment of other separate systems of self-government.

<sup>177</sup> See Principles Guiding Members on info Article 73 UN Charter UNGA res 1541(XV) 1960, available at: <http://daccess-ods.un.org/TMP/8628758.19206238.html>; Crawford 2006, p. 621.

<sup>178</sup> Malanczuk 2004, p. 331; Crawford 2006, p. 623-226.

<sup>179</sup> Malanczuk 2004, p. 331.

<sup>180</sup> See ICJ Advisory Opinion on Western Sahara, ICJ Reports 1975, p. 12.

<sup>181</sup> Miguel 2010, in *Multilateralism and International law with Western Sahara as a Case Study*, p. 200.

Granting of Independence to Colonial Countries and Peoples’, Administering Powers were called upon to ensure that all economic activities in the NSGTs under their administration did not adversely affect the interests of the peoples of such Territories, but were instead directed towards assisting them in the exercise of their right to self-determination.<sup>182</sup> The UNGA has reiterated in its resolutions under agenda item ‘Activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Territories under colonial domination,’ that the exploitation and plundering of the marine and other natural resources of colonial and other natural resources of colonial and NSGTs by foreign economic interests, in violation of the relevant resolutions of the UN, constitutes a threat to the integrity and prosperity of these Territories.<sup>183</sup> The UNGA has furthermore stated that any Administering Power that deprives the colonial peoples of NSGTs of the exercise of their legitimate rights over their natural resources violates the solemn obligations it has assumed under the Charter of the UN Charter.<sup>184</sup> It is stated by one author that this doctrine was sharpened by the UNGA, in its resolution 50/33 of 6 December 1995. With this resolution the General Assembly drew a distinction between economic activities that are detrimental to the peoples of these Territories and those directed to benefit them.<sup>185</sup> In paragraph 2 of that resolution, the UNGA affirmed “the value of foreign economic investment undertaken in collaboration with the peoples of the Non-Self-Governing Territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the Territories”.<sup>186</sup> Again, in 2003 a draft resolution was introduced by the Fourth Committee under agenda item “Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples”.<sup>187</sup> This

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<sup>182</sup> Letter dated 29 January 2002 from the Under-Secretary-general for Legal Affairs, the Legal Council, addressed to the President of the Security Council, S/2002/161, p. 3, par. 10.

<sup>183</sup> Symmons 2009, p. 320.

<sup>184</sup> See Chapter 3, Rights and Obligations of Administering Powers; Letter dated 29 January 2002 from the Under-Secretary-general for Legal Affairs, the Legal Council, addressed to the President of the Security Council, S/2002/161, p. 3, par. 11; UNGA res 47/23 of 25 November 1992, par. 2, 7, 8; UNGA res 48/46 of 10 December 1992; UNGA res 49/40 of 9 December 1994.

<sup>185</sup> See in this perspective the Legal Opinion to the Security Council of 12 February 2002 by Corell. United Nations Security Council, 12 February 2002 S/2002/161.

<sup>186</sup> This position has been affirmed by the General Assembly in later resolutions (resolutions 52/72 of 10 December 1997, 53/61 of 3 December 1998, 54/84 of 6 December 1999, 55/138 of 8 December 2000 and 56/66 of 10 December 2001).

<sup>187</sup> Symmons 2009, in *Denial of Self-Determination and Utilization of Natural Resources by an*

resolution contains the affirmation of the UNGA the inalienable right of the peoples of NSGTs to self-determination.<sup>188</sup> It furthermore reaffirms that exploitation that is damaging and plundering of natural resources including the marine resources of the NSGTs, in violation of relevant UN resolutions, are a threat to the integrity and prosperity of these territories.<sup>189</sup> The administering Powers concerned were therefore urged to take effective measures to safeguard the inalienable right of the peoples to their natural resources.<sup>190</sup> In this context it is furthermore appropriate to make a specific reference to the 1982 UNCLOS resolution II which applies specifically to NSGTs.<sup>191</sup>

#### **§4. The Principle of PSNR**

##### *§4.1. Introduction*

In order for one to comprehend the full extent of the Saharawi people right to self-determination in the light of the current EU-Morocco FPA, previous sections of this Chapter already reflected upon the principle of self-determination, and the legal entitlement of external self-determination of peoples which evolved from this principle. This present paragraph sheds light on the economic feature of self-determination which developed from the principle of permanent sovereignty over natural resources (hereafter: PSNR), uncovering its emergence, content, scope and status in contemporary international law.

##### *§4.2. Emergence and contents of the principle of PSNR*

The principle of PSNR emerged during the era of decolonization. As decolonization brought forward a wave of newly independent States, it became apparent, that a State's political independence could not be realized without the effective control over natural resources situated within its borders.<sup>192</sup> Consequently, the topic of PSNR was introduced to the political

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*Illegal Occupier of Territory*, p. 320.

<sup>188</sup> See in this perspective the Legal Opinion to the Security Council of 12 February 2002 by Corell. United Nations Security Council, 12 February 2002 S/2002/161.

<sup>189</sup> See in this perspective the Legal Opinion to the Security Council of 12 February 2002 by Corell. United Nations Security Council, 12 February 2002 S/2002/161.

<sup>190</sup> See in this perspective the Legal Opinion to the Security Council of 12 February 2002 by Corell. United Nations Security Council, 12 February 2002 S/2002/161.

<sup>191</sup> See in this perspective the Legal Opinion to the Security Council of 12 February 2002 by Corell. United Nations Security Council, 12 February 2002 S/2002/161.

<sup>192</sup> Kamal Hossain and Subrata Roy Chowdhury 1984, p. 90; Cassese 1995, p. 99; Schrijver 1995, p. 6.

forum of the UNGA in the 1950s.<sup>193</sup> In 1962, deliberations within the UN led to the adoption of the *Declaration on Permanent Sovereignty over Natural Resources*.<sup>194</sup> In this respect, underlying desires ‘to secure the benefits of natural resource exploitation for non-self-governing peoples’ and ‘to regain effective control over natural resources’ were addressed.<sup>195</sup> With the emergence of the principle of PSNR the foundation of the New International Economic Order was created.<sup>196</sup> The concept furthermore evolved in the development of international environmental law.<sup>197</sup> PSNR is regarded to be a corollary to the principle of self-determination of peoples as a collective human right.<sup>198</sup> A definition of the principle PSNR has been formulated by one author

‘Permanent sovereignty over natural resources means that the natural resources belong to the peoples of the territory in which they are situated; that, whether or not those peoples constitute independent States, the resources in question must be exploited for their benefit; and that the legal régime governing such exploitation must be established or modified in accordance with the will of those peoples by their independent State or, in the case of peoples still dependent, by the authorities administering them.’<sup>199</sup>

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<sup>193</sup> UNGA 523 (VI) of 12 January 1952; UNGA 626 (VII) of 21 December 1952; UNGA 1314 (XIII) of 12 December 1958 establishing the Committee on Permanent Sovereignty over Natural resources which was instructed to conduct a full survey on the status of the permanent sovereignty of peoples and nations over their natural wealth and resources as a basic constituent of the right of self-determination of peoples; 1515 (XV) of 15 December 1960. This resolution entails the recommendation that the sovereign right of every State to dispose of its wealth and its natural resources should be respected; UNGA 626 (VII) of 21 October 1962 which stipulates that ‘the right of peoples freely to use the natural wealth and resources is inherent in their sovereignty and is in accordance with the purposes of the Charter of the United Nations; Kamal Hossain and Subrata Roy Chowdhury 1984, p. 90; Brownlie 2008, p. 540.

<sup>194</sup> UNGA 1803 (XVII). According to Cassese the resolution was passed by 87 votes to 2 (France, South Africa), with 12 abstentions (socialist countries, plus Burma and Ghana).

<sup>195</sup> Schrijver 1995, p. 133; Brownlie 2008, p. 539-541.

<sup>196</sup> David Flint 1984, p. 144-181 in *Permanent Sovereignty over Natural Resources, Foreign investment and State Practice*.

<sup>197</sup> Schrijver 1995, p. 133. ; Brownlie 2008, p. 539-541.

<sup>198</sup> The close relationship between PSNR and self-determination of peoples as a collective human right is described at p. 103 by Paul Peters, Nico Schrijver and Paul J.M. De Waart in *Permanent Sovereignty over Natural Resources, Foreign investment and State Practice*, in *Permanent Sovereignty over Natural Resources in International Law*.

<sup>199</sup> Aureliu Cristescu, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments*, Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, p. 71 at para. 432.

The contemporary interpretation of the *Declaration on Permanent Sovereignty over Natural Resources* stipulates that peoples are the subject to the right to ‘freely dispose of its natural wealth and resources’. When referring to peoples, this includes people subjected to colonial rule, belligerent occupation and indigenous peoples.<sup>200</sup> As noted before, it is therefore not relevant whether the peoples concerned constitute a State.<sup>201</sup> Furthermore, paragraph 1 of the *Declaration on Permanent Sovereignty over Natural Resources* stipulates that

‘1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.’

In this respect, one author states that the violation of the right of a people to PSNR leads to a gross infringement of the right of the concerned people to self-determination.<sup>202</sup> He emphasizes in concrete terms, that the use or exploitation of natural resources in a NSGT by a colonial or foreign ruler amounts to a gross infringement of the right to peoples to self-determination.<sup>203</sup> In addition to that he states that a violation of the right to PSNR hinders the development of international cooperation and the maintenance of peace.<sup>204</sup> It has been put forward also, that the right to PSNR includes according to paragraph 4 of GA resolution 3201 (S-VI) and Article 16 of CERDS and paragraph 33 of the Lima Declaration of UNIDO II, in

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<sup>200</sup> ICJ Namibia 1971, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16; ICJ East Timor 1995, ICJ Case Concerning East Timor East, Judgment, ICJ Reports 1995, 102. ICJ Nauru Phosphate Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, p. 240; ICJ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136; ICJ Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda, Judgment, ICJ Reports 2005, p. 168; see in reference to the applicability of PSNR to indigenous peoples; See Schrijver 1995, p. 1 on the applicability of the principle of PSNR in situations of belligerent occupation. See also Ruys & Verhoeven 2008, p. 155-198.

<sup>201</sup> Cassese 1995, p. 99; Cristescu 1981, *The Right to Self-Determination, Historical and Current Development on the Basis of United Nations Instruments, Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, p. 71 at para. 432; See Schrijver 1996, p. 133 for an elaboration on the applicability of the principle of permanent sovereignty over natural resources in a situation of foreign occupation; UNGA 3171 XXVII.

<sup>202</sup> Cassese 1995, p. 99.

<sup>203</sup> Cassese 1995, p. 95.

<sup>204</sup> Cassese 1995, p. 95.

case of violation, the right to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples.<sup>205</sup>

#### §4.3. Current status of the right to PSNR in contemporary international law

The right to PSNR was recognized by the international community with its inclusion into common Article 1 paragraph 2 of the ICCPR and the ICESCR.<sup>206</sup> This Article states that

‘All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.’

The adoption of the principle into the 1966 ICCPR and the ICESCR had been proposed by Chilli which introduced the concept as a human right.<sup>207</sup> The principle PSNR is part of current international contemporary law. The principle of PSNR has *jus cogens* character.<sup>208</sup> As a *jus cogens* principle it extends *erga omnes* to the international community as a whole.<sup>209</sup> The principle of PSNR became a corollary to the right to self-determination of peoples, a principle included into contemporary international law.<sup>210</sup>

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<sup>205</sup> Schrijver 1995, p. 133.

<sup>206</sup> Daes 2004, United Nations Economic and Social Council, Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous peoples’ permanent sovereignty over natural resources. Final report of the Special Rapporteur, Erica-Irene A. Daes. E/CN.4/Sub.2/2004/30. 30 July 2004. Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Fifty-sixth session Item 5(b) of the provisional agenda.

<sup>207</sup> Schachter 1993, p. 301; Article 47 ICCPR and Article 25 ICESCR furthermore stipulate that “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

<sup>208</sup> Brownlie 2008, p. 511.

<sup>209</sup> Brownlie 2008, p. 511; Brownlie 2008, p. 15; See J. Hofbauer 2009, p. 2-3.

<sup>210</sup> The General Assembly Resolution of 12 December 1957 (1314(XIII)) characterises permanent sovereignty as a basic constituent of the right to self-determination; Kamal Hossain and Subrata Roy Chowdhury 1984, p. 90; Cassese 1995, p. 99; Daes 2004, United Nations Economic and Social Council, Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous peoples’ permanent sovereignty over natural resources. Final report of the Special Rapporteur, Erica-Irene A. Daes. E/CN.4/Sub.2/2004/30. 30 July 2004. Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Fifty-sixth session Item 5(b) of the provisional agenda.

## §5. Conclusion

Self-determination of peoples originated from the principle of nationality and had been solely a political claim in the 18<sup>th</sup> century. This was manifested when the principle was invoked by the inhabitants of the Aaland Islands at the 20<sup>th</sup> century League of Nations. After the Second World War, the principle of self-determination was included into the UN Charter, constituting one of fundamental principles of the UN Charter. From this perspective, the principle became the underlying concept of Chapter XI and XII of the Charter. By means of Chapter XI, the Members of the United Nations responsible for the administration of colonies, entered an agreement of sacred trust towards the UN and the non-self-governing peoples, obligating them to act in accordance with Article 73 UN Charter. The principle of self-determination as the foundation of Article 73 UN Charter was interpreted by means of the 1960 UNGA resolution 1514 (XV) and UNGA resolution 1541 (XV). Practicalities regarding the NSGTs were addressed by UNGA resolution 1541 (XV). Instant state practice resulted in the reception of this method of implementation to become part of international customary law, and affirmed by the ICJ in the *Case concerning Western Sahara*. This body of law is characterized as the law concerning the right to external self-determination of peoples. Subject to this right are peoples under colonial domination and military occupation. Excluded from this right are ethnic groups not constituting a people; religious, cultural or linguistic minorities. The right to self-determination is part of *jus cogens* and has been recognized to have *erga omnes* character.<sup>211</sup> Certain State positive and negative duties have become part of contemporary international customary law regarding peoples entitled to (the external) right to self-determination. These State duties can be summarized in: (1) the negative State duty to refrain from any forcible action which deprives people under colonial domination or a people subjected to military occupation to the exercise of its right to self-determination; (2) the positive State duty to promote the realization of the right to self-determination of peoples; (3) the positive State duty to respect the right to self-determination of peoples, in conformity with the UN Charter. States are entitled to: (1) refer to situations where self-determination is forcible denied at the UN (2) assist non-self-governing peoples in their struggle to achieve self-government in any form short of sending arms and or troops. Finally, the continuing character of self-determination beyond the context of decolonization, was made possible by the recognition of a permanent right to self-determination of peoples by the international community. The recognition of the continuing character is reflected by the adoption of the

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<sup>211</sup> See ICJ Case Concerning East Timor East, Judgement, ICJ Reports 1995, 102, para. 29.

ICCPR and the ICESCR and resulted in the crystallization of the law concerning internal self-determination. Subject to this right are groups organized within the legal framework of a State. It was acknowledged by the international community that political independence could not be maintained without economic self-determination. From this perspective the principle PSNR is therefore perceived as a corollary to the right to self-determination of peoples. The principle of PSNR applies to peoples. Irrelevant is whether or not they are organized in statehood and its application therefore includes NSGTs and situations of belligerent occupation. The principle of PSNR has a *jus cogens* character. Finally, it should be mentioned that within the time period of the adoption of the Charter and the adoption of the mentioned resolutions the principle of self-determination of peoples had evolved from a political principle into a legal entitlement. In other words, self-determination including the right to PSNR, was no longer dependent either of the will or the might of a colonial power, nor the effective control of an Occupying power.



## Chapter 4

### The extent of the Saharawi people right to self-determination

The Saharawi people right to self-determination and the current status of Western Sahara in relation to Spain and Morocco

#### §1. Introduction

In pursuance of Chapter 3, this Chapter contains a very modest survey into State practice concerning self-determination of peoples in the case of Western Sahara and the Saharawi people. This endeavor consists of a historical overview concerning the recognition by the international community of the Saharawi people legal entitlement to external self-determination. From this angle, light will be shed firstly on the creation of the international status of Western Sahara by means of Article 73 UN Charter and UNGA resolution 1514 (XV). Secondly, the legal relationship between both Western Sahara and Spain as its former colonial power that resulted from this classification. The legal relationship between Western Sahara and Morocco as a result of the prohibited use of force in the meaning of Article 2(4) UN Charter will be discussed lastly. The reconstruction and classification of these facts are crucial for this thesis, for it uncovers the extent of the Saharawi people right to self-determination and permanent sovereignty over natural resources with regard to the conclusion and implementation of the current EU-Morocco FPA.

#### §2. Western Sahara NSGT

##### §2.1. Spanish Sahara

European colonization of the African continent took place at the 1884-1886 Berlin Conference during the era of “New Imperialism.” At this Conference, the territory currently known as Western Sahara was declared a Spanish protectorate by Spain.<sup>212</sup> The territory became a Spanish province in 1958. This situation lasted until 1961.<sup>213</sup> One author describes this event in the following words

“Responding to a variety of pressures, and suffering from the steady erosion of its influence in the Americas, the Spanish government in 1884 declared a ‘protectorate’ over most of Western Sahara (including the coastal

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<sup>212</sup> Hodges 1984, p. 42; Munene 2010, in *Multilateralism and international law with Western Sahara as a Case Study*, p. 76-78; p. 40; Cuervo 2007, p. 27 in *International Law and the Question of Western Sahara*.

<sup>213</sup> Cassese 1995, p. 214; Kouri 2011, in *International Law and the Israeli-Palestinian Conflict*, p.151; Munene 2010, in *Multilateralism and international law with Western Sahara as a Case Study*, p. 76.

settlements of Boujdour and Dakhla) in an attempt to preserve for itself at least a limited standing in a community of European imperial powers that were swiftly establishing themselves on the African continent.<sup>214</sup>

The discovery of phosphate in the territory's desert by a Spanish geologist in 1947 made the territory of crucial economic importance to Spain.<sup>215</sup>

## *§2.2.UN and the decolonisation process of Ifni and Spanish Sahara*

### *The Saharawi people right to self-determination*

This process of decolonization of Western Sahara was initialized by its inclusion into the list of Article 73 UN Charter NSGTs in 1963 by the UNGA.<sup>216</sup> On 16 December 1965, the UNGA moved to the adoption of resolution 2072 (XX), thereby approving the Special Committee of 24 resolution regarding the question of Ifni and Western Sahara. The UNGA had considered the Special Committee of 24<sup>217</sup> reports relating to Ifni and Spanish Sahara and recalled the *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 14 December 1960. With this act the UNGA recognized the Saharawi people right to self-determination. Morocco also recognized the Saharawi people right to self-determination.<sup>218</sup> In this respect, the UNGA furthermore urgently requested Spain, as the Administering Power of Spanish Sahara, 'to take immediately all necessary measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination and, to this end enter into negotiations on the problems relating to sovereignty presented by these two Territories'.<sup>219</sup> On 20 December 1966, the UNGA went on to adopt resolution 2229 (XX) where it requested Spain as Administering Power of Spanish Sahara

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<sup>214</sup> Pazzanita, p. xv.

<sup>215</sup> Cassese 1995, p. 214, Mercer 1976, p. 224-225; Hodges 1984, 122-134.

<sup>216</sup> UNGA A/5514, annex III, 1963; Casesse 1995, p. 214; See Corell, S/2002/161, United Nations Security Council, 12 February 2002, par. 5; Omar 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 59.

<sup>217</sup> Hodges 1984, p. 104-108; Cassese 1995, p. 214.

<sup>218</sup> Omar 2010, in *The Legal Claim of the Saharawi people to the right to self-determination and decolonization*, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 60.

<sup>219</sup> See Question of Ifni and Spanish Sahara UNGA res 2072(XX) of 16 December 1965; Omar 2010, in *The Legal Claim of the Saharawi people to the right to self-determination and decolonization*, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 59.

- ‘(a) To create a favourable climate for the referendum to be conducted on an entirely free, democratic and impartial basis, by permitting, *inter alia*, the return of exiles to the Territory;
- (b) To take all necessary steps to ensure that only the indigenous people of the Territory participate in the referendum;
- (c) To refrain from any action likely to delay the process of the decolonization of Spanish Sahara;
- (d) To provide all the necessary facilities to a United Nations mission that it may be able to participate actively in the organization and holding of the referendum;’<sup>220</sup>

This status has remained so until this day.<sup>221</sup> The qualification of Ifni and Spanish Sahara as a Chapter XI NSGT by the UNGA created certain legal implications for Spain as its Administering Power.<sup>222</sup> The UNGA requested the Special Committee of 24 to send out a visiting mission to Western Sahara.<sup>223</sup> In May 1975 this mission was confronted with an ‘overwhelming consensus for independence.’<sup>224</sup> It therefore recommended that the UNGA ‘take steps to enable the population groups to decide their future in freedom and security.’<sup>225</sup>

### **§3. ICJ Advisory Opinion on Western Sahara**

#### *§3.1. UNGA request*

As mentioned earlier, the UN articulated that a referendum should be organized in order for the Saharawi people of Western Sahara to decide on the international status of Western Sahara. Morocco and Mauritania however, gained enough support among the Members of the UN to submit the case to the ICJ in the Hague, and convinced Spain –still responsible for the territory – according to one author to delay the referendum for the outcome of the Advisory

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<sup>220</sup> See UNGA res. 2229 (XX) 20 December 1966.

<sup>221</sup> See Special Committee of 24 at: <http://www.un.org/en/decolonization/workingpapers.shtml>.

<sup>222</sup> These obligations consist firstly the two obligations set out in Article 73 UN Charter which are (1) the promotion of the social, economic and educational well-being of the non-self-governing people by the Administering Power and (2) the obligation to promote self-government in the Non-Self-Governing Territory. As has been stated earlier, the UNGA 1514 (XV) considerably elaborated the Article 73 UN Charter Obligations; See Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p 201 for a discussion on Spain as Administering Power; Eduardo Trillo de Martín-Pinillos 2007, in *Spain as Administering Power of Western Sahara*, p. 79-85.

<sup>223</sup> Hodges 1983, p. 198; See Report of the United Nations Visiting Mission to Spanish Sahara, 1975, General Assembly, 30<sup>th</sup> Session, Supplement, UN Document A/10023/Rev. This document is available at:

<sup>224</sup> Koury 2011, in *International Law and the Palestinian Conflict*, p.152; Eduardo Trillo de Martín-Pinillos, in *Spain as Administering Power of Western Sahara*, p. 80.

<sup>225</sup> Koury 2011, in *International Law and the Palestinian Conflict*, p.152.

Opinion.<sup>226</sup> The ICJ received a request by the UNGA to provide the Assembly with an Advisory Opinion on the situation of the Western Sahara territory in 1974.<sup>227</sup> The International Court of Justice was requested, without prejudice to the application of the principle embodied in resolution 1514 (XV), to give an advisory opinion on the status of Western Sahara and any legal ties between the territory and the two claimant countries at the time of Spanish colonization. According to another author, the decision to request this advisory opinion from the ICJ was made, in order for the UN to determine the policy to be followed and to accelerate the decolonization process in Western Sahara.<sup>228</sup>

### §3.2. *The Advisory Opinion*

The legal questions put forward by the UNGA were: 1. Was Western Sahara at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If the answer to this question was in the negative, the following question was: What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity? On 16 October 1975, the ICJ announced its Advisory Opinion to the world. It stated in relation to the first question that Western Sahara at the time of colonization by Spain was not a territory belonging to no one (*terra nullius*). In regard to the second question, the ICJ answered that even though Mauritania and Morocco both had historical ties with Western Sahara, those ties were not ‘of such a nature as might affect the application of Resolution 1514 (XV) namely the decolonization of Western Sahara and, secondly on the principle of self-determination of peoples through free and genuine expression of the will of the peoples of the territory. The ICJ had recognized the Saharawi right to external self-determination<sup>229</sup> and determined the question of sovereignty over Western Sahara.<sup>230</sup> The Advisory Opinion of the ICJ did not however, stop Morocco and Mauritania from invading the Western Sahara territory in November 1975.

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<sup>226</sup> Omar 2010, p. 62, in *The Legal Claim of the Saharawi people to self-determination in Multilateralism and International Law with Western Sahara as a Case Study*.

<sup>227</sup> UNGA res 3292 (XXIX) of 13 December 1974.

<sup>228</sup> Omar 2010, p. 62 in *The Legal Claim of the Saharawi people to self-determination in Multilateralism and International Law with Western Sahara as a Case Study*.

<sup>229</sup> See ICJ Advisory Opinion on Western Sahara, ICJ Reports 1975, p. 12

<sup>230</sup> See ICJ Advisory Opinion on Western Sahara, ICJ Reports 1975, p. 12

## §4. Spain Administering Power

### §4.1. Madrid Tripartite Agreements

On 14 November 1975 Spain, Morocco and Mauritania concluded the Madrid Tripartite Agreements. These Agreements entail a declaration by Spain which was transmitted to the UN, in addition to several secret annexes,<sup>231</sup> and entered into force on 19 November 1975.<sup>232</sup> According to one author, these arrangements had initially been kept secret for some time, because they run contrary to the Saharawi people right to self-determination.<sup>233</sup> By means of these agreements a tripartite interim administration was established by Spain, Morocco, Mauritania. They furthermore regulate the transfer of all responsibilities and powers of Spain as Administering Power to Western Sahara to Morocco and Mauritania.<sup>234</sup> It is stated that according to the first paragraph of this agreement, Spain articulates that it will ‘resolve to decolonize the Territory of Western Sahara by terminating the responsibilities and powers which it possesses as the territory’s Administering Power.’<sup>235</sup> Obligations of Spain as Administering Power under international law were thus attempted to be transferred to the interim tripartite administration.<sup>236</sup> The second paragraph of the Agreement proceeded to establish ‘a temporary administration for the Territory,’ and the final date of Spanish withdrawal from Western Sahara as no later than 19 November 1975.<sup>237</sup> The Agreement furthermore stipulated the establishment by Spain of a temporary administration by the *Djemaa*, which is a council of Saharawi notables. According to one author, the members of the *Djemaa* were however, not elected in democratic elections by the Saharawi people themselves.<sup>238</sup> On 26 February 1976 the *Djemaa* claimed to be the authentic and legitimate representative of the Saharawi people and articulated its approval of the Madrid Tripartite Agreements and its preference for integration with Morocco.<sup>239</sup> It is stated that the Madrid Tripartite Agreements became the basis of the 14 April 1976 Treaty on the Borders between

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<sup>231</sup> Jensen 2005, p. 28; Miguel 2010, p. 202; Hannikainen 2007, *The Case of Western Sahara from the Perspective of Jus Cogens*, in *International Law and the Question of Western Sahara*, p.66.

<sup>232</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 202.

<sup>233</sup> Hodges 1984, p. 223.

<sup>234</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 202.

<sup>235</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 202.

<sup>236</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 202.

<sup>237</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 202.

<sup>238</sup> Hodges 1984, p. 224; Lauri Hannikainen 2007, in *The Case of Western Sahara from the Perspective of Jus Cogens*, in *International Law and the Question of Western Sahara*, p.66.

<sup>239</sup> Casesse 1995, p. 216.

Morocco and Mauritania which regulated the partition and annexation of Western Sahara.<sup>240</sup> Morocco argues that its presence in Western Sahara as its Administering Power derives from the Madrid Tripartite Agreements.<sup>241</sup>

#### *§4.2. UNGA reaction to the Tripartite Madrid Agreements*

The UN's observation in regard to the Madrid Tripartite Agreements was twofold as a result of the Cold War.<sup>242</sup> Therefore two distinct resolutions were adopted by the UNGA on 10 December 1975. Resolution 3458A (XXX) and resolution 3458B (XXX).<sup>243</sup> Resolution 3458 (A) continues to address Spain as Administering Power of Western Sahara. This resolution expresses the view of the UNGA that the Madrid Tripartite Agreements did not transfer the status of Administering Power to the tripartite administration of Spain, Morocco and Mauritania. The Administering Power according to this resolution thus remained Spain.<sup>244</sup> Resolution 3458 (B) noted the Tripartite Agreement but requested the tripartite administration to consult the entire Saharan population originating from the Western Saharan territory. It furthermore requested the parties to Madrid Tripartite Agreements to do what is necessary to ensure and enable the entire Saharan population in the Western Saharan territory to exercise their inalienable right to self-determination through free consultations.<sup>245</sup> The legality and the validity of the Madrid Tripartite Agreements however, has been disputed.<sup>246</sup> In 2002 *Correl* stated the following on this subject

“On 14 November 1975, a Declaration of Principles on Western Sahara was concluded in Madrid between Spain, Morocco and Mauritania (“the Madrid Agreement”) whereby the powers and responsibilities of Spain, as

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<sup>240</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 205.

<sup>241</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 205.

<sup>242</sup> Hodges 1984, p. 236.

<sup>243</sup> UNGA 3458 A (XXX) and UNGA 3458B (XXX), 10 December 1975; Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 202.

<sup>244</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 203; Eduardo Trillo de Martín-Pinillos 2007, in *Spain as Administering Power of Western Sahara*, in *International Law and the Question of Western Sahara*, p. 82.

<sup>245</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 203.

<sup>246</sup> Corell 2002, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Council to the President of the Security Council*; The legality of the Madrid Tripartite Agreements itself, have not been challenged by neither the United Nations nor the Organization of African Unity, according to Leite 2007, p. 13. Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 205.

the administering Power of the Territory, were transferred to a temporary administration. The Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred. The transfer of administrative authority over the Territory to Morocco and Mauritania in 1975 did not affect the international status of Western Sahara as a Non-Self-Governing Territory.”<sup>247</sup>

#### *§4.3. Spanish withdrawal from Western Sahara*

The announcement of the Spanish formal withdrawal from the Western Sahara territory reached the UN Secretary-General on 26 February 1976. The Administering Power stated that ‘as of that date it had terminated its presence in Western Sahara and relinquished its responsibilities over the Territory, thus leaving it in fact under the administration of both Morocco and Mauritania in their respective controlled areas.’<sup>248</sup> The announcement however, does not affect the obligations of Spain as *de jure* Administering Power in relation to Western Sahara. The UN therefore have continued to address Spain as the Administering Power of Western Sahara.<sup>249</sup> On this subject, the following has been stated by one author

“However, in order to be truly free from its responsibilities in the international order, Spain needed approval from the UN General Assembly. As Administering Power, Spain had no sovereignty over Western Sahara. It simply acted as a delegate from the international community. Consequently, it could never dispose of the non-self-governing territory without the authorization of the United Nations.”<sup>250</sup>

### **§5. SADR**

#### *§5.1. Moroccan and Mauritanian troops invade Western Sahara in 1975*

In response to the outcome of the World’s Court Advisory Opinion, King Hassan II organized a Green March of 350.000 Moroccan unarmed civilians. With the 350.000 marching into Western Sahara territory, the message was sent out to the world that Western Sahara was part

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<sup>247</sup> Corell 2002, *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Council to the President of the Security Council*.

<sup>248</sup> Miguel 2010, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 203; Eduardo Trillo de Martín-Pinillos 2007, in *Spain as Administering Power of Western*, in *International Law and the Question of Western Sahara*, p. 82.

<sup>249</sup> Corell 2002, in *Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Council to the President of the Security Council*, p. 2, para. 6; Haugen 2007, p. 73. Available at: <http://www.lead-journal.org/content/07070.pdf>.

<sup>250</sup> Eduardo Trillo de Martín-Pinillos 2007, in *Spain as Administering Power of Western Sahara*, in *International Law and the Question of Western Sahara*, p. 81.

of the Kingdom of Morocco.<sup>251</sup> This manifestation was condemned by the UN Security Council, which called for the civilians to be retreated within Moroccan borders. Despite of such a resolution, the Green March was quickly followed by the invasion of Moroccan and Mauritanian troops in November 1975.<sup>252</sup> Mauritania, however withdrew its claims to Western Sahara in 1979 and recognized the SADR. After the withdrawal of Mauritania in 1979, Morocco occupied the territory that was given up by Mauritania.<sup>253</sup>

## §5.2. SADR

The Madrid Tripartite Agreements and the invasion of Moroccan and Mauritanian troops into Western Sahara territory would leave the Saharawi people and its territory in the hands of the Kingdom of Morocco and the Mauritanian Republic without the opinion of the Saharawi people ever to be heard.<sup>254</sup> The Saharawi people liberation movement POLISARIO and the Provisional Saharawi National Council [therefore] declared the SADR on 27 February 1976 and initiated armed conflict against Morocco and Mauritania, resulting in the retreat of Mauritania. With this act, a *fait accompli* was prevented.<sup>255</sup>

‘Meanwhile, on February 27, one day after the rump Djemaa meeting and the formal termination of Spanish administration, the Provisional Saharawi National Council proclaimed the founding of an independent Saharawi state, to avoid a juridical *fait accompli* being created by the Spanish withdrawal and the Moroccan-Mauritanian occupation of the towns. At a nighttime ceremony near Bir Lehlou, in the eastern Saguia el-Hamra, attended by thousands of Saharawi guerrillas and refugees and a party of thirty foreign journalists, the council’s president, M’hammed Ould Zion, read out a proclamation announcing “the birth of a free, independent, sovereign state, ruled by an Arab, national, democratic system of unionist, progressive orientation and of Muslim religion, named the Saharan Arab Democratic Republic.” The new republic’ green, red, white and black flag, with Islamic crescent and star, was then strung up on a makeshift pole, as a detachment of guerrillas presented arms.’<sup>256</sup>

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<sup>251</sup> Hodges 1983, p. 211.

<sup>252</sup> See UNSC res 380 of 6 November 1975; UNSC res 377 of 22 October 1975; Omar 2010 in *The Legal Claim of the Saharawi people to the right to self-determination and decolonisation*, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 56-57; Hodges 1984, p. 224.

<sup>253</sup> Hannikainen 2007, *The Case of Western Sahara from the Perspective of Jus Cogens*, in *International Law and the Question of Western Sahara*, p.67; Omar 2010 in *The Legal Claim of the Saharawi people to the right to self-determination and decolonisation*, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 63.

<sup>254</sup> Hodges 1983, p. 224; Jensen 2005, p. 28.

<sup>255</sup> Hodges 1984, p. 238.

<sup>256</sup> Hodges 1984, p. 238.



Approximately 170,000 Saharawi fled to Tindouf, Algeria.<sup>257</sup> They have remained in refugee camps near Tindouf until this day.<sup>258</sup> The Moroccan occupation forces increased from 56,000 to 250,000 between 1975 and 1991. It has reported to have used napalm and phosphorus 'to displace citizens who had not already fled to the camps in Tindouf.'<sup>259</sup>

### §5.3. Recognition of the SADR

The SADR has been recognized by 75 States, among these are Timor Leste and several Member States of the African Union.<sup>260</sup> The SADR has been a Member of the Organization of African Unity since 1984, which has been succeeded by the African Union. It is however, not a Member of the United Nations.<sup>261</sup> In this regard it should be mentioned that POLISARIO is recognized by the UN as the legitimate representative of the Saharawi people.<sup>262</sup> As for the factual situation on the ground, a so called 'berm' currently divides the Western Sahara territory into two parts. The western part boarding the Atlantic Ocean, including Western

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<sup>257</sup> See Jensen 2005, p. 29. Algerian troops were involved in armed conflict with the Moroccan troops at Amgala, but were withdrawn after casualties on Algerian side.

<sup>258</sup> Larosch 2007, p. 7; Lauri Hannikainen 2007, *The Case of Western Sahara from the Perspective of Jus Cogens*, in *International Law and the Question of Western Sahara*, p. 66; Lawless 1987, p. 150.

<sup>259</sup> Lawless 1987, p. 151-153; Jensen 2005, p. 29; Leite 2006, p. 13; Haugen 2007 p. 73.

<sup>260</sup> Leite 2006 in *International Legality versus Realpolitik, The Cases of Western Sahara and East Timor*, p. 15; Symmons in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory in Timor Leste: Challenges for Justice and Human Rights in the Shadow of the Past*, p. 336; Lauri Hannikainen 2007, *The Case of Western Sahara from the Perspective of Jus Cogens*, in *International Law and the Question of Western Sahara*, p. 66; See Raič 2002, p. 53-58.

on the meaning of effectiveness in the context of the formation of States; See Shaw 2008, p. 236-237. Shaw is of the opinion that the reduced importance of the effectiveness of control criterion in cases of self-determination similar to Western Sahara makes a credible argument in relation to the existence of SADR statehood. The issue is however, according to the author still controversial taking into consideration 'the continuing hostilities and what appears to be effective Moroccan control.' See [www.fishelsewhere.eu](http://www.fishelsewhere.eu). The SADR statehood has been disputed by the Legal Office to the European Parliament in relation to the establishment of its Exclusive Economic Zone; See in this respect Kalaidjian 2010, in *Fishing for Solutions: The European Fisheries Partnership Agreements with West African Coastal States and the call for effective regional oversight in an exploited ocean*, in *Emory International Law Review*, p. 399; See Sturman 2008, p.74-75 in *New Norms, Old Boundaries: The African Union's Approach to Secession and State Sovereignty in On the Way to Statehood*.

<sup>261</sup> Leite 2006 in *International Legality versus Realpolitik, The Cases of Western Sahara and East Timor*, p. 15.

<sup>262</sup> See UNGA res 34/37 of 21 November 1979; Cassese 1996, p. 216; Omar 2010, in *The legal claim of the Saharawi people to self-determination and decolonisation*, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 59 Kooijmans 2002, p. 38.

Sahara territorial waters, is *de facto* controlled by Morocco. The eastern part of the territory is *de facto* controlled by POLISARIO or the SADR. The ‘berm’ which was constructed by Moroccan troops constitutes the *de facto* boarder between Morocco and POLISARIO or the SADR. One author states that this ‘berm’, which is a 2250 km long defense wall, was built from sand and stone and is protected by minefields.<sup>263</sup>

#### §5.4. Ceasefire and MINURSO

A cease-fire was proposed by the UN and accepted by both POLISARIO and Morocco in 1992.<sup>264</sup> The subject of a referendum was tabled and negotiations were initialized between POLISARIO and Morocco representatives under the auspices of the UN. The Security Council proceeded with the extension of the United Nations Mission for the Referendum in Western Sahara (hereafter: MINURSO) mission mandate to Western Sahara until 30 April 2012. MINURSO is tasked with the monitoring of the ceasefire in Western Sahara. It is also mandated to organize the long awaited referendum in order for the Saharawi people to express their free and genuine will concerning the international political status of the territory of Western Sahara. The resolution concerning the extension of the mission was recommended by Secretary-General Ban Ki-Moon.<sup>265</sup>

#### §6. Conclusion

The legal relationship between Spain and Western Sahara is based upon Article 73 UN Charter and UNGA resolution 1514 (XV). Western Sahara (Ifni and Spanish Sahara) was included into the list of NSGTs in 1965. With this act, the UN has recognized the Saharawi people right to external self-determination, for the Saharawi people constitute a colonial people entitled to decolonization. The right to external self-determination of the Saharawi people consists of the entitlement to opt for (1) independent statehood (2) free association

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<sup>263</sup> Larosch 2006, p. 7; Leite 2007, p. 13; See Kooijmans 2002, regarding the doctrine on the creation and recognition of States, p. 20-26.

<sup>264</sup> Larosch 2006, p. 7; See Jensen 2005, p. 39-58.

<sup>265</sup> See El Ouali 2008, in *Democratic self-determination and Western Sahara: How to bring an end to a long-standing conflict*, in *Multilateralism and International Law*, p. 6-55 for the Moroccan perspective; See Omar 2010, in *The legal claim of the Saharawi people to self-determination and decolonisation*, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 63-67 on the various diplomatic efforts under auspices of the United Nations and the Organization of African Unity to find a political resolution to the conflict between Morocco and POLISARIO concerning Western Sahara; Information on the MINURSO mission is available at: <http://www.un.org/en/peacekeeping/missions/minurso/>.

with an existing State (3) integration into an existing State, or (4) any other political status they desire.<sup>266</sup> Morocco recognized the Saharawi people right to self-determination.<sup>267</sup> In this perspective it should be noticed also that the ICJ determined on 16 October 1975, that the sovereignty of the Kingdom of Morocco does not include the territory of Western Sahara and reaffirmed the Saharawi people right to self-determination. The 1975 Madrid Tripartite Agreements and Spain's announcement to the UNGA on 26 February 1976, that it no longer considers itself to be the Administering Power to Western Sahara, did not withhold the UN to continue to consider Spain as the *de jure* Administering Power to Western Sahara. Moreover, the legality and validity of the Madrid Tripartite Agreements have been questioned by many leading authors. The basis for this reasoning can be found in the rule that the transfer of sovereignty over territory requires the implementation of the principle of self-determination. In respect to the presence of Moroccan troops in Western Sahara, it can be concluded that the invasion and occupation have resulted in the effective control of 85% of the Western Sahara territory. The remaining 15 % is under the effective control of the SADR, which is recognized by 75 States, and a Member of the African Union. As stated before, the SADR is not a Member of the UN. Parties to the negotiations led by the UN concerning a referendum in order for the Saharawi people to exercise their right to self-determination, are therefore POLISARIO and Morocco. The ongoing negotiations have thus far resulted in a ceasefire between POLISARIO and Morocco in 1992.<sup>268</sup>

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<sup>266</sup> UNGA 1541(XV) 15 December 1960 and UNGA (XXX) Friendly Relations 1970

<sup>267</sup> Omar 2008, in *The legal claim of the Saharawi people to the right to self-determination and decolonization in Multilateralism and International Law*, p. 56-69.

<sup>268</sup> See Koury 2007, p. 172-180, in *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Agreement: State Responsibility and Customary International Law*, in *International Law and the Question of Western Sahara*; See Chinkin 2010, in *Laws of Occupation*, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 167-188. See Chapaux 2007, in *The Question of the European Community-Morocco Fisheries Agreement*, in *International Law and the Question of Western Sahara* p. 224-226.

## Chapter 5

### **The current EU-Morocco FPA from the perspective of the Saharawi people right to self-determination and PSNR**

#### **§1. Introduction**

This present Chapter addresses the central question of this thesis: to what extent has the current EU-Morocco FPA been concluded and implemented in accordance with the Saharawi people right to self-determination and PSNR? From the perspective of the Saharawi people right to self-determination, this question takes into account the international status of Western Sahara as NSGT, and the factual circumstance that 85% of Western Sahara territory has been the *de facto* control of Morocco since 1975.

#### **§2. The current EU-Morocco FPA and the rights and obligations of an Occupying Power in regard to the exploitation of natural resources in Occupied Territories**

##### *§2.1. Applicable legal regime regarding exploitation of natural resources in a NSGT under belligerent occupation*

As has been mentioned earlier, exploitation of natural resources in NSGTs within the legal relation between an Administering Power and the NSGT concerned, is primarily focused at the protection of interests and the benefit of the non-self-governing people in its exercise of their right to self-determination.<sup>269</sup> This legal relationship is based upon Article 73 UN Charter and the UNGA resolution 1514 (XV) of 14 December 1960. IHL, on the other hand, is focused on the regulation of warfare and belligerent occupation. The legal relationship between Western Sahara and Morocco could be classified as Occupying Power and Occupied Territory.<sup>270</sup> Situations of belligerent occupation are regulated by the 1907 Hague Regulations

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<sup>269</sup> See Chapter 3, §3.3 and §3.6. See J.J.P. Smith, in *State of Self-Determination: The Claim to Sahrawi Statehood*, for a perspective from SADR statehood. This article is available at:

<http://www.arso.org/Self-DeterminationJSmith310310.pdf>; See Case Concerning East Timor (1995), Dissenting Opinion Weeramantry. p. 197-198.

<sup>270</sup> See Chapaux 2007, in *The Question of the European Community-Morocco Fisheries Agreement*, in *International Law and the Question of Western Sahara*, p. 223 and his reference to the term 'de facto administering power' at p. 224-226; See Chinkin 2007, in *Multilateralism and International Law with Western Sahara as a Case Study*, p. 167-188. Clive R. Symmons in *Denial of Self-Determination and Utilization of Natural Resources by an Illegal Occupier of Territory*, p. 328-329; See Letter POLISARIO to Mrs. Damanaki dated 16 November 2010; See Corell in *The Legality of Exploring and Exploiting Natural Resources*

and the Geneva Conventions and its Additional Protocols. From this perspective it is stated that an Occupying Power is granted limited authority concerning the exploitation of natural resources in occupied territories.<sup>271</sup> It should be noticed that the applicability of IHL to NSGTs is made possible by the UNGA through resolution 3103 (XXVIII) of 12 December 1973.<sup>272</sup>

## §2.2. *Belligerent occupation*

The exploitation of natural resources by Morocco in Western Sahara from the perspective of the law of belligerent occupation brings to the fore Section III Article 42 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, which stipulates the definition of belligerent occupation:

‘The territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.’<sup>273</sup>

Belligerent occupation however, does not alter the NSGT status of Western Sahara. Belligerent occupation as one author states, does not *supersede* the Saharawi people right to external self-determination.<sup>274</sup> Put differently, the applicability of the law of belligerent occupation does not determine or alter status.<sup>275</sup>

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*in Western Sahara*, p. 242; See San Martin, in *EU-Morocco Fisheries Agreement: the Unforeseen Consequences of a Very Dangerous Turn*, p. 2 available at <http://www.gees.org.articulo/2601>; Toby Shelley in *The Western Sahara Conflict The Role of Natural Resources in Decolonization*, Current African Issues No. 33, Nordiska Afrika Institutet, p. 17-18. The author refers to the current EU-Morocco FPA as constituting a backdoor recognition of the status quo in Western Sahara; See Shaw 2008 p. 468-470.

<sup>271</sup> Fleck 2008, p.273-276, para. 527.

<sup>272</sup> See Chapaux 2007, in *The Question of the European Community-Morocco Fisheries Agreement*, in *International Law and the Question of Western Sahara*, p. 224-232. The author elaborates on applicability of the law of belligerent occupation to Non-Self-Governing Territories; See also Crawford 2006, p. 616, on the subject of Non-Self-Governing Territories and the use of force.

<sup>273</sup> See Article 42 1907 Hague Regulations; Fleck 2008, p.273-276, para. 527.

<sup>274</sup> See UNGA res 3103 of 12 December 1973 concerning Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes; The applicability of the law of belligerent occupation to Non-Self-Governing Territories has been elaborated upon by Vincent Chapaux on in *The Question of the European Community-Morocco Fisheries Agreement* at p. 224-232; Brownlie 2008, p. 77-78 on States in *statu nascendi*, belligerent occupation, and self-determination of peoples as *jus cogens*.

<sup>275</sup> See Chinkin 2010, in *Laws of Occupation, in Multilateralism and International Law with Western Sahara as*

### §2.3. Rights and Obligation of an Occupying Power

As indicated above, an Occupying Power does not acquire sovereignty regarding, or legal title to the territory it occupies.<sup>276</sup> Therefore, rights and obligations of an Occupying Power do not derive from sovereignty over the occupied territory. To the contrary, rights and obligation of an Occupying Power stem directly from effective control.<sup>277</sup> An Occupying Power is therefore also prohibited from annexing the territory it occupies.<sup>278</sup> This means that the authority of an Occupying Power to alter legislation that is in force in the occupied territory, is limited to safeguarding the security of the occupying forces and to maintain the public life of the local population. According to Article 43 of the 1907 Hague Regulations, the Occupying Power does however, acquire a *temporary right of administration* over the territory with limitations on the scope of its authority.<sup>279</sup>

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, order and public life, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>280</sup>

The *ratio* of this Article is to ensure the separate existence of the occupied territory in the situation of *de facto* control of an Occupying Power.<sup>281</sup> Finally, belligerent occupation ends through a change of the international status of the territory. This change may manifest itself,

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*a Case Study*, p. 171 and p. 177. The author refers to the recognition of the international community that foreign occupation prevents the exercise of the right to self-determination, at 60. The author also refers to Espiell, who includes foreign occupation in the context of colonial and alien domination to constitute an absolute violation of the right to self-determination, at 61.; See R. Wolfrum 2005, p. 7 on the applicability of the Fourth Geneva Convention.

<sup>276</sup> See Green 2008, p. 284-286. See doctrine on acquiring title to territory Malanczuk 2004, 147-160; in relation to Western Sahara see Koury 2007, in *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement: State Responsibility and Customary International Law*, in *International Law and the Question of Western Sahara*, p. 172.

<sup>277</sup> Fleck 2008, p. 277-278, para. 530.

<sup>278</sup> See Green 2008, p. 287; See Malanczuk 2004, p. 152-154.

<sup>279</sup> Green 2008, p. 285-286; Scobbie 2008, p. 231.

<sup>280</sup> See Article 43 of the 1907 Hague Regulations.

<sup>281</sup> See Koury 2007, in *The European Community and Member States' Duty of Non-Recognition under the EC-Morocco Association Agreement; State Responsibility and Customary International Law*, in *International Law and the Question of Western Sahara*, p. 173.

through the withdrawal of the occupying force or the achievement of self-government by a non-self-governing people entitled to self-determination.<sup>282</sup>

#### *§2.4. Usufruct and PSNR under belligerent occupation*

In respect of the temporary right of administration and the use of economic resources of the occupied territory by an Occupying Power, reference should be made to Article 55 of the 1907 Hague Regulations. This Article stipulates that the Occupying Power is solely ‘an administrator and usufruct of public buildings, real estate and agricultural estates belonging to the adverse party’.<sup>283</sup> In this respect the Occupying Power is obliged to safeguard the capital of these economic resources as usufruct, and is prohibited from using these in the war against the occupied. As no sovereignty is transferred by means of belligerent occupation, it derives from Article 55, that the Occupying Power as usufruct, is not entitled to sell or acquire title to economic resources of the occupied territory. Article 55 of the 1907 Hague Regulations, thus reflects that the right of a people to self-determination and permanent sovereignty rests unaffected. The latter derives from the modern interpretation of Article 55 of the 1907 Hague Regulations, taking into account the prohibition of the use of force and the principle of self-determination of peoples as provided for by the UN Charter, the customary rule of international law that ‘no territorial acquisition resulting from the threat or use of force shall be recognized as legal’.<sup>284</sup>

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<sup>282</sup> See Chinkin 2010, in *Laws of Occupation, in Multilateral and International Law with Western Sahara as a Case Study*, p. 169.

<sup>283</sup> Article 55 of the Hague Regulations stipulates the following ‘The Occupying State shall be regarded only as administrator and usufruct of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.’

<sup>284</sup> Green 2008, p. 289; Scobbie 2008, p. 231; It not, the Occupying Power is liable for waste or destruction of property in occupied territory; Chapaux 2007, p. 228. Taking into account the modern interpretation of Article 55, it is stated by one author that ‘If the occupation constitutes a wrongful act, the law on responsibility, as codified in article 31 of the International Law Commission (ILC) articles on state responsibility, establishes an obligation for the responsible state to make full reparation for any material or moral damage caused by the internationally wrongful act.’; See R. Wolfrum 2005, p. 24; Green 2008, p. 289; Malanczuk 2004, p. 152-154; See Chapter 3, §2.7; See Ruys & Verhoeven 2008, for a discussion of the application of the principle of PSNR in a situation of belligerent occupation, p. 155-198.

### **§3. Conclusion**

From the perspective of IHL, the military invasion and occupation of Western Sahara territory by Morocco, can be classified as belligerent occupation. Belligerent occupation cannot however, change the Western Sahara international status of NSGT, nor does it affect the Saharawi people right to self-determination and permanent sovereignty over natural resources. It should be noted in this respect, that Moroccan sovereignty over Western Sahara has never been recognized by the international community, nor has Morocco been recognized by the UN as Administering Power in the meaning of Article 73 UN Charter. Belligerent occupation does however, prevent the *exercise* of self-determination. From the perspective of the law of belligerent occupation, Morocco as Occupying Power has limited authority in respect to exploitation of natural resources of Western Sahara. The authority to exploit natural resources in occupied territories by an Occupying Power is stipulated by Article 55 of the 1907 Hague Regulations. The authority of an Occupying Power is however, limited by necessity, which excludes commercial exploitation of natural resources, such as provided by the 2007 EU-Morocco FPA. This implicates the answer to the question whether the 2007 EU-Morocco FPA conforms rules and principles of international law, where it has been put forward, that this should depend on the manner in which Morocco implements this agreement. Moreover, present-day international law, holds the rule that third States shall not recognize the territorial acquisition which results from the threat or use of force. This rule derives from both the prohibition of the threat or use of force in international relations, and the principle of self-determination of peoples.



## Chapter 6 Concluding Remarks

From the perspective of the Saharawi people subject to the right to external self-determination, confronted with foreign belligerent occupation of the territory of Western Sahara, this much can be concluded. The Saharawi people right to self-determination was established within the legal framework which evolved from UN decolonization practice. Based upon Article 73 UN Charter, UNGA resolution 1514 (XV), UNGA resolution 1541 (XV), and sealed with the sacred trust, this framework has accommodated the legal relationship between Spain, Western Sahara and the UN since 1965. The recognition of the Saharawi people right to self-determination by the UN resulted in a *status apart* of the territory of Western Sahara. The Saharawi people right to freely choose the international status of Western Sahara and UN decolonization practice was affirmed by the ICJ. The 1975 invasion and occupation of Western Sahara by Morocco did not alter the *status apart* of NSGT. This conclusion derives from the rule in customary international law that acquisition of territory by the use or threat of force does not result in legal title to the concerned territory. In other words, according to contemporary international law, the right to external self-determination including the right to permanent sovereignty over natural resources does not cease to exist during belligerent occupation. Any State recognition otherwise possibly results in a breach of the State duty of non-recognition. Sovereignty can no longer be the result of the threat of use of force in international relations. Subsequently, commercial exploitation of natural resources by an Occupying Power cannot be based on sovereignty. Exploitation of natural resources by an Occupying Power is subject to the rules of belligerent occupation based on necessity. In reference to the legal relationship between Morocco and Western Sahara, and the exploitation of natural resources in Western Sahara by Morocco the following can be concluded. The laws of belligerent occupation, especially with reference to Article 55 of the 1907 Hague Regulations, taking into account also its contemporary interpretation, does not provide Morocco with the authority to undertake commercial exploitation of natural resources activities in Western Sahara. This stated, it can be concluded that belligerent occupation prevents the Saharawi people to exercise their right to self-determination and PSNR. In respect to the 2007 EU-Morocco FPA it can be concluded that the agreement has not been concluded in accordance with the Saharawi people right to self-determination and PSNR. In this respect mention should be made especially to the State duty of non-recognition in relation to entering treaties where an Occupying Power represents the occupied territory. Furthermore, to facilitate a *de facto* Occupying Power with the rights of an Administering

Power in the meaning of Article 73 UN Charter, would run contrary to the ratio of Article 73 UN Charter and the subsequent legal regime that brought forth by UNGA resolution 1514 (XV), which was designed to safeguard the political, economic, social and cultural existence of a people during the process towards the exercise of their external right to self-determination, and might invoke the danger of creating new facts on the ground. With this stated, it can be concluded that the 2007 EU-Morocco FPA from the perspective of the Saharawi people right to self-determination, not only infringes the Saharawi people right to self-determination and permanent sovereignty over their natural resources, it could also constitute the recognition of a situation derived from a serious breach of a peremptory norm of general international law, and could therefore be declared void.

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