

A People vs. Corporations?

Self-determination, Natural Resources and Transnational Corporations in Western Sahara

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“Contemporary history has shown us that in the vast area stretching from Berlin to Vladivostock, the so-called “realities”, which more often than not consisted of crime and lawlessness on a massive scale, proved to be less real and less permanent than many assumed. In matters pertaining to military invasion, decolonisation and self-determination, that peculiar brand of realism should be kept at a distance”

Judge Skubiszewski, Separate Opinion, ICJ East Timor case

“Tel est le pays sans nom que les cartographes du temps persistent à désigner sous le nom de “Zone dissidente””.

Michel Vieuchange

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Abstract

Since the mid-1970s, the Western Saharan conflict has defied both resolution and understanding, as an entire people, split between refugee camps in the Algerian desert and the Moroccan occupied territory, has been waiting for the international community to effectively enforce its right to self-determination.

Through a combination of legal and geopolitical perspectives on the issues related to the exploitation of the rich natural resources in the last African territory still to be decolonised, this research paper will argue that transnational corporations (TNCs) can directly affect the welfare and the self-determination of a people, while the means to enforce corporate accountability remain limited and poorly adapted to the current global realities. The recent media campaigns led by NGOs against TNCs active in this area demonstrate the key role of global civil society in the emergence of corporate accountability and in reminding individuals, corporations and governments of their ethical and legal obligations towards indigenous peoples such as the Saharawis.

This paper will first consider the historical and socio-economic context of the conflict and the importance of natural resources in this dispute (chapter I) before addressing the legal dimension of the exploitation of these resources by the occupying power and third parties (II). I will then argue that the decision of Morocco to involve Western oil and gas TNCs in the Western Sahara represents a complicating factor to the conflict and has created a new, corporate playing field for the conflicting parties (III). The last chapter of this analysis will address the current political and legal mechanisms for ensuring the accountability of such TNCs and assess whether campaigns by global civil society actors provide an effective, alternative avenue for corporate accountability (IV).

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Acronyms

AI	Amnesty International
CoE	Council of Europe
EU	European Union
FAR	Moroccan Royal Armed Forces
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organisation
KMG	Kerr-McGee
MINURSO	United Nations Mission for the Referendum in Western Sahara
NGO	Non Governmental Organisation
ONAREP	Office National de Recherches et d'Exploitations Pétrolières
POLISARIO	Popular Front for the Liberation of Seguiet el Hamra and Rio de Oro
POW	Prisoner of War
SADR	Sahrawi Arab Democratic Republic
TNC	Transnational Corporation
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WS	Western Sahara

Map Western Sahara (MINURSO)

Introduction

“The cases of Western Sahara and East Timor are the two most salient failures of de-colonisation. In the case of Western Sahara, the United Nations has allowed itself to be a pawn in the machinations of a minor regional power”,

José Ramos-Horta in his acceptance speech for the Nobel Peace Prize in 1996

The Western Sahara has the sad privilege to belong to the few ongoing “forgotten conflicts”, which have long slipped off the radar screens of the international community. The tragic fate of the 230,000 Saharawi people and the occupation of their territory by Morocco, with the support of its staunch ally France, have gone virtually unchecked since the invasion of the territory in 1975. The UN mission in Western Sahara, the MINURSO, in charge of organising a referendum of self-determination in one of the very last territories placed on the list of those to be de-colonised, has been extending its mandate every 6 months since its inception in 1991 and so far, it has proven unable to make any tangible progress towards implementing its mandate. Instead, the MINURSO and through her, the entire international community, have only witnessed a painful demonstration of the inefficiency of international law in the absence of political (good) will of the members of the UN Security Council. What seemed like a relatively straightforward mission for the UN in the enthusiastic beginnings of the “New World Order” actually turned out to be one of the UN’s most resounding failures: 16 years later and after over half a billion dollars spent¹, the situation on the ground has hardly changed. Morocco continues to control over 80% of the territory and the vast majority of the Saharawi population still lives in refugee camps near the Algerian military outpost of Tindouf. Worse still, the referendum has still no more reality than a desert mirage.

The role of natural resources in this conflict is often overlooked by observers and diplomats, who instead seek the causes of the conflict in oversimplified socio-historic elements or pure opportunism of the Moroccan monarchy. As a result, several “experts” tend to disregard the geo-strategic interest of the territory altogether and go as

¹ The annual cost of MINURSO is of \$41 million for a total staff of 232 including 200 military observers.

far as stating for example that “oil is certainly not a key issue in the resolution of the conflict”². This paper will argue quite the contrary and offer a return to classical imperialist theory. In fact, this conflict may be perceived as being *essentially* about natural resources and their exploitation by Morocco.

While there has been some research done on the exploitation of fisheries and phosphates, little if any is available on the hydrocarbon reserves. This is all the more regrettable since the role of oil appears as most illustrative of the “neo-imperialist” dynamics at play in Western Sahara. In addition, a focus on oil provides a fresh perspective on the broader issue of the exploitation of natural resources of non-autonomous peoples, as the Saharawis have been designated since the mid 1960's.

Notwithstanding the actual amount of oil reserves off and onshore Western Sahara, the oil issue has come to the fore of the conflict since 2000 and has proven to be a significantly complicating factor. The signature of reconnaissance licenses by Rabat in 2001 with key oil players, the French group *Total* and US firm *Kerr-McGee*, and the counter-response by the Saharawi liberation movement, the *Frente Polisario*, consisting in a rival deal with independent *Fusion Oil* have allowed trans-national corporations (TNCs) to enter the Saharawi battlefield with their own rules and logic. This thesis will argue that this proxy "corporate war" has significantly affected the strategies of all actors involved in the conflict, including the NGO solidarity movement as well as the UN.

Evidently, the involvement of TNCs bears direct and significant consequences for the self-determination of the local, indigenous population. Indeed, as I will seek to demonstrate, by exploiting the local natural resources with the backing of the occupying power Morocco and without involving the Saharawi people as required by international law, TNCs not only place themselves in complete illegality, but also contribute to impede the realisation of this people's right to self-determination. This interference of TNCs with the *erga omnes* right to self-determination is not an isolated event and can be placed within the broad context of the ever increasing role of TNCs (and the corporate sector at large) on both global and local realities. Such a trend goes largely unregulated owing to the reluctance or inability of States to adapt international law and mechanisms to this new situation of unregulated corporate power. In spite of the recent development of notions such as corporate legal accountability and codes of conduct,

² De Saint Maurice (2000), p11.

indigenous peoples are still far from holding effective tools to oppose the violation of their rights.

This study will first consider the complex historical and socio-economic context of the Saharawi conflict and discuss the importance of natural resources in this protracted dispute (Part I) before addressing the legal dimension of the exploitation of these resources by the occupying power and third parties (Part II). The recent Moroccan decision to involve oil and gas TNCs in the Western Sahara territory represents a further complicating factor to the conflict owing to their tight relations with their home states and their political and economic clout, and has created a new, corporate, playing field for the conflicting parties (Part III). The last section of this paper will consider the existing political and legal mechanisms for ensuring the accountability of TNCs, such as those involved in Western Sahara. The current limits of corporate accountability will lead us to assess whether media campaigns by NGOs, such as that led by the Norwegian Support Committee for Western Sahara against a Norwegian exploration company involved in the Western Sahara, may provide an effective, alternative avenue for corporate accountability (Part IV).

By combining notions and perspectives from both international law and political science, this paper will seek to demonstrate that the issue of the exploitation of oil reserves in Western Sahara goes well beyond that of a minor and localised question, and in fact, can be approached as the nexus of the notion of the accountability of trans-national corporations and that of the self-determination of a people.

I. An overview of the conflict and the role of natural resources in the conflict

“Le Sahara on ne connaissait pas. Enfin si, un peu, grâce à ce qu’on nous racontait à la télé et à ce qu’on lisait dans les journaux et qui peut, grosso modo, se résumer en une phrase: “De Tanger à Lgouira, le Sahara marocain est marocain, le reste, ta gueule! T’as pas à savoir”...Pourtant, on savait que ça ne s’arrêtait pas à l’image qu’on nous donnait et comme on n’avait rien d’important à faire pendant dix jours on s’est dit que ça valait le coup d’aller voir”.

Yassine Zizi³

The Western Sahara is a vast stretch of 260,000 square kilometres of mostly desert landscape along the Atlantic Ocean and bordered by Morocco, Algeria and Mauritania. Since its inception in the mid-1970s, the conflict over this territory has defied both resolution and understanding. Whereas the invasion of the territory by Morocco in 1975 and the ensuing armed conflict have been to some extent reported and analysed, the reality of the occupation on the ground has been largely undocumented over the past 28 years and has met with ever-decreasing international public interest as the peace talks led by the UN and its Special Envoy, James Baker, repeatedly fail to break the protracted stalemate. Prior to discussing the exploitation of natural resources in the territory, it thus appears crucial to first provide an overview of the key aspects of this complex conflict.

Following a brief review of the main historical events and actors of the Western Saharan conflict (A), the first part of this study will identify and present the three main facets of the occupation - political repression (B), socio-economic control (C) and demographic change (D), which have a direct impact on the ownership and exploitation of the rich natural resources of this territory (E).

A) A historic overview of the conflict

i. Spanish “rule and run”.

³ Page Blanche, TelQuel number 100, 7 November 2003.

During the later stages of the de-colonisation process of the African continent, the territory, which was then named the Spanish Sahara - a Spanish protectorate since 1884, was widely expected to follow the same path as other European colonies on their way to self-determination. In line with a string of international instruments adopted by the UN bodies and in particular by the United Nations General Assembly (UNGA) covering “non self governing territories” under Chapter XI of the UN Charter⁴, as the region had been designated as early as 1963, preparations were reluctantly made by the administrative power, Spain, to organise a referendum on self-determination to decide on the final status of the territory. In 1974, Spain carried out the required census of the local population, which identified some 73,500 Saharawis. However, in the mean time the Moroccan King, Hassan II, claimed sovereignty over the Saharawi territory as part of the “Greater Morocco” nationalist discourse⁵. This claim led UNGA to ask the International Court of Justice (ICJ) for an advisory opinion on the following two questions: whether Western Sahara was at the time of Spanish colonisation a “terra nullis” and, if not, what the legal ties were between this territory and the two neighbouring kingdoms of Morocco and Mauritania? In a landmark decision, the ICJ answered on 16 October 1975 that there was no evidence of “any tie of territorial sovereignty” between Western Sahara and either neighbour even though the World Court could identify “indications of a legal tie of allegiance between the Moroccan sultan and some, although only some, of the tribes in the territory”⁶. The Court also found certain legal ties between Mauritania and Western Sahara, however neither of these ties were considered to be of “such nature as to affect the application of Resolution 1514 (XV) in the de-colonisation of the Western Sahara and in particular of the principle of self-determination”.

Regardless, the Court’s opinion was to fall upon deaf ears. Days later and in complete violation of its international obligations (and moral responsibility) towards the Saharawi people, Spain signed, in the last moments of an agonising Franco⁷, the secret “Madrid Accords” with Morocco and Mauritania, which *de facto* set out the progressive transfer of the control over the territory to its two neighbours, and incidentally ensured

⁴ in particular UNGA resolution 2072-XX 1964 and Resolution 2220-XXI of 1966; A/5514 Annex III.

⁵ The notion of “Greater Morocco” was developed by the Istiqlal party, the leading force behind Morocco’s independence in 1956 and encompassed Western Sahara, Mauritania as well as parts of Algeria and Mali and the Spanish islands of Ceuta and Melilla. According to Ruiz Miguel (2003), this nationalist theory has no historical grounding.

⁶ Cf. KNOP (2002) and CASTELLINO (2000) for legal analyses of the ICJ opinion.

⁷ Franco died on 20/11/75.

the preservation of Spanish commercial interests in fisheries and phosphate exploitation⁸. On 26 February 1976, Spain was to publicly relinquish its responsibility over the territory, transferring it to Morocco and Mauritania.

ii. Moroccan invasion.

As the last Spanish troops left the territory in this tense autumn of 1975, 350,000 Moroccan citizens (accompanied by 10,000 soldiers) crossed into the Western Sahara as part of the so-called “Green March” (La Marche verte) skilfully masterminded by the Moroccan king, Hassan II (namely as a jingoistic means to recoup his authority, which had just been challenged by two failed *coups d’Etat*)⁹. The March was condemned by UNSC and UNGA resolutions¹⁰, but this did not prevent the Moroccan Royal Armed Forces (FAR), and two months later the Mauritanian troops, from invading and taking over most of the territory by the end of January 1976. The Saharawi national liberation movement, the Popular Front for the Liberation of Seguiet el Hamra and Rio de Oro (hereafter the Polisario) created in the last period of Spanish occupation¹¹, engaged in guerrilla warfare against the Moroccan and Mauritanian troops with the active support of Algeria and Libya, and proclaimed the Saharan Arab Democratic Republic on 27 February 1976. Thanks to extensive external military support (most notably from France and the USA), the Moroccan troops rapidly consolidated their control over most of the Saharawi territory and, with napalm and cluster-bombs forced the Polisario and the vast majority of its people out of its territory into the neighbouring Algerian desert, where they settled in tent camps in the area of Tindouf. A military coup in July 1978 overthrew the Mauritanian leadership of Ould Daddah and led to the signature of a peace treaty in Algiers on 3 August 1979 between Mauritania and the Frente Polisario by which Mauritania was to hand over progressively the occupied territory to the SADR. However, a week later, Morocco took over that same territory as a further step towards the realisation of its “Great Morocco” project.

⁸ Technically speaking, the Madrid agreement established the transfer of powers and responsibilities of Spain as the administrative power of the territory to a temporary tripartite administration. Regarding the secret deal and the Spanish benefits cf. MISKE-TALBOT.

⁹ For details on the march see PERRAULT pp 237-249.

¹⁰ S/RES/380 and S/RES/379 called for the immediate withdrawal of the participants in the Green March.

¹¹ The Polisario Front was created on 10 May 1973 to fight for independence from Spanish rule.

iii. Moroccan occupation.

Throughout the 1980s, Morocco consolidated its presence in the occupied territory (around 85% of the Western Sahara¹²) by constructing a series of long defensive walls, the “Berm”, which were heavily mined and fortified with foreign assistance in particular from France, the USA and the UK, and posted along the 2,400 km sand and rock walls 110,000 soldiers, representing no less than 2/3rd of the FAR. The provinces of Seguiet el Hamra and Rio de Oro were integrated within the Moroccan administrative borders and became known as the “Southern Provinces”. And, the population was included in Moroccan elections and referenda, such as the parliamentary municipal elections in September 2002. On the other side of the Moroccan “Great Wall”, the Saharawi population in exile (now estimated by UNHCR at 165,000) has been languishing ever since in the Algerian desert, separated from their family members and homes left in the occupied territory.

iii. UN steps in and stumbles.

Following years of tentative efforts by the United Nations in co-operation with the Organisation of African Unity¹³ to seek a solution to the conflict, both parties finally agreed in 1988 to a settlement plan, which was approved by the UN Security Council on 29 April 1991. This plan established the United Nations Mission for the Referendum in the Western Sahara (MINURSO), which was given the mandate to organise and conduct a referendum, in which “the people of Western Sahara would choose between independence and integration with Morocco”¹⁴, as well as to monitor the cease-fire between the Polisario and the FAR rendered effective in 1991. In view of holding the referendum, the Identification Commission of MINURSO would first identify the persons entitled to participate in the referendum on the basis of the earlier census carried out by Spain in 1974.

However, the identification process proved extremely tedious with Rabat seeking to enlist 130,000 additional voters with the aim of fixing the result of the referendum, and, even though it was finally completed on 30 December 1999, the UN in each successive resolution regrets that “the parties continue to hold divergent views

¹² US State Department (2003).

¹³ SADR was admitted to the organisation in 1984, which led to the withdrawal of Morocco. Currently, 75 countries recognise SADR. These do not include any major Northern country.

¹⁴ UNSC Press Release, SC/8077, 29/04/2004.

regarding the appeals process, the repatriation of refugees and other crucial aspects of the plan”¹⁵. In parallel to the hotly contested identification process, the UN through the Personal Envoy of the UN Secretary General, James Baker, has painstakingly sought to reach a “political solution that provides for self-determination”. His latest initiative, “the Peace Plan for Self-Determination of the People of Western Sahara”¹⁶, submitted in January 2003 and unanimously approved by the UNSC¹⁷, consists in a compromise solution: local elections would be held to establish legislative, executive and judicial bodies of a provisional local self-government for four or five years, following which a referendum would be held on the permanent status of the territory¹⁸. The “detail devil” lies in the fact that the “Western Sahara Authority” would be elected by the voters on the UN voter list of 1999 and those on the UNHCR repatriation list (in the Tindouf camps), while the referendum would include those “residing continuously” in Western Sahara since 30 December 1999, thereby including the numerous Moroccan settlers, which evidently outnumber the “Saharawi people” as defined by the UN¹⁹. The Plan also provides for the release of all detainees and POWs and the demilitarisation of the region. The Polisario initially rejected the Plan before later expressing “a willingness to agree to work towards several options” in July 2003²⁰. In a long-delayed response in April 2004, Morocco stated that the Baker Plan (it had agreed with earlier) “goes against the legitimate interests of the Kingdom” and that it would only agree to a solution for Western Sahara based on “autonomy within the framework of Moroccan sovereignty”. Rabat rejected the possibility of a transitional period and the “possibility for the independence option to be submitted to the said population”, and concluded that it was “out of the question for Morocco to engage in negotiations with anyone over its sovereignty and territorial integrity”²¹. While for a long time, many observers believed that Morocco “did not oppose a referendum, they are just waiting for it to occur only

¹⁵ *ibid.* In his report to the UNSC in April 2004, K. Annan noted that the referendum was never held “because of lack of co-operation over the years, by one or the other party, at different times”.

¹⁶ for details on the different phases of the UN talks refer to RUIZ MIGUEL (2002, 2003). Ruiz Miguel considers that the Plan “will not bring peace, but violence. It does not provide for self-determination; it negates it”.

¹⁷ UNSC Resolution 1495 (2003).

¹⁸ Peace Plan, S/2003/565, Annex II (cf. annex).

¹⁹ For a critical analysis of the Baker Plan see Sahara Analysis, n°23, 10/06/03.

²⁰ Williams and Zunes (2003) provide a sharp analysis of the positions of the various key actors. The authors believe the Polisario “supported the plan precisely because they knew Rabat would oppose it”. The shift consisted in “sound diplomatic strategy to manoeuvre [Morocco] into defying the USA and the rest of the world”.

²¹ Report of the UNSG on the situation concerning Western Sahara, 23/04/04, S/2004/325. The Report contains the reply of the Kingdom of Morocco to Mr. Baker’s proposal.

when they are 99,9% sure the vote will be in their favour”²², in fact the latest official position on the issue establishes that Rabat has now rejected the consultation altogether (if it ever had even considered the possibility) and is only considering autonomy, i.e. official UN legitimisation of the annexation. In his last report, a visibly frustrated UN Secretary General remarked that because of Morocco’s response, the parties should negotiate a solution based on “autonomy within the framework of Moroccan sovereignty”²³, yet noted that the UNSC should also consider the option of terminating MINURSO and returning the issue to UNGA, thereby “[acknowledging] that, after the passage of more than 13 years, the UN was not going to solve the problem of Western Sahara without requiring that one or both of the parties do something that they would not voluntarily agree to do”. However, while “noting the role and responsibilities of the parties”, the UN Security Council simply reaffirmed its support for the Peace Plan as “an optimum political solution on the basis of agreement between the two parties” and extended once more the mandate for MINURSO by 6 months until 31 October 2004²⁴. In the absence of any tangible progress in the political talks, the single positive development to date is the initiation by UNHCR in March 2004 of a programme of exchange of family visits between the camps in Tindouf and the occupied territories.

Much has been said, albeit discreetly, about the reasons for the failure of MINURSO. The work of MINURSO has been strongly criticised by independent observers and UNSC has systematically failed to seriously investigate such criticism²⁵. However, most independent observers agree that the responsibility lies not so much on the UN and MINURSO, whose efficiency - as is commonly known for all UN missions and activities, largely depends on the will of member states, and in particular those of the Security Council, than on Morocco and France who have until now vigorously opposed any progress on the referendum by all sorts of delaying tactics. Human Rights Watch concluded from its fact-finding mission in 1995, “Morocco, which is the stronger of the two parties both militarily and diplomatically, has regularly engaged in conduct that has obstructed and compromised the fairness of the referendum process. In addition, a lack of UN control over the process has seriously jeopardised its fairness”²⁶.

²² Sahara Analysis, n 23, 10/06/2003.

²³ S/2004/325, 23/04/2004.

²⁴ S/RES/1541, 29/04/2004.

²⁵ In part. see the critical analyses of US Ambassador Ruddy and Human Rights Watch (1995).

²⁶ HRW (1995) p 4. HRW elaborates at length on the “obstructionist behaviour” of Moroccan authorities including the intimidation of Saharawi applicants, shameless pressure on MINURSO staff members and policy such as the insistence that all UN flags be removed from UN identification centres or the

Morocco's strong allies on the UNSC have successfully prevented any investigations into its interference with the UN mission and overall behaviour in the territory. Therefore, in spite of UN presence and a score of UN resolutions, the Saharawi people remain as far as ever from realising their right to self-determination and have to bear either the harsh realities of Moroccan occupation or that of the refugee camps in Tindouf as they patiently hope for the UNSC to muster the necessary political will to enforce international law.

B) Repression in the dark: an overview of the human rights situation.

i. In the occupied territories.

Ever since the Green March and the invasion of the territory by the Moroccan army, the occupied part of the Western Sahara has witnessed large scale human rights violations as well as blatant disrespect for international humanitarian law, and this throughout the period. With little avail, the leading international human rights organisations²⁷ have regularly denounced the repression committed by Moroccan authorities and security forces against the Saharawi civilian population. In particular, NGOs have singled out the forced disappearances²⁸ (figures vary between 452 and 1,500), arbitrary, collective and mass arrests, indiscriminate killings of civilians and inhuman and degrading treatment and torture. In their 2002 Mission Report²⁹, *France Libertés* and AFASPA state unequivocally that the civilian population has been the “deliberate target” of the Moroccan army since 1975 and that the Moroccan authorities still carry out arbitrary actions against the civilian population. In addition, they note that owing to a defective judicial system, the rights to a fair trial and to reparation are largely violated and the perpetrators of these crimes continue to enjoy full impunity³⁰. Recently, *Reporters Without Borders* issued a report highlighting the continuation of arbitrary arrest, torture and ill treatment of Saharawi militants and denounced the torturing and sentencing of 14 activists in 2002 to jail terms of six months to two years for

interception of UN supplies. Interestingly, the reports shun from mentioning the behaviour of other States such as France.

²⁷ this section is based on the latest reports on the region by Amnesty International (2003), Reporters Without Borders (2004), Human Rights Watch (1995; 2003) and Fondation France Libertés & AFASPA (2002). The US State Department also provides a synthetic review of the HR situation in WS (2003).

²⁸ on disappearances see Amnesty International (1993).

²⁹ France Libertés & AFASPA (2002), p9.

³⁰ *ibid* p 21-22.

participating in a pro-independence demonstration³¹. Similarly, *Amnesty International* in 2003 denounced the "the imprisonment of several Saharawi human rights and civil society activists for the peaceful expression of their views in favour of an independent Western Sahara" and "the harassment and intimidation of dozens of other Saharawi human rights and civil society activists, particularly those perceived to advocate the independence of Western Sahara"³². Several NGOs and Governments (including the USA) have reported on the existence of secret detention centres in the occupied territories, most notably those of Agdz, Laayoune, Tazmamert and Kal'at M'gouna, where numerous cases of disappearances have occurred in the past. While the Monarchy has recently started to compensate certain victims of torture or disappearances by members of its security forces, the extent of compensation and of investigation into the crimes remains largely unsatisfactory and the Moroccan state persists in refusing to admit its responsibility for "a single case of disappearance in the region"³³. Freedom of movement is also limited in numerous military sensitive areas and Saharawis face difficulties in obtaining Moroccan passports³⁴. While the mandate of MINURSO implicitly contains that of protecting human rights, the UN mission has remarkably failed to act in this field.

ii. In the camps.

The human rights situation in the Saharawi controlled area in the Tindouf camps is difficult to assess owing to the refugee condition of the population, albeit a protracted one. It appears that the Saharawi population faces the typical issues and problems of any refugee camp in terms of socio-economic and human development³⁵ (health problems, unemployment etc.). These are aggravated by the hostile environment of the Algerian desert. However, many observers have noted that thanks to extensive international assistance and to organised Polisario structures (government, education, judiciary etc.) the conditions in the camps remain remarkably decent considering the conditions. Also,

³¹ Reporters Without Borders (2004), p4.

³² Amnesty International (2003).

³³ *ibid.* To date, not one person responsible for ordering or carrying out "disappearances" has been prosecuted. The US State Department notes that "many still view the [compensation and investigation] process as biased, slow and flawed administratively" (2003).

³⁴ US State Department (2003).

³⁵ Cf. S/2003/39 and report of joint assessment mission to the camps by WFP and UNHCR in Jan. 2004. The World Food Programme provides 3000 tonnes of emergency food aid per month for a total annual cost of \$26 million. The average life span of Saharawis is 45-47 years old. HOPE (2004). The European Commission provides, through ECHO, €14 million worth of humanitarian aid per year.

the Polisario Front appears to have established functioning democratic institutions in the camps³⁶. However, one may mention the polemical report by France Libertés on the remaining Moroccan POWs, who allegedly have been and still are victims of forced labour, torture and arbitrary killings³⁷. This report was vigorously denounced as pro-Moroccan propaganda by the pro-Saharawi solidarity movement. In any event, the partial lack of coherence and double-checking of sources and the somewhat excessive tone of the report, confronted to the absence of any similar accusations by other international observers in the past, do indeed raise serious questions as to the value of these allegations³⁸. Notwithstanding the veracity of this report, the presence of the world's longest POWs remains a serious source of concern (and a violation of the 3rd Geneva Convention which states that "all POWs should be released and repatriated without delay following the end of active hostilities") and the leading human rights organisations and international bodies, such as the ICRC, regularly call for their release. The Polisario Front has nonetheless partly headed these concerns and has lately been releasing POWs³⁹.

iii. In Morocco.

An overview of the poor human rights situation in the occupied territories should not be isolated from the overall worrying Moroccan context. Indeed, a review of the various human rights reports indicates that any improvement or deterioration of the rights situation in Western Sahara is intimately linked to that in Morocco and to the political developments in Rabat⁴⁰. Owing to the policy of integrating the occupied territories into the Moroccan judicial, political and economic structures, Saharawis suffer therefore from the same human rights violations and lack of democracy as Moroccan citizens in addition to the specific violations related to the occupation mentioned above. Abdelsam Maghraoui from *Reporters Without Borders* (RWB) notes

³⁶ WILLIAMS & ZUNES (2003). The Polisario is eager to point out the democratic credentials and religious tolerance of the Saharawis. For example, 12 out of 51 Saharawi MPs are women, HOPE (2004).

³⁷ France Libertés (2003). Most of the POWs have been detained for more than 20 years.

³⁸ In my interview with Afifa Karmous, the author staunchly defended her report, while all the other European observers I discussed this issue with, who had also been in the POW camps, flatly rejected these allegations. Amnesty International (2003) p 16 does note that "serious human rights abuses- including torture- were widespread in the Polisario camps particularly during the late 1970s and throughout the 1980s. The report does not mention the extension of such practices into the 1990s.

³⁹ The Frente Polisario released 300 POWs in November 2003 and a further 200 in February and June 2004. Polisario now retains 414 POWs.

⁴⁰ Significantly, all major human rights organisations refer to the HR situation in Western Sahara under the Morocco country heading.

that the country's "steps towards democracy have been tentative and any progress to date can be reversed" and that "ultimate authority continues to rest with the king, the supreme political actor and arbitrator"⁴¹. Among some of the key concerns, Maghraoui identifies: legal discrimination against women and Berbers, child labour, an increase in civil and human rights violations since May 2003, a legal system hampered by corruption and political pressure and "pervasive and systemic corruption". The early years of the new monarch Mohammed VI had witnessed undeniable progress in civil and political liberties and a tangible improvement of the situation in Western Sahara. Regrettably, all reports now converge in noting a worrying counter-trend emerging in the aftermath of the Casablanca bombings in 2003⁴² and the concurrent regain of influence of the least liberal forces in the political and military elite (the "Makhzen") over the King. In 2003, Amnesty International observed a "sharp rise" in the number of reported cases of torture or ill-treatment, which represented a "step backwards in what has otherwise been a positive trend in Morocco / Western Sahara towards improved human rights protection and promotion over the last decade"⁴³. Similarly, France Libertés and AFASPA denounced a recent wave of arrests not only of Saharawi activists such as those members of the Sahara section of the Moroccan Truth and Justice Forum but also that of persons involved in the last legislative elections in the occupied territories⁴⁴.

C) Plundering the neighbour's resources

i. Information blackout.

A study of the economic aspect of the Moroccan occupation of Western Sahara is immediately confronted with a fundamental problem; that of the scarce information and documentation available, not only about economics but also about the whole territory in general. Indeed, the developments in this part of the world have gone largely unaccounted for during the last quarter of a century - which ironically has been heralded as that of ever more ubiquitous and immediate communication and information. This phenomenon can be attributed in part to the relative lack of interest by foreign

⁴¹ For an extensive and thorough review of Morocco's authoritarian realities, cf. RWB (2004) and PERRAULT (1992).

⁴² Five synchronised suicide bombings killed 45 persons on 16 May 2003 and have been attributed to a group related to Al-Qaeda.

⁴³ Amnesty International (2003).

journalists and academics in this largely uninhabited, inhospitable and poorly accessible region, as well as to what can be coined as “conflict fatigue” over a protracted crisis, which has shown little signs of being resolved. Moreover, in a Western media-friendly time perspective. However, needless to say that the lack of information is first and foremost the result of a deliberate policy by the Moroccan authorities to keep a dark veil over its dealings in the occupied territory. As stated by Amnesty International, "the monarchy and the status of Western Sahara are taboo subjects for public discussion"⁴⁵. Any reference to Western Sahara in Moroccan or even foreign media by Moroccan or Saharawi journalists is indeed considered by the authorities as "undermining the stability of the State" or the monarchy or "threatening the integrity of the national territory" and as such liable of heavy sentences for the author⁴⁶. This has led to the imprisonment of several journalists and political activists, including Moroccan journalist Ali Lmrabat who was heavily convicted in June 2003 on all the charges mentioned above for a series of articles, cartoons and a photo-montage published in his French-language weekly *Demain Magazine* and in a Spanish newspaper. These articles included an interview with a former Moroccan political prisoner advocating the right to self-determination for the Saharawis⁴⁷. The expulsion of Norwegian journalists on three occasions since January 2004 from Morocco and the occupied territory for wanting to write on the Western Sahara is yet another sharp reminder of the media blackout ensured by Rabat⁴⁸. Also, international NGO reports are few and far between. *Amnesty International* hardly publishes any reports specifically on Western Sahara since any reference to the territory is included under Morocco country reports or under the Morocco/Western Sahara heading. There is only one report by *Human Rights Watch* available (from October 1995) on the conflict, appropriately entitled “Western Sahara, keeping it secret; the UN operation in the Western Sahara”, and HRW does not appear to raise the issue of Saharawi self-determination in its press statements⁴⁹ and the influential and prolific think-tank *International Crisis Group* is strikingly mute on this conflict. In addition, the Sahara Section of the NGO Forum for Truth and Justice was banned by a court in Laayoune on 18 June 2004 and the rare remaining NGOs in the

⁴⁴ France Libertés & AFASPA, p22.

⁴⁵ AI (2004).

⁴⁶ RWB (2004).

⁴⁷ AI (2004). Ali Lmrabat was the laureate of the 2003 Reporters Without Borders-Fondation de France annual press freedom award.

⁴⁸ Norwegian News Agency (2004). See also www.rsf.org.

area are under tremendous pressure and even physical violence from the ubiquitous Moroccan security forces. As Mahmoud Daddach experienced following his testimony at the UN Human Rights commission, testifying about human rights abuses in Western Sahara may lead to serious consequences for the witness and his or her family. Regrettably, the presence of MINURSO has not been conducive to greater transparency in the occupied territories-HRW notes that MINURSO rules strictly limit “the opportunities for independent outsiders to observe and analyse the identification process”⁵⁰. The New York-based NGO notes that internal pressure from MINURSO in addition to constant surveillance by Moroccan security agents make UN staff members “reluctant, even frightened” to speak to observers such as HRW⁵¹.

In addition to the limited freedom of expression, the predominant role and sheer presence of the military and secret police in the area (estimated figures vary between 110-200,000 soldiers) also largely contribute to the information blackout over the area. The “sacred” nature of the army as enshrined in the Constitution ensures firstly that the army budget (an annual budget of \$2 billion or 12% of total state funds, which are principally directed toward the financing of the occupation) and its activities are not discussed and secondly, that public debate over the army is limited - criticising the military is punishable by up to three years in prison⁵².

ii. Deeply entrenched interests.

The lack of information available is all the more manifest regarding the economic dimension of the occupation. This would tend to corroborate the statement that “economics is the justification itself for the Moroccan presence in Western Sahara. To address the issue of the economic management by Morocco is to address the Moroccans and foreigners responsible for the state of depredation of the natural resources in the Western Sahara”⁵³. Hence, the absolute taboo over the economic realities of the Moroccan occupation. A closer study of the beneficiaries and owners of Western Sahara natural resources rapidly reveals the collusion between the economic and political-military elite in the occupied territory. Whereas according to the saying “trade follows the flag”, it seems that in the case of Western Sahara “trade is the flag”

⁴⁹ see the most recent letter by HRW Director Kenneth Roth to US Secretary of State Colin Powell on the eve of his visit to the region in December 2003 (HRW 2003).

⁵⁰ HRW (1995), p6.

⁵¹ *ibid.*

⁵² RWB (2004), p 10.

i.e. that on a first-come-first-serve principle, the military leadership has from the very beginning of the occupation of the territory ensured its control over the economic activities therein (including human and drug trafficking). *France Libertés* and AFASPA state in their report that “the natural resources of Western Sahara are stolen to the sole benefit of a few persons in senior military or political positions”⁵⁴. The report then provides detailed information on the ownership of the main fisheries companies, which essentially belong to the so-called “Lords of the Sahara”; a group of military Generals, together with senior political leaders such as the current parliamentarian and former President of the Laayoune-Boujdour region, Braïka Zerouali. The King himself allegedly owns a prosperous 13 ha farm in the area. This collusion between economic and political-military interests has even been mentioned in the Moroccan press. The military are also increasingly participating in the economic activities itself with FAR directly involved in the surveillance of the foreign fishing fleets and of oil exploration expeditions offshore Western Sahara⁵⁵.

iii. The “makzhen” governance.

The heavy-handed control by the military elite over the Saharawi resources is characteristic of the type of the “makzhen” governance established by Hassan II and upheld by his son, Mohammed VI. In Moroccan Arabic, “makzhen” means the storehouse, which corresponds to the palace quarters where goods offered to or expropriated by the sultan’s representatives were stored. According to this system, a king’s servant “from the highest to the lowest levels of the state hierarchy is left to operate his sector of the public domain like a personal fiefdom in exchange of loyalty to the monarch”⁵⁶. This loyalty is crucial since the Alaouit regime has always faced a legitimacy issue not only in the Western Sahara but also throughout Morocco⁵⁷. More generally, the “makzhen” refers to the political and economic elite profiteering from such feudal practices. In Western Sahara, the monarchy has simply extended this elaborate strategy of distributing public assets to the armed forces, royal family members and to a local Saharawi elite. It comes thus as no surprise that the rich Western Sahara resources play a key role in the makzhen policy and in particular vis-à-vis the

⁵³ France Libertés & AFASPA (2002), p36 (my translations).

⁵⁴ France Libertés & AFASPA (2002), p 47.

⁵⁵ ECHEVERRIA (2003) p8.

⁵⁶ MAGHRAOUI (2001).

⁵⁷ See PERRAULT (1992).

army. As a consequence, the government has been keen to ensure that allegations of corruption in the military are suppressed while the whistleblowers are “disciplined, prosecuted or arrested”⁵⁸. The vast sums of government money annually spent by Rabat in Western Sahara on civilian and military infrastructure is also a source of lucrative business for the makzhen⁵⁹. Consequently, the occupation of Western Sahara has largely contributed to the corruption of the regime and to an over-dimensioned military with deeply entrenched geostrategic interests.

The Spanish journalist Tomas Barbulo is one of the very rare authors to have written on the Saharawi elite co-opted into the makzhen⁶⁰. He identifies four Saharawi families or tribes- Yumani, Habib El Kentoui, Brahim Hammad and Hassan uld Dirham, which control most of the economic activities of the occupied territory in co-operation with the Moroccan military and members of the royal family. Barbulo describes in details how each of these families have carved up the activities in monopolies (e.g. cementry, gas supplies or transport) and how Rabat carefully fuels rivalry between the four clans in terms of loyalty to the monarchy. Interestingly, Barbulo establishes that such practices and roughly the same Saharawi elite were already observable under Spanish colonial rule, and were simply preserved under the ensuing Moroccan occupation.

D) State-sponsored migration

i. A policy of demographic change.

Another area particularly undocumented is the demographic reality of the occupied territory. A piecemeal analysis reveals that the occupation of the territory has been accompanied by a deliberate and organised policy of demographic change. Following the “Marche verte”, which was a State-sponsored (and not spontaneous as Rabat claims) migration “happening”, Rabat has sought to encourage further settlement of Moroccan citizens in the territory. Such a policy is in direct violation of the 4th Geneva Convention, which prohibits countries from transferring their civilian

⁵⁸ RWB, p12.

⁵⁹HRW (1995) quotes figures that indicate that most of the cost of the invasion and occupation has been covered by Saudia Arabia. The Saudi aid has been estimated at \$1 bln. a year from 1979 to 1981 and \$500 million since then. Civilian expenditures between 1976 and 1989 amount to \$180 mln a year. According to RWB, the total amount of estimated embezzled funds in the public sector had reached \$15 billion in 2002.

⁶⁰ BARBULO (2002), chapter 1.

population into territories seized by military force. Beyond the well-documented, expedient goal of fixing the voter identification process of the MINURSO for the organisation of an ever improbable referendum on self-determination⁶¹, the long-term goals of the state-sponsored migration policy are twofold: legitimising the annexation by sheer demographic change and providing the workforce to exploit the bountiful natural resources of the territory.

ii. From majority to minority status.

In less than thirty years, Rabat appears to have largely succeeded in its first goal: the Saharawi population is now a minority within its own territory- in Laayoune it represents only 30% of the population, in Smara 20% and in Dakhla 10%⁶². Such figures are astounding and tend to reveal the scale of the migration policy, which finds little precedent in recent history besides possibly Chinese state-sponsored Han migration in Xinjiang or Tibet. In what is commonly regarded as a “twin case”, East Timor, the Indonesian junta over the same period of time largely restrained from such policies of demographic change. In the absence of available documents and research, it remains difficult to assess in detail the migration policy led by Rabat in the occupied territory, however one may only point out the considerable incentives offered by Morocco to settle in the territory, such as double pay for civil servants, tax-free salaries, subsidised food (fuel, power, water and commodities such as flour, cooking oil and sugar are subsidised)⁶³. This leads the US State Department to conclude on the existence of a “sizeable Moroccan economic programme [which] subsidises migration and development as part of its efforts to strengthen Moroccan claims to the territory” . In impoverished Morocco, such offers are certainly very attractive to a large part of the population. Moreover, the Green March (and to a lesser extent the ensuing migration policy) was presented by the monarchy as a quasi sacred obligation, with the

⁶¹ HRW (1995) notes that “in 1991, neither MINURSO nor the SC took steps to halt Morocco’s transfer of 40,000 individuals, who it claimed were Saharawis into the territory” (p 7). These individuals were placed in “tent cities”, under 24 hour guard and receives food and other benefits from the Moroccan government. Access is tightly restricted by Moroccan police and secret service agents.

⁶² France Libertés & AFASPA (2002) p36. According to a Moroccan census quoted by HRW (1995), the population of the Western Sahara increased from 74,000 according to the Spanish census of 1974 to 162,000 in 1981. Currently, according to US State Department figures the population amounts to 260,000 State (2003). The Polisario counts 200,000 Moroccan settlers, 200,000 FAR soldiers and 65,000 Saharawis in the occupied territories in FADEL (2002).

⁶³ MISKE-TALBOT states that the salaries are 25 to 75% higher than in Morocco.

“marchers” walking into Western Sahara with the Koran (together with a picture of the King) in their hands (hence the colour of the march).

iii. Migrant workers.

Regarding the second goal, reliable figures attest that the settlers are used principally as labour force to exploit the Saharawi resources and thereby squeezing out the Saharawis from the labour market. As a result, the indigenous population is confronted with dramatic socio-economic difficulties⁶⁴, which only compound the already difficult consequences of the forced sedentarisation of a nomadic population in the occupied territory. For example, while in 1967, 1600 Saharawi workers were employed in the largest industry of the region, the phosphate mine of Bou Craa, today a mere 200 Saharawi workers out of 2000 are employed in that mine and are faced with very severe labour discriminations vis-à-vis their Moroccan (and even Spanish) colleagues⁶⁵.

E) Natural resources in Western Sahara

But what exactly makes this region so attractive to Morocco and worth both mobilising such human, military and financial resources and challenging international legality for a quarter of a century? The region of Western Sahara is indeed far from being the barren desert landscape criss-crossed by lonely nomads and their herds of camels that its name may represent to the distant observer. In fact, Western Sahara possesses some of the richest possessions of natural resources in Africa. As Afifa Karmous notes, “the only information upon which the different observers may agree is that the territory is rich in resources”⁶⁶. While reliable figures are scarce both because of the Moroccan policy of secrecy and the relatively limited exploration done in the region, it is however possible to establish that the territory contains indeed a significant amount of natural resources. Firstly, these include some of the world’s largest reserves in phosphates; in particular in Bou Craa situated 130 km east of Laayoune⁶⁷. In addition, the warm currents along the 1,200 km of coastline of the Western Sahara endow it with

⁶⁴ recently documented by France Libertés & AFASPA (2002), p36.

⁶⁵ *ibid*, pp 38-39.

⁶⁶ KARMOUS (2001).

⁶⁷ for an extensive review of Moroccan and Saharawi phosphates, see RICHE (2003).

one of the richest fisheries zone in the world⁶⁸. Other resources include titanium, iron ore, magnesium, and salt and sand extraction⁶⁹. The actual amount of hydrocarbon reserves is yet unknown due to limited exploration, but the US geological Survey of World Energy of 2000 estimates that the resources off the Saharan coast are “substantial” and that the probability of finding lucrative oil and gas fields is “very high”⁷⁰. According to Dr. Lindsay Parson of the UK’s Southampton Oceanography Centre, there is a considerable potential of frozen methane on and beneath the seafloor off Western Sahara⁷¹. In contrast, the oil reserves of Morocco are considered low and insecure and Rabat imports most of its hydrocarbon consumption⁷². This is a key aspect to bear in mind since the endowment of the Saharawi territory in natural resources is all the more significant in relative terms, in comparison to that of Morocco, thereby fuelling any “natural” tendencies to engage in expansionist policies.

Conclusion: textbook imperialism?

An analysis of the occupation of Western Sahara through the perspectives of demographic policy (“bring the labour force”), the socio-economic control (“distribute the bounty”) and the political repression (“keep it quiet”) reveals the interconnectedness of these three elements. At the heart of the latter lie the natural resources and their exploitation. On a broader analytical level, it appears possible to assert that in fact the occupation of Western Sahara can to a large extent be considered as a classical case of neo-imperialism.

According to the analytical framework developed by Immanuel Wallerstein in his World System Theory, empires can be perceived as "a system of government, which, through commercial monopolies combined with the use of force, directs the flow of economic goods from the periphery to the centre"⁷³. It relies on a strong centralised government, an extensive bureaucracy and a large army. The periphery, according to this model, is an occupied or subservient territory whose main function is to provide cheap raw materials to the core (or semi-periphery) through unequal trade relations and

⁶⁸ for a review of the Saharawi resources in fisheries cf. GORZ (2002) and KARMOUS (2003).

⁶⁹ for details cf. KARMOUS (2001).

⁷⁰ ETAN CD-Rom.

⁷¹ Upstream Online, 29/04/04.

⁷² RICHE (July 2004).

⁷³ Wallerstein (1974). The quotes are from "The development of a world economic system" by Paul Halsall, 1997.

coercive labour practices. The different elements of the establishment of a periphery/core relation are: bureaucratisation, the homogenisation of the population and the "expansion of the militia to support the centralised monarchy and to protect the new state from invasions", the introduction of absolutist rule and the diversification of economic activities to maximise profits and strengthen the position of the local bourgeoisie. When applied to the case of Western Sahara, the Wallerstein model seems strikingly pertinent in addressing the dynamics behind the Moroccan occupation of the territory. Indeed, as mentioned above, there is undeniably a highly centralised Moroccan regime essentially exploiting, through monopolistic control, cheap raw materials (phosphates, fisheries, and hydrocarbons), which are then processed by its industrial sector situated in the core. The control over the territory is guaranteed by a large bureaucracy and a strong military. In addition to Wallerstein's theoretical framework one may point out to the presence of a pervasive nationalist ideology which accompanies the economic dominance. As a conclusion, the Moroccan rule over the Western Sahara can thus be considered as a mere continuation of the imperialist dynamics, which occurred at end of the 19th century-early 20th century on the African continent, but this time by a North-African rather than a European power.

Hence, one is led to ask what is the impact both for the Moroccan regime and for the Saharawi people? Firstly, the Moroccan economy has become increasingly dependant on the supply of these resources, and thus on the preservation of its control over the territory. The most striking illustration of this phenomenon is the fisheries industry. Morocco is the first African producer of fish and ranks the world's largest in the capture and export of sardines. Moreover, the share of the fish industry in the overall Moroccan exports is increasing steadily and the capture of fish has more than doubled over the last 15 years⁷⁴. When confronted to the share of Western Sahara fisheries, it appears that the dramatic increase in the Moroccan fisheries industry is precisely due to an increase in activities off Saharawi shores. Two thirds of the production is brought to the Saharawi ports of Dakhla and Laayoune and this figure should even reach 90% by 2007 with the mass investment in the refurbishing of the Dakhla industrial port with the aim of making it Africa's first port⁷⁵. Significantly, the port of Laayoune ranks first in

⁷⁴ KARMOUS (2003).

⁷⁵ *ibid.*

terms of Moroccan volume of fish production⁷⁶ and has the largest fishing fleet off the Moroccan coast. Such growing core-periphery dependence of the Moroccan economy on Saharawi resources can be observed for other industries, where Rabat is intensifying its investment, such as in the Bou Craa mine.

Secondly, the occupation of Western Sahara has created powerfully entrenched interests in particular among the Moroccan military elite. As stated by Reporters Without Borders, the “pivotal role of the FAR between 1976 and 1991 in securing the Western Sahara, reinforced the military’s power in Morocco”⁷⁷. Consequently, the loss of access over these resources would represent a source of significant political and military tension in addition to the financial and economic impact - the export of Saharawi resources represents a crucial source of foreign currency and employment⁷⁸.

It remains questionable whether the regime in Rabat, which is already in a potentially volatile situation with unemployment figures in Morocco as high as 40% and seething discontent with the failure of the King to deliver on his promises to reform, would survive such a loss. Perez Gonzalez (2002) notes that the Moroccan monarchy is based on two pillars: an almighty monarchy and a nationalist ideology based on expansion. The loss of the Western Sahara would therefore directly threaten the legitimacy of the regime. However, Perez Gonzalez justly remarks that the monarchy has placed itself in a legitimacy trap, where in fact, the maintenance of such foundations is a source of instability itself (i.a. tensions with other African states, waste of resources related to the assimilation policy and territorial protection), which can only play in the hands of Islamic fundamentalists. Regardless of the legitimacy issue, the lack of freedom of expression in Morocco makes it difficult to assess social support for the occupation of Western Sahara. Not surprisingly, Moroccan diplomats do not fail to stress the potential impact of the destabilisation of Morocco for the whole region when discussing the future of the Saharawi territory, and are keen to pose as a bulwark for Western interests, yesterday against Communism, today against radical Islam (which is somewhat ironic in the aftermath of the 11/03/04 Madrid bombings organised principally by Moroccan Islamic terrorists).

⁷⁶ 94% of pelagic captures in 2000 and 40% of the total Moroccan production KARMOUS (28/05/02).

⁷⁷ RWB (2004) p 9.

⁷⁸ 250,000 persons are allegedly employed in the fisheries sector in Western Sahara according to France Libertés & AFASPA (2002) p 47. GORZ (2002) considers that 500,000 persons directly or indirectly live off the fisheries sector in Western Sahara.

For the Saharawis, beyond the loss of sovereignty over the natural resources (to be discussed below), the nature of Moroccan occupation bears severe consequences in terms of cultural identity. Indeed, the deliberate aim of integrating the occupied territories, as well as the forced settlement in refugee camp over an extended period of time, have dramatically affected the traditional nomadic patterns of the Saharawi populations. This has led to the double phenomena of acculturation and assimilation through the forced importation and imposition of Moroccan population and lifestyle.

II. International law and the exploitation of natural resources of non autonomous peoples, and its application to the case of Western Sahara

“Even in apparently hopeless situations, respect for the law is called for”

Judge Skubiszewski, Separate Opinion, ICJ East Timor Case

Having provided an overview of the key elements to the conflict, established the presence of considerable natural resources and assessed the imperialist nature and consequences of Moroccan rule over the territory, one is then naturally led to switch from a geopolitical angle to a more legal one and ask the following questions: in such a case of a disputed territory with high geopolitical value and international involvement, what does international law have to say? How does or can international law apply to the Western Sahara? And, whom do the bountiful natural resources rightfully belong to?

A) The status of Western Sahara, Morocco and Spain

Notwithstanding Moroccan, and to a lesser extent French⁷⁹ diplomatic efforts and Morocco’s integration policy, the quarter of a century-long occupation of Western Sahara has not affected its international status: in theory, the applicable international instruments remain those relative to the non-self governing territories in view of their future self-determination. Since Western Sahara remains on the UN list of non autonomous territories, Spain continues to be the administrative power *de jure* as defined under article 73 of the UN Charter and hence, Morocco should not be regarded legally speaking as anything else but the occupying power. Furthermore, no country has officially recognised the annexation of the territory by Morocco. As such, for the IVth UN Decolonisation Commission, Spain continues to be ultimately responsible for the fate of the territory, which remains to be de-colonised.

However, as of yet, Morocco has not been nominally designated by UNSC or UNGA resolutions as “the occupying power”, as in the case of South Africa in Namibia or Iraq in Kuwait. As a result, the status of the territory has regularly been subject to controversy and deliberate or accidental misnomers. For example, the UN Secretary General Kofi Annan himself referred to Morocco as the “administrative power” in his

⁷⁹ French President Jacques Chirac touring the region in 2001 referred to the territory as “the Southern Provinces”.

annual report to the UNSC on 24 April 2001 and consequently, faced heavy criticism from international legalists and the Polisario.

The designation of the administrative power is of prime importance since it will determine the liability for any activities carried out in the territory and in particular the exploitation of natural resources (as well as for the legal responsibility of Spain for such activities). The law applicable in this matter is based on Article 73 of the UN Charter and a series of documents and practice developed by the UN (especially by the Special Committee and UNGA). Article 73 states that Administrative Powers by their status have “recognised the principle that the interests of the inhabitants of these territories are paramount” and have accepted “as a sacred trust the obligation to promote to the utmost [...] the well-being of the inhabitants of these territories”. However, there had been until a UN Legal Opinion in 2002, no prior ruling by the International Court of Justice (ICJ) on such an issue since both cases brought before the World Court on the question of the exploitation of natural resources by Administrative Powers in NSG territories had not led to a conclusive ruling on the merits of the case. In the case of East Timor (Portugal vs. Australia, 30 June 1995), the Court ruled that it had no jurisdiction over the case in the absence of Indonesia in the proceedings; in the case of Nauru Phosphate Case (Nauru vs. Australia, 12 September 1993), both parties reached a settlement before the Court made its judgement.

B) The 2002 UN Legal opinion on Western Sahara

Whereas on a theoretical level, the application of international law on non self-governing territories seems thus at first glance relatively straight-forward, the signing by Rabat of oil reconnaissance contracts with two TNCs in October 2001 off the Saharawi coast represented in fact a challenge of unprecedented nature to the application of international law to the complex realities of Western Sahara. Indeed, whereas the conflict had been until then fairly circumscribed in terms of actors and hence the UNSC could turn a blind eye on the violations or the non-application of international law, the *potential* consequences of these oil contracts - such as the increased involvement of high-profile foreign companies in the region, drastic environmental consequences, media campaigns by NGOs or the considerable benefits to be accrued in the case of large findings, made the UN’s posture increasingly untenable. Confronted with such a challenge, the UN rapidly reacted through the Under-Secretary

General for Legal Affairs, the Legal Counsel, Hans Correll on 29 January 2002⁸⁰. Responding to a request from the President of the UNSC on behalf of the SC members on “the legality in the context of international law, including relevant resolutions of the Security Council and the General Assembly of the United Nations, and agreements concerning Western Sahara of actions allegedly taken by the Moroccan authorities consisting in the offering and signing of contracts with foreign companies for the exploration of mineral resources in Western Sahara”, the chief UN legal advisor provided his opinion on “the status of the territory of Western Sahara and the status of Morocco in relation to the territory” as well as an analysis of the principles of international law governing mineral resource activities in Non-Self-Governing Territories (hereafter NSG). Owing to its non binding nature, this document does not carry as such legal effect yet represents a crucial, albeit ambiguous development at UN level regarding the situation of Western Sahara and more generally regarding the exploitation of natural resources in non autonomous territories.

In his opinion, Hans Corell first states that the Madrid Agreement and the subsequent notification by Spain to the UNSG of the relinquishing of its responsibilities have no legal founding and that “Spain alone could not have unilaterally transferred” its status of administrative power. As a result, Corell notes that the international status of Western Sahara remains that of NSG territory and that, while “Morocco has administered the territory alone since 1979”, it is not listed as the administering power of the territory in the UN list of NSG territories.

In a second part of his reasoning (§ 9 to 14), the UN Legal Counsel enlists the developments in international law applicable to mineral resource activities in NSG territories. In brief, he notes that Administrative Powers must ensure that all economic activities in NSG territories do not adversely affect the interests of the peoples therein but are directed towards assisting them in the exercise of their right to self-determination (§10); and that any administrative power that deprives the colonial peoples of NSG territories of the exercise of their legitimate rights over their natural resources violates the solemn obligations it has assumed under the UN Charter (§ 11). The Legal Counsel then observes that the doctrine regarding the exploitation of natural resources has evolved and refers in particular to a resolution of 6 December 1995 (50/33) which drew a distinction between economic activities that are detrimental to the people of these territories and those directed to benefit them (paragraph 12). In that

⁸⁰ Legal Opinion (S/2002/161).

same resolution, UNGA stated the “value of foreign economic investment undertaken in collaboration with the peoples of NSG territories and in accordance with their wishes in order to make a valid contribution to the socio-economic development of the territories”. The Legal Counsel notes that such an evolution in the doctrine was confirmed in later resolutions⁸¹. In paragraph 14, Hans Corell refers to the principle of “permanent sovereignty over natural resources”, which was established by UNGA in 1962 and also reaffirmed in subsequent resolutions⁸² as well as in international conventions such as the 1966 ICCPR and ICESCR. This principle, which as the UN Legal Counsel notes “is indisputably part of customary international law” yet “its exact legal scope and implications are still debatable”, consists in the “right of peoples and nations to use and dispose of the natural resources in their territories in the interest of their national development and well-being” (§ 14).

Using the ICJ cases of East Timor and Nauru Phosphates, Corell concludes that mineral resource activities in a NSG territory by an administering power is illegal “only if conducted in disregard of the needs and interests of the people of that territory” (§ 21). The UN Legal Counsel goes as far as noting the existence of an “*opinio juris*” (§ 24): resource exploitation activities in NSG territories are compatible with international law when they are conducted “for the benefit of the peoples of these territories, on their behalf or in consultation with their representatives”. This applies *both* to administering powers and third states

Regarding the specific exploration contacts signed by Rabat, Corell ends his opinion by an ambiguous and rather impractical distinction by assessing that these contracts “do not entail exploitation or the physical removal of the mineral resources, and no benefits have as of yet accrued” and hence that “the specific contracts are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of WS, they would be in violation of the international law principles applicable to mineral resource activities in NSG territories” (§25).

⁸¹ UNGA resolutions 52/72 of 10/12/97; 53/61 of 03/12/98; 54/84 of 05/12/99; 55/38 of 08/12/00; 56/66 of 10/12/01.

⁸² e.g. Resolution 3201 (S VI) of 01/05/74 containing the “Declaration on the establishment of a new international economic order”; Resolution 3281 (XXIX) containing the Charter of Economic Rights and Duties of States.

C) The UN opinion and the limits of international law

Overall, the contribution of the UN legal opinion to the international doctrine regarding resource exploitation in NSG territories can hardly be perceived as positive. As a constructive contribution to the international doctrine it reaffirms the principle of permanent sovereignty of the peoples in these territories over the natural resources (already qualified as *erga omnes* by the ICJ in the Timor case⁸³) and does not distinguish between administrative powers and third states in the application of this principle. The introduction by Corell of third states along side the administrative power may represent an attempt by the Legal Counsel to bypass the legal impasse due to the lack of political resolve at UNSC level. Also, Corell refers not only to mineral resources but also to “economic activities in NSG territories in general and mineral resource exploitation in particular”⁸⁴, thereby confirming that the international doctrine applies to all types of natural resources.

On a more negative note however, the nuance introduced between the initial phase of exploitation (seismic reconnaissance) and “further exploration” (supposedly exploratory drilling) and exploitation is highly dubious. It seems more the result of a carefully balanced political compromise over the specific contracts than of a sound legal reasoning with general application - such a distinction is absent from any international document on this matter. Moreover, such distinction is not accepted by most States such as Norway. Referring to the UN legal opinion, the Norwegian Deputy Foreign Minister Helgesen rejected in February 2003 the question whether there was a juridical limit between purely exploratory activities on the one side and exploitation on the other and unambiguously stated that “according to the Norwegian viewpoint, one cannot distinguish between exploration and exploitation of petroleum resources in relation to a question of sovereignty of this type”. As a further support to his argument, he noted that such a distinction is “neither done in the UN Convention on the Law of the Sea”. Lastly, the Legal Opinion fails to broach the topic of corporate, i.e. non State, responsibility and obligations vis-à-vis mineral resource exploitation, even though this issue led to the referral to the Legal Counsel in the first place. This reflects the persistence of State-

⁸³ the ICJ ruled that the principle of self-determination had an *erga omnes* character, ie a right that can be asserted against any power (ICJ Press Release, 3 July 1995).

⁸⁴ Legal Opinion, paragraph 25.

centred legal perspective and the limits of international law in this area (to be discussed below in Part III).

As regards the specific case of Western Sahara, the Legal Opinion remains largely unsatisfactory. This is essentially because Corell shuns from taking a clear position on the specific legal status of Morocco with regards the Western Sahara. One may only deduct from the Legal opinion that the only possible status of Morocco in relation to the territory is of an occupying power, and that Corell considers Spain still legally responsible for the fate and well-being of its former colony. It appears as if Corell were challenging the UNSC to take up its political responsibility and to qualify nominally the status of Morocco. In the absence of such a qualification, Morocco remains thus in a legal void and lawyers such as Corell are at pains to apply international law. This leads to the remarkable situation that Corell does not appear to consider it illegal as such for a country to sign contracts regarding a territory over which it has no recognised sovereignty and that the only critical issue is the respect of the “will and interest” of the indigenous population. Pushing the argument to its limits, this would then imply that Canada, Laos or any other country in the world can legally sign contracts with foreign corporations for activities in Western Sahara as long as they involve the Saharawis or as long as these do not involve “further exploration”...Corell equally neglects the financial aspect of the reconnaissance licenses (which are common to any hydrocarbon exploration deal around the globe) and hence the crucial fact that ONAREP (ie Morocco) benefits financially from such deals independently of the nature of the exploratory activities.

In addition, there is an absurd “catch 22” situation whereby Saharawi individuals or NGOs seeking for redress for the violation of their rights related to the principle of permanent sovereignty (such as the right to property) have the choice between either using local Moroccan jurisdiction but thereby recognising Moroccan sovereignty (and with unlikely success in court) or going through Spanish courts but facing the evident risk of the latter rejecting the case for lack of jurisdiction...

Hence, one is led to believe that the elaborate doctrine on NSG territories remains primarily a theoretical construction with mere academic and bureaucratic value. This is all the more regrettable owing to the very limited number of NSG territories left. This opinion represents therefore a sharp illustration of the limits of the application of international law in the legal void of Western Sahara.

D) Breaking the deadlock: the legal options available

i. Decomposing the notion of permanent sovereignty

In the critical absence of the legal qualification of the status of Morocco in relation to the territory, is then international law entirely toothless? Beyond this verdict of a legal impasse, one may in fact identify a series of alternative legal options at the disposal of the people of the Western Sahara to ensure that their inalienable rights inscribed in international law over the natural resources in the territory are respected. These options stem from the decomposing of the concept of permanent sovereignty over natural resources into five sub-principles as identified by Afifa Karmous⁸⁵: (1) the non autonomous territory and its natural resources may not be alienated to the benefit of the occupying power⁸⁶; (2) abusive exploitation or plundering of natural resources which are the propriety of non autonomous peoples is contrary to international law; (3) the administrative power must ensure the well-being of the non autonomous peoples and their rights over their natural resources⁸⁷; (4) the State has the obligation to sanction its citizens and legal persons of its nationality which act in contradiction with the interests of non-autonomous peoples⁸⁸; (5) foreign economic investments must be realised in collaboration with the non autonomous persons and according to their interests.

These five principles provide a rough framework to approach the issue of exploitation of natural resources, from which I have identified a series of (legal) options applicable to the Western Sahara, which are not directly dependent on a prior qualification of the status of Morocco. Moreover, not all the legal options depend on the UNSC reaching a consensus and some correspond merely to the application of existing international or even domestic law and obligations.

ii. To qualify Morocco as the occupying power.

The non-autonomous territory and its natural resources may not be alienated to the benefit of the occupying power

⁸⁵ KARMOUS (2001) (my translation).

⁸⁶ Resolution 2625 of 24/10/70 on the Declaration of Principles of International Law Concerning Friendly Relations between States: “the territory of a state shall not be subject to acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from threat or use of force shall be recognised”.

⁸⁷ Resolution A/54/L.50 October 1999.

⁸⁸ Resolution 2621 XXV 12/10/70.

In application of this principle, the UNSC could qualify Morocco as the occupying power and thus apply the *Declaration of amicable relations between states* and confront the economic activities of Morocco in the light of this key international document. Any Moroccan activity would be declared illegal and Saharawis could seek compensation. This would be in line with a precedent when the UNSC declared the continued presence of South Africa in Namibia as illegal and that consequently all acts taken by the South African government were illegal and invalid⁸⁹. Subsequently, the UN Council for Namibia issued a Decree (Decree n°1 for the protection of the natural resources of Namibia) in 1974 declaring the exploitation of uranium and other natural resources in the country by South Africa and several Western multinational corporations as illegal. This decree was supported by the UNGA in resolutions 36/51 of 24/11/81 and 39/42 of 05/12/84. This precedent is mentioned by Hans Corell in his Legal Opinion (as a hint?). In addition, this qualification would induce immediate and complete application of international humanitarian law with essential benchmarks to assess Moroccan (and Polisario) actions due to the fact that Geneva Conventions directly apply in the cases of armed conflict and military occupation (until now Rabat negates the existence of a conflict itself and hence the applicability of IHL).

iii. To confront Spain with its legal obligations.

The administrative power must ensure the well-being of non-autonomous peoples and their rights over their natural resources

This principle clearly stresses the responsibility of Spain, as the administrative power, with regards the activities carried out in the Western Sahara. As seen above, Spain remains legally speaking responsible for the well-being of the local inhabitants and to ensure that their rights over the natural resources are respected, such as the right to property, right to human development, right to participate, right to information and of course right to self-determination (which are inscribed in UDHR, ECHR and other Conventions which Spain is party to). The ensuing obligations are twofold: firstly, Madrid has a legal obligation to ensure that the Spanish government and the numerous companies based in its territory which are directly involved in the exploitation of natural resources in Western Sahara (for example, Spain owns shares in the Bou Craa phosphates mine) respect international obligations stemming from article 73 of the UN

⁸⁹ UNSC Resolution 276 1979

Charter as well as from other international treaties, including ILO conventions. Secondly, Spain has an obligation to ensure that other countries and companies respect the interests of the Saharawi people. Were Spain to observe a violation of the rights of the latter, it is under the obligation to take diplomatic or legal action, for instance in front of the ICJ as in the case of East Timor, when Portugal, nominally the administrative power challenged Australia for activities in the NSG territory of East Timor. Similarly, any country could take up a case at the ICJ or other UN or regional instances against Spain if it considers that the administrative power has failed to respect its obligations under the UN Charter and article 73 in Western Sahara. Such a legal step would be in mere compliance with membership obligations under the UN Charter and with UNSC resolutions and other UN decisions regarding Western Sahara self-determination process and the principle of permanent sovereignty over natural resources.

iv. To change the administrative power

Under the same principle, the UNSC could consider that the current administrative power, Spain, has failed to comply with its legal obligations under the UN Charter and could appoint another administrative power for the territory. For example, Morocco could nominally be appointed as the “administrative power”, which *de facto* it already is according to the UN Secretary General and even to Hans Corell. This would end the legal vacuum regarding the economic activities of Morocco in the territory and provide a benchmark to assess the activities by the Moroccan government and private companies with regard natural resources. Evidently, giving Morocco *de jure* power over the territory provides it with legitimacy when dealing with TNCs such as *Total*. However, it would also imply an official recognition by Rabat of the separate political, legal (and to some extent, cultural) nature of this territory and would impose a series of stringent obligations upon Morocco as the administrative power under article 73 (such as regular reporting to the UN, educational policies etc.).

Another possibility would be to modify the mandate of MINURSO to include the management of Saharawi natural resources or more radically, to appoint MINURSO as the administrative power under the model of the UN Transitional Administration in East Timor (UNTAET). Even though UNTAET established in October 1999 had a *sui generis* status and was not *stricto sensu* the administrative power, the UN body ensured

the continuation of the Gap Treaty⁹⁰ and negotiated a new arrangement, the Timor Sea Arrangement, on the behalf of East Timor in consultation with and participation of local representatives. This case demonstrates the flexibility of the international community (and the UN) in the presence of political will of the UNSC and that any agreements signed by Morocco regarding natural resource exploitation (such as those with the European Commission or the Free Trade Agreement with the USA or the oil reconnaissance licences) could be taken up (and possibly revised) by MINURSO or a new UN body in Western Sahara.

v. To apply the principles of horizontal application and extra-territoriality

The State has the obligation to sanction its citizens and legal persons of its nationality, which act in contradiction with the interests of non-autonomous peoples

Under the principles of horizontal application and of extra-territoriality of international human rights law, any State, whose citizens and legal persons (private companies) of its nationality are involved in economic activities in the Western Sahara, is under the obligation to ensure that such activities respect international human rights law and principles listed above. For example, France has the obligation to ensure that any French citizen or company in Western Sahara (such as Total) acts in conformity with international law. The ongoing case by a French court against Total accused of grave human rights violations in Myanmar (allegations of forced labour) or that against UNOCAL in front of a Los Angeles court are illustrations of the (nascent) extra-territorial application of domestic law to corporate activities⁹¹.

vi. To define the “interests and wishes” of the Saharawi people.

Foreign economic investment must be realised in collaboration with the non autonomous peoples and according to their interests and abusive exploitation or plundering of natural resources which are the propriety of non autonomous peoples is contrary to international law

⁹⁰ A treaty signed between the occupying power, Indonesia, and Australia granting the latter concessions for the exploration and exploitation of oil. Portugal was at the time the de jure administrative power.

⁹¹ Caveat: these two cases concern grave violations of human rights. It seems difficult to prove similar violations in Western Sahara by foreign companies. However, ILO conventions on labour discrimination could certainly apply as in the case of Bou Craa. For details see below Part III.

As seen above in the Legal opinion, the notion of “interests and wishes” of the non-autonomous peoples lies at the heart of the principle of permanent sovereignty over natural resources. This notion applies to all States, the administrative power as well as third states. In the case of Western Sahara, Morocco - as a third state, is also obliged to respect the “interests and wishes” of the Saharawis. The definition of this notion, set as a litmus test, is therefore of the utmost importance. The UN Legal Counsel observes three possibilities to ensure that exploitation of natural resources is in conformity with international law: the activities must be “conducted for the benefit of the peoples of these territories, on their behalf or in consultation with their representatives”.

“*For the benefit of the people*”: This notion is obviously difficult to define. Nonetheless, in the light of Article 73 of the UN Charter, one may note that this notion strictly constricts the economic activities to those that assist the *people*⁹² of Western Sahara towards self-determination. In addition, these activities should fully abide by the principle of sustainable development, which Picoletti and Taillant (2002) define as comprising both social and ecological sustainability, i.e. the impact on environmental conditions and on the quality of life of humans.

Applied to the occupied territory, the social sustainability of the economic activities is highly questionable: (a) these activities are largely if not totally disconnected from local needs – the Saharawi consumption of fish is very limited, mainly for cultural reasons - the average consumption of fish is around 7,5 kg per inhabitant which is considerably lower than neighbouring countries and reveals that the vast majority of the production (2/3rd) is destined for export⁹³. (b) the activities are not integrated within a local economic system - most fisheries transformation industries are situated in Moroccan territory⁹⁴. (c) the lucrative and intensive natural resource activities in the territory are largely controlled by Moroccan interests. (d) the Saharawis are mostly excluded from the extraction and exploitation industry (e.g. Bou Craa mine⁹⁵) and replaced by imported Moroccan labour force. (e) it appears difficult to argue with good faith that the Saharawi people benefit from the spill-over benefits of the Moroccan-led industrialisation process – there is no university in the territory, limited

⁹² It is important to note that the Legal Counsel and all previous UN resolutions refer to the “people” of Western Sahara and not the “population” of the territory, i.e. the legality check must be realised according to the respect of the interests of the Saharawis and not those of the imported Moroccan population.

⁹³ GORZ (2002). According to Afifa Karmous (28/10/02), the local consumption of fisheries production represents a mere 9% of the total capture (p46).

⁹⁴ KARMOUS (2003) p 4.

investment made in medical and social infrastructures and unemployment remains dramatically high (2/3 of the population is unemployed). The near-daily attempts of emigrants to cross by "pateras" (small boats) the Saharawi waters and to enter illegally into Spanish territory in the Canary Islands represent a clear rebuff to any claims by Morocco to the effectiveness of its alleged development policies in the area.

In addition, the exploitation of natural resources can hardly be qualified as environmentally sustainable. There is ample information attesting to the extensive nature of the resource exploitation, which has led to the dramatic depletion of the resources of the territory. The Moroccan National Institute for Fisheries itself concluded in 1999 on the over-exploitation of the sardines stock offshore Western Sahara⁹⁶ and a temporary moratorium on squid was imposed and extended until April 2004. External experts also consider that the stocks of pelagic fishes are reaching a level of non-return⁹⁷. In the light of the information on the current state of the Saharawi fisheries reserves, any current fisheries co-operation agreement, such as the one recently signed between Morocco and the Russian Federation⁹⁸ or with the Dutch-based Pelagic Freezer-trawler Association (PFA)⁹⁹, can hardly be considered in the "interests and wishes" of the people of the territory.

"On their behalf": only the administrative power, i.e. Spain, has the capacity according to article 73 to act on the behalf of the people of Western Sahara.

"In consultation": The "twin case" of East Timor may provide practical indications for the latter option in Western Sahara. In the case of Timor, a representative of FRETELIN was fully associated in the negotiations between UNTAET and Australia. Therefore any foreign economic investment or economic activity in the territory should involve a member of the Frente Polisario, widely recognised as the legitimate national liberation movement of the Saharawis¹⁰⁰. The local elections in the occupied territory are widely acknowledged as rigged and therefore the local officials can hardly be considered as representatives of the Saharawi people (moreover since the majority of the people lives out of the territory itself). It appears that Morocco has not involved the Polisario or

⁹⁵ For the violation of labour rights of Saharawi workers at the Bou Craa phosphate mine and Spanish responsibility (Spain detains 35% of the shares of the mining company). See KARMOUS.

⁹⁶ GORZ (2002). Ironically, Morocco used this argument to end the fisheries agreement with the EC in 1999 yet has since heavily increased the fishing activities in the same waters.

⁹⁷ In particular see RICHE (2004).

⁹⁸ On the agreement see SMITH (2002).

⁹⁹ on PFA cf. MOLENAAR (2002).

¹⁰⁰ UNGA Resolution 35/19 of 11 November 1980 recognised the Frente Polisario as the legitimate representative of the Saharawi people.

Saharawi representatives in the negotiations of the 2001 oil exploration contracts or more generally in any economic activity in the occupied territory. Therefore, these are in clear violation of international principles, which are of an *opinio juris* nature according to Corell and as such, binding on all States.

Conclusion: the permanent tension between law and politics

In spite of its limitations, international law and principles regarding resource exploitation in non autonomous territories such as the Western Sahara can nonetheless provide a (provisional) framework and litmus test to assess the ongoing economic activities in the territory of concern as well as various legal options to ensure that the “wishes and interests” of the local population are respected. To a large extent, it appears that the exploitation of natural resources, in particular fisheries, phosphates and now oil, by Moroccan and foreign companies fails to comply with these principles. And, as demonstrated above, while the failure of the UNSC to qualify nominally the status of Morocco with regards the Western Sahara territory does represent a fundamental legal hurdle, it does not prevent individual States from taking the required legal steps at domestic, regional and international levels to ensure that such activities do not violate international law and the rights of the Saharawi people. However, needless to say that no State has of yet used these legal options or expressed its intention to do so.

As observed by Carlos Ruiz Miguel, “one of the most striking singularities of the Western Sahara conflict is the permanent tension between law and politics”. He notes the contrast between binding decisions of international law which would “solve immediately and in a simple manner the conflict if they were to be implemented” and numerous political manoeuvring which seek to counter the efficiency of legal rules”¹⁰¹. This is in fact first and foremost because international law (i.e. its drafters: the governments), continues to consider States, and not peoples or private companies as its prevailing actors and objects (even when concerning non autonomous peoples). The case of Western Sahara is yet another vivid illustration of the fact that, in the absence of political will by the States to apply a roundly developed doctrine of international law, the exploitation of natural resources in this territory goes virtually unchecked. This is all the more problematic when foreign, trans-national companies are involved. For example, when challenged by NGOs on the activities of French company Total and Houston-based Kerr-McGee in Western Sahara, the French and US governments

answered that they were not responsible for such activities since the companies were privately owned. Such statements disclose a further dimension to the legal void the Western Sahara is in since 1975: the corporate dimension.

¹⁰¹ RUIZ MIGUEL (13/10/2003). (my translation).

III. Oil TNCs and the "corporate dimension" of the Western Saharan conflict

“Unfortunately, the world’s oil and gas reserves are not necessarily located in democracies, as a glance at a map shows”.

Total web site.

"In the New World Order of the Bush family, the Western Saharans have little future. That is because the lifeblood of what it means to be a Bush –oil- has been discovered off the coast of Western Sahara"

Wayne Madsen¹⁰²

For obvious reasons, the richness of Saharawi natural resources has kindled the interest of numerous transnational corporations¹⁰³ in the past and several of these have been involved at one stage or another in the exploration or/and exploitation of these resources with the active (and indispensable) support of the occupying power, Morocco. In the specific oil and gas sector, there have been frequent attempts in the past by foreign companies to explore Saharawi reserves. However, all of these were rapidly abandoned due to the political risks deemed too high at the time as compared to the expected economic benefits. However, the interest was to be re-awaken in the early 00s when the Moroccan state-owned company, ONAREP¹⁰⁴ announced the signature of two reconnaissance licenses with two leading players of the hydrocarbon industry, *Total* and *Kerr-McGee*. Beyond the potential economic consequences of such an act, the signing of the reconnaissance contracts was in fact to announce further geopolitical and legal complications of the conflict. Indeed, this chapter will argue that the reconnaissance licences announced a new stage in the involvement of TNCs as “pacific” weapons at the service of Moroccan foreign policy goals and the corresponding decision by the Polisario to counteract by searching for its own “corporate allies” to adapt its national liberation strategy affected by the Moroccan move. Such a shift in the conflict led thus

¹⁰² Wayne Madsen (2003).

¹⁰³ By transnational corporations (TNCs), I refer to the definition by the UN Sub-Commission for the Promotion and Protection of HR (2003, paragraph 20): “an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries- whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively”.

¹⁰⁴ The website states that the Office National de Recherches et d'Exploitations Pétrolières "ONAREP", is “a public organisation under the administrative supervision of the Ministry of Energy and Mines, with a mandate of coordinating and being responsible for managing all activities related to the exploration and production of hydrocarbons in Morocco”. For more information cf. www.onhym.com.

to a realignment of strategies and the re-positioning of all actors involved, including the UN and the NGO Saharawi solidarity movement, which had to integrate this new “corporate dimension” to the conflict.

This chapter will therefore first consider the oil TNCs involved in Western Sahara and discuss the impact of this corporate involvement on the parties in conflict and on the conflict itself, before considering how it affects the notion of self-determination of the Saharawi people.

A) Total and Kerr-McGee: corporations versus self-determination?

i. Past sporadic interest.

Over the second half of the past century, oil and gas companies have shown sporadic interest in the Western Sahara territory, which has fed many rumours about the existing hydrocarbon reserves. However, the protracted territorial dispute and the related legal uncertainties of investing in the area, added to the technological difficulties in extracting the Saharawi reserves and the presence of large and more accessible gas deposits in neighbouring countries such as Algeria, diverted the attention of a traditionally risk-averse sector away from the territory. Among the companies which took an interest in the potential hydrocarbon reserves were Gulf Oil, WB Grace, Texaco and Standard Oil, who considered establishing a joint venture with the Spanish colonial authorities as early as the 60s. Also, in the second half of the 1960’s, US companies Pan American Hispano Oil, Caltex, Gulf Oil and Philips undertook an initial exploration of onshore WS desert resources, which revealed some oil strata (the results were kept secret). Some significant gas deposits were found south of the town of Smara in the late 60’s by two US companies. Later, in 1978 offshore blocks were awarded by Morocco to Philips Oil and BP, but were abandoned due to the concurrent war between the Polisario and the Royal Moroccan forces. Finally, the abandonment of an oil project by Shell in 1981 was to announce a pause of nearly two decades in foreign interest in the Saharawi hydrocarbons¹⁰⁵.

ii. Big business steps in.

¹⁰⁵ For more information cf. ETAN CD-Rom, RICHE (July 2004) and SMITH (2002).

However, this situation was to change in October 2001, when the Moroccan government, through ONAREP, issued exclusive reconnaissance licenses to US based *Kerr-McGee* and French company *Total* (at the time TotalFinaElf) to evaluate the potential for hydrocarbons in the Saharawi offshore areas of respectively Boujdour and Dakhla. These 1-year, extensible licenses contained provisions for the collection and analysis of seismic data with a view of making preliminary evaluations of the geology of the area¹⁰⁶. At the end of the reconnaissance permit, the two companies have the option to convert the license into a petroleum agreement for oil exploration and exploitation activities in co-operation with ONAREP.

Moroccan Energy and Mines Minister Boutaleb stated unequivocally that exploitation of oil in Western Sahara is "not a problem. It's simply our country and His Majesty the King is committed to developing Morocco, so there is no question or illegal aspects to exploration and development there"¹⁰⁷.

Allegedly, the Moroccan decision to award licenses "caught the industry by surprise" according to the Managing Director of *Fusion Oil*, a competing oil exploration firm. Stein noted, "I genuinely believed there was an understanding that this was an area off limits, it was a disputed zone" and denounced the deal as "provocative" and "designed to intimidate"¹⁰⁸. On the Polisario side, Australian SADR representative Kemal Fadel also expressed his surprise by the awarding of licenses since "this territory is still on the UN list as a non-self governing territory, it is a de-colonisation issue and the UN mission is present in the territory"¹⁰⁹. He noted that his government was not against companies investing in WS but "it has to be done with the people who have a right to deal in the territory, with Saharawis themselves not with Morocco". The SADR sent letters of protest to Total and Kerr McGee but these were ignored by the companies.

One may though somewhat question the actual surprise of the industry and the Polisario. Earlier media reports had hinted at growing impatience by various actors to have a grab at the "forbidden" oil reserves. In 1997, satellite images of Mauritania had revealed large offshore oil deposits and had spurred hopes of similar findings in the

¹⁰⁶ the two areas are roughly of the same size- 27 million acres; 350 miles along the coast and 200 miles offshore and cover the whole offshore Saharawi area.

¹⁰⁷ Upstream Online, 29 April 2004.

¹⁰⁸ PESA April/May 2003.

¹⁰⁹ PESA April/May 2003.

neighbouring Saharawi basin. Polisario had in 2000 warned that with the findings in the region (Gabon and Mauritania), it would not remain a passive spectator and would "pay greater attention to its natural resource base in its national liberation struggle". Polisario representative at the UN Ahmed Boukharie noted in 2000 that "with Morocco and Mauritania moving into deep-water exploration, [he could not] imagine that the Western Sahara, sandwiched between two oil countries, will be an exception to the general rule"¹¹⁰. And, indeed Rabat had clearly indicated its intention to develop its oil potential, which was likely to involve the reserves of Western Sahara. Prior to the 2001 contracts, ONAREP had allegedly signed a deal for an offshore feasibility study by Australian "Roc Oil" in 1998 and a joint venture had been established by Shell and a Russian company Evikhom in 1996 for unspecified hydrocarbon activities in Western Sahara¹¹¹.

iii. Background of KMG and Total

Prior to analysing the impact of the licenses on the conflict, it appears necessary to have a brief look at the two companies involved, Total and Kerr-McGee.

Kerr-McGee. Based in Oklahoma City and founded in 1929, Kerr-McGee (hereafter KMG) is one of the leading global oil and gas companies. While the company was initially involved in the nuclear industry¹¹², most of its current activities are now in the hydrocarbon industry, principally in the USA and the Gulf of Mexico. Interestingly, it is a familiar face to international legal disputes and illegal exploitation as attests its contested involvement in the Timor Gap. Responding to criticism of the 2001 contract with Rabat, KMG Director of Corporate Communications stated that the "UN Under-Secretary for Legal Affairs confirmed that [the company] had acted lawfully in contracting with Morocco. Neither the United States of America nor the UN recognise any other administrative authority or government in that territory". "Kerr-McGee continues to support the ongoing efforts of the UN to find a permanent and amicable solution to the WS issue. We hope to be able to make a contribution to the development of this area and its people. It would be inappropriate to speculate about what the future

¹¹⁰ Upstream Online, 11.08.2000.

¹¹¹ de Saint Maurice, p 64.

¹¹² Which led to the infamous killing of an employee, Karen Silkwood, in 1974 as she was about to reveal to the US media the radioactive pollution caused by the company's power plant in Oklahoma City. This

may hold in this area”, he continued¹¹³. Irrespective of KMG’s subtle discourse and questionable legal reading of the UN Opinion, it continues to refer to the area as Morocco on its web site¹¹⁴.

Total. The Paris-based group *Total* is the fourth largest oil and gas integrated company in the world with 110,000 employees spread over 130 countries¹¹⁵. It is also the largest French company with a history of close relationship with the French government and diplomacy, as attested for example by the NGO *Global Witness*, on the intricate ties between Total and the French political establishment, including French President Jacques Chirac, in the "Angolagate" scandal¹¹⁶. Similarly to the Kerr-McGee position, Total spokesperson Patricia Marie referred to the UN legal opinion to defend the legality of its activities, stating that the UN Counsel considers the contract signed between Total and ONAREP as “not illegal under prevailing practice of States or international law”. Having noted that Morocco and Polisario representatives accepted publicly the UN legal statement, “Total’s operations are therefore in full agreement with the international law and the positions of the political stakeholders of the area. It is clear that in case of discovery, the situation would have to be re-examined in close connection with the UN”¹¹⁷.

iv. In the legal limbo, the exploration continues.

As seen above, the ensuing dispute over the legality of these reconnaissance contracts led the Security Council to ask an opinion of the UN Legal Counsel, which in fact failed to produce a conclusive statement that would effectively end the dispute regarding the legal nature of such contracts. The failure of UNSC to take any subsequent action on the basis of this ambiguous opinion (cf. chapter II) allowed a third key player in the global oil and gas industry, the Norwegian exploration company, **TGS Nopec**, to subsequently enter the oil fray, following a successful bid to a tender launched by Total and KerrMcGee to perform the physical collection of the seismic data in the offshore area of Boujdour and Dakhla. TGS Nopec started its survey in May 2002

incident received widespread publicity following its adaptation into a movie, *Silkwood*, with Meryl Streep.

¹¹³ PESA April/May 2003.

¹¹⁴ Kerr-McGee website, <http://www.kerr-mcgee.com>

¹¹⁵ Total website: <http://www.total.com>

¹¹⁶ <http://www.globalwitness.org> See also <http://www.collectif-tfe.cedetim.org> for more independent information on Total.

¹¹⁷ PESA 2003. During my interview in July 2004, Patricia Marie confirmed Total’s unchanged position on the issue.

and completed it in January 2003 and handed over all the data collected to ONAREP and the two foreign companies in March 2003¹¹⁸.

Owing to the traditional mystery clouding activities in the area and to the general high degree of secrecy of the oil business, it is not clear what the position of both companies is at the moment, as attest several rare and contradictory reports on the actual situation¹¹⁹. Some potential partners for the necessary second phase of the study such as **Multiwave** have indicated they would not get involved in the area as long as the political-legal situation is not cleared. Regardless, a Dutch company, **Fugro N.V.** was contracted by KMG in spring 2004 to carry out the second phase of seismic exploration in the Boujdor area¹²⁰ and completed its survey in June 2004 in co-operation with its UK-based subsidiary **Fugro SL Limited/Svitzer** and **Robertson Research International**. The second one-year renewal of the reconnaissance license of KMG will expire on 29 October 2004, by which KMG will be allowed to convert it into an exploration permit¹²¹.

Impervious to the controversy over the offshore contracts, the appetite of foreign oil and gas corporations for the resource-rich Saharawi territory goes unabated. Indeed, an acreage deal for the whole of WS onshore territory had been provisionally inked a year ago between ONAREP and the London/Houston based oil company **Wessex exploration**, but had been delayed owing to the UN Legal opinion¹²². It appears that the deal was finally reached in May 2004. According to the company web site, "Wessex is currently undertaking a comprehensive technical analysis of the Aaiun Basin in order to facilitate further hydrocarbon exploration in this very under-explored area"¹²³. While it remains unclear what the contract with Wessex entails and what the activities in the area currently are, the UK company failed to consult the Saharawi people as required by international law. A campaign was launched early June 2004 calling upon the company

¹¹⁸ TGS NOPEC press release, 18 March 2003. For comparison, the Polisario signed a counter exploration deal with Fusion Oil deal in May 2002 and the company's assessment was handed over in October 2003 (see below).

¹¹⁹ Upstream Online, 5 June 2003 and Western Sahara Campaign, June 2002. Various sources have told me that TOTAL is continuing its activities in the area, which Total spokesperson Patricia Marie flatly rejected in my interview and noted that Total is exclusively analysing the data collected by TGS.

¹²⁰ letter by the SADR, 8 June 2004 to CEO of Fugro NV. The SADR Minister of Foreign Affairs denounced the activities of Fugro as "unauthorised, illegal and an insult to the Saharawi people". Fugro is an Amsterdam based company, with 275 offices and 8,000 staff world-wide.

¹²¹ IHS Energy report, 23 June 2004.

¹²² Upstream Online, 9 April 2004.

¹²³ <http://www.wessexexploration.co.uk>. In an email exchange on 5 May 2004, South African Managing Director Fredrik Dekker declined to answer my request for further details.

to immediately terminate its activities in the Western Sahara or to consult with the Polisario¹²⁴.

B) Corporations and self-determination, SADR and its corporate allies: Fusion Oil & Premier Oil

As seen earlier, international law grants the people of the Western Sahara an inalienable right over the natural resources, including oil, in their territory. Indifferent to the UN Legal opinion and to the *erga omnes* nature of such a principle, Morocco and its corporate partners have pressed ahead on the exploration of oil reserves, which is the first step towards exploitation. It appears then interesting to analyse the reaction of the rightful owner of these resources, the Saharawi people.

i. The reaction of Polisario.

In the tense context of the ongoing diplomatic warfare between the two parties since the cease-fire in 1991, the signature of the oil exploration deals by Rabat was largely perceived by the Polisario as an offensive move, which required an appropriate reaction. Polisario representative at the UN Ahmed Bukharie said at the time that the Saharawi Arab Democratic Republic (hereafter SADR) would "blacklist those companies that participate in the exploitation and production of any kind in our Exclusive Economic Zone and if we have to resume the armed struggle the arena would include the sea and offshore areas". He also warned, "there was no guarantee" that the companies' investments would be recovered¹²⁵. In the light of the above-mentioned limitations of international law with regards the Western Sahara, such threats were likely to be discarded as mere verbal gesticulation and the Frente Polisario decided to respond to the licenses by an original move: the signature of a counter-deal with Australian-based company **Fusion Oil**, thereby enlisting a TNC among the supporters of Saharawi self-determination alongside states and NGOs.

This part will present the SADR deal as a political-diplomatic response (rather than an economic or legal one) to the Moroccan contracts of 2001 and ask the two following questions: What are the reasons behind a maverick oil corporation supporting self-determination? And, what is the impact of the deal for Saharawi self-determination?

¹²⁴ On the campaign cf. <http://www.arso.org/wessex04.htm>

A technical and co-operation agreement (TCA) with British-Australian exploration company, Fusion Oil & Gas (hereafter Fusion) was announced by the exiled government of the SADR on 27 May 2002¹²⁶. According to the agreement, Fusion was to evaluate the petroleum potential and to undertake an exclusive study and report on oil and gas prospectivity offshore Western Sahara. The deal covered the entire offshore territory of Western Sahara, i.e. 210,000 km². Upon completion of the study (approximately 16 months), Fusion Oil would have the right to nominate up to three areas of unexplored offshore acreage (of up to 20,000 km²) for future exploration licensing on regionally competitive terms, “once WS is a member of the UN”¹²⁷. These licenses were to be approved by the SADR government. According to Fusion's exploration director Jonathan Taylor, “any exploration licenses will be converted into full exploration licenses dependant on the outcome of the UN mission, which will determine the future status of Western Sahara”.

Months later, Fusion signed a deal with **Premier Oil** in May 2003 “to purchase a number of West African interests” including 35% of Fusion's rights under the TCA with the SADR in return for the funding of 35% of costs incurred up to any future licence award¹²⁸. By this deal, Fusion enlisted an additional "corporate ally" behind Saharawi self-determination.

ii. **Background of Fusion and Premier Oil**

Fusion is a relatively small independent oil and gas exploration company, which has lately become one of the leading players in Northwest Africa¹²⁹. It was created in 1998 and two years later was floated on the London Stock Exchange as a pure exploration company with a market capitalisation of £50 million. It has around 950 shareholders, the largest being Westmount Energy. According to the Managing Director, Fusion's advantage lies in its readiness to “take a risk where others see the risk-reward ratio being too high. We're prepared to invest our time in areas not

¹²⁵ Upstream Online, 27 May 2002.

¹²⁶ SADR/Fusion Oil Joint Press Statement, 27 May 2002. Interestingly, the statement was issued hours after a lawyers' conference on Saharawi natural resources organised in Brussels.

¹²⁷ Afrol News, 27 May 2002.

¹²⁸ Premier Oil Press Statement, 28 May 2003. In each licence in which it chooses to participate (to a maximum of three), Premier will fund 70% of the initial exploration costs capped at \$3 million and 35% thereafter.

¹²⁹ Information mainly from Offshore Magazine, Upstream Online, and Fusion website.

currently on the radar screen for bigger companies”. Recently, Fusion pioneered deepwater exploration efforts offshore Northwest Africa, in Mauritania, Gambia, Senegal, Guinea Bissau, Ghana and Gabon where it established itself through similar arrangements than that signed with the SADR, i.e. a cost free exploration survey with a preferential treatment for the selection of exploitation sites if hydrocarbons are discovered (e.g. Senegal, Guinea Bissau and Gambia).

Premier Oil is a UK-based oil and gas exploration company with activities in the UK, Pakistan, Indonesia and until 2003, in Burma, where it was heavily criticised by Burmese activists, the UK pro-Burma Campaign and even by the British government. As a result of this campaign against Premier, the two leading shareholders withdrew from Premier in September 2002. This led to a major restructuring of the company throughout 2003 (its size in terms of oil and gas reserves and production was halved¹³⁰). Premier Chairman welcomed the May 2003 deal with Fusion as giving the company “critical mass in West Africa”¹³¹.

iii. Background of the deal

Fusion Managing Director Stein said his company had sought to become involved in the Western Sahara ever since it started its activities in Mauritania in 1997, where the large findings encouraged Fusion to look for further opportunities in the region and realised “there was a big void on the map”¹³². This interest in the region can be placed within a recent trend, according to experts, among small independent Australian companies to become less reliant on the declining Australian Northwest shelf resources and to have identified Northwest Africa as their prime focus¹³³. Also, as a result of the Asian economic and financial crisis, the corporate sector was certainly eager to look to other continents for recovery.

Allegedly, Fusion's London-based chairman Peter Dolan was advised by the UK Foreign Office to talk with Polisario's UK representative Brahim Mokhtar to gain a further understanding of what was happening in the region¹³⁴. According to Stein, Mokhtar’s briefing was “an eye opener” for the Fusion team and sufficiently convincing for Fusion to initiate regular contacts and look into possible co-operation, before signing

¹³⁰ Premier Oil Press Statement, 31 December 2003. On the campaign cf. Nahal (pp 29-31) and www.burmacampaign.org.uk

¹³¹ Premier Oil Press Statement, op cit.

¹³² PESA, April/May 2003.

¹³³ Offshore Magazine, April 2003.

the co-operation deal three years later. Fusion Oil Managing director Stein noted that “after looking at the international law in relation to non-self governing territories, we decided it wasn't appropriate at the time to make a counter claim in the form of an exploration licence”. Hence the choice of a TCA to “make sure we were doing the right thing” and “we agreed to work together and any licence would be awarded once the situation was resolved”. According to Polisario, the Perth-based company was chosen because of its “proven expertise and commitment to the region”¹³⁵. In any event, Fusion’s offer to co-operate must certainly have met with heightened interest from the Polisario side following the decision in 2001 by Rabat to grant exploration licenses to Total and Kerr-McGee. Indeed, this move by Morocco directly led the Saharawi government to seek to make a counter deal for the same offshore region as confirmed by Mohammed Sidati, European co-ordinator of the Polisario¹³⁶. This is made explicit in the SADR press statement which states, that the government had been “repeatedly opposed to the commencement of exploration activities whilst the UN has been engaged in the organisation of the referendum” and strongly denounced the “illegal, offensive and highly provocative” nature of the Moroccan exploration awards.

iv. A peculiar deal

Clearly, the deal between the Polisario and Fusion is a peculiar one. Firstly, it is in direct competition with the licenses awarded by Rabat since it covers the same area. Secondly, the legal value of these contracts is questionable due to the legal uncertainties concerning the territory and the SADR itself (which has not been recognised by the home countries of Fusion and Premier). Also, it is unclear to what extent Fusion could provide reliable seismic information without having access to the area (other than a compilation of different sources?). Lastly, the deal covers an area over which the Polisario has no effective control and is thus of an anticipative nature. Nonetheless, all these elements did not prevent the small “indie” Fusion from being outspoken about the contracts, from challenging bigger players in the industry and bringing another company, Premier Oil, into the diplomatic-commercial dispute.

What is the economic interest for Fusion Oil? Allegedly, the TCA could increase Fusion Oil's foothold in the region were the findings to reveal critical oil and gas

¹³⁴ Upstream Online, 16 October 2003.

¹³⁵ Offshore Magazine, April 2003.

¹³⁶ Interview with Mr. Sidati in Brussels, 10 May 2004.

reserves. This seems highly likely in the light of Fusion Managing Director's statement that the project was "significant" and that findings in Saharawi waters could be equal to those offshore Mauritania (where very significant oil and gas discoveries were announced in May 2001), Gambia, Senegal and Guinea Bissau. This was confirmed in the data presented to the SADR in November 2003¹³⁷, indicating that, there was "sufficient indication of a viable petroleum system offshore that would merit future investment in exploration"¹³⁸. However, there's the catch: as explained earlier, the SADR does not have control over this territory and is not likely to do so in a foreseeable future.

TNCs supporting self-determination? Evidently, this deal is more than of a strictly business nature; it carries in fact notable political consequences, which Fusion Managing Director Stein has not denied. He admitted there was "an element of geopolitical expediency", yet he stressed that "fundamentally for Fusion, this is not a political issue, although we take an interest in the political struggle, we are not part of the political process". He further noted that, "this is not a contest between Fusion and other oil companies. This is, and always has been, a struggle between the Government of Morocco and the Saharawi people. We have chosen to provide technical assistance to the Saharawi people. If that means we end up being able to pursue the relationship through to taking an exploration license, then so be it. If that opportunity does not materialise, then so be it also"¹³⁹. However, Fusion's commitment appears to go well beyond merely sitting on the fence, as illustrated by the following examples:

(a) Fusion and Premier attended the Polisario's 11th party congress in October 2003 in the so-called liberated areas (areas not occupied by Morocco), where Fusion Director handed over the results of its geophysical analysis to the SADR presidency and expressed "readiness to continue the work in co-operation with the Saharawi republic"¹⁴⁰. Noteworthy is the fact that neither Australia nor the UK (the home countries of the two corporations) has officially recognised the SADR.

(b) Fusion has fully adopted the SADR legal and historical perspective of the Saharawi conflict as illustrated by the company's brief presentation of Western Sahara in its May

¹³⁷ A geophysical analysis including a technical report and a digital GIS database.

¹³⁸ Platt's Commodity News, 10 November 2003. On their web-site, Premier Oil states that the "regional studies indicate that the area has exciting oil potential".

¹³⁹ PESA April/May 2003.

¹⁴⁰ Upstream Online, 16 October 2003.

2002 statement¹⁴¹. Furthermore, Fusion appears to have gone as far as even adopting the Polisario discourse. For example, when justifying Fusion's decision to sign the TCA, Stein notes that "the worst that can happen it that we will have made an investment in deepening our understanding about how the petroleum geology of this whole coastline works while being comfortable in the knowledge that *we have acted with integrity*" (my italics). He continues, "if, *as we fully expect*, there is a *just resolution* that allows the *Saharawi people* to administer *their own territory*, then there is an opportunity for us to explore a whole new province and we will have delivered a game changing opportunity for our shareholders"¹⁴².

(c) Fusion openly states its support for Saharawi statehood, which is unequivocally set out as a specific goal of the deal. Indeed, according to the SADR statement, this agreement was concluded with Fusion in order to "allow the Saharawi people to independently determine the potential of their territorial waters". "Through collaboration with Fusion on their project, Saharawi officials will become further accustomed to the principles and standards of the international oil and gas industry in readiness to assume custodianship and management of these resources following confirmation of sovereignty", the statement continues¹⁴³. The May 2002 joint statements by Fusion and SADR indeed explicitly state that the initial study will "assist the Government of the SADR to better understand the offshore oil and gas potential of the area and formulate appropriate policy to attract international investment". As an example, one may note that one of Fusion's first activity as part of the deal was to prepare a brief report on the history of oil and gas exploration offshore Western Sahara for the Polisario because "it knew little about the petroleum industry". Alan Stein predicts that a significant discovery offshore WS could "have dramatic economic benefits and yes, I'd love to think that I'd been able to change the GDP of an entire country"¹⁴⁴.

Beyond all doubt, the language and pro-active behaviour of Fusion Oil is unusual, and all the more so because it is a private company taking a (geo) political

¹⁴¹ Compare Fusion and SADR press statements over the TCA.

¹⁴² Offshore Magazine, April 2003.

¹⁴³ Afrol News, 27 May 2002.

¹⁴⁴ in Upstream Online, 24 June 2002. NB: such a discourse can be perceived as somewhat tainted by an industrialist conception of development (in terms of the overall cost-benefit of oil production). Such an approach for example was rejected by Costa Rica, which decided not to exploit its proven oil reserves

stand in a highly disputed context. It is common knowledge that business and human rights groups or indigenous peoples rarely share a common agenda. Moreover, businesses, and in particular big ones such as multinational oil and gas companies, traditionally shun from publicly engaging in sensitive issues and if so, are rarely known to have taken the side of the underdog. Fusion managing director acknowledged that his company was “exposing itself to an aspect of political risk that companies wouldn’t normally be exposed to”¹⁴⁵. Being accustomed to a wide-spread perception (and practice?) of big businesses siding with “the dark side” of *Realpolitik* and carefree exploitation of natural resources in the developing world, one is naturally led to question the motives behind this deal; What are the real issues at stake? What has Fusion to gain from being the white knight of an oil-dark business? Moreover, is it reasonable to consider the costly investment of the company in this deal as mere charity?¹⁴⁶

A Public relations stunt? Fusion Director Alan Stein rejected suggestions that the company had signed the agreement in order to raise its profile: “I don’t think there has been much profile for Fusion in doing this”. However, it is partly the deal with the SADR that allowed newly created Fusion to make (specialised press) headline news and to assert itself both in the industry and on the stock exchange after several years of financial struggling. Alan Stein appears to revel in what he calls “a David and Goliath situation”¹⁴⁷ of Fusion ruffling the feathers of the two giants Total and Kerr-Mcgee. And, the Saharawi corporate allies are clearly aware of the potential “good guy” image this deal will bring: Alan Stein remarks that “oil companies are so often associated with rape and pillage, so it’s really refreshing to be involved in a deal which is morally correct”¹⁴⁸. For the sceptic mind, it could appear that Fusion has identified a niche in the industry (“the small good guys” vs. “the big bad guys”) which is bound to provide it with publicity and thereby shareholder attention (and possibly affection). This is all the more valuable when attempting to change its image. It so happens that Fusion’s partner, Premier Oil, had been heavily criticised for its involvement in Burma, where it allegedly benefited from forced labour provided by the military junta. It was the first Oil

having evaluated the overall consequences as negative for the country. For more on the socio-economic consequences of oil development for a developing country, cf. Oilwatch website.

¹⁴⁵ PESA April/May 2003.

¹⁴⁶ the TCA specifically states that the initial study will be conducted by Fusion Oil “at its own cost”.

¹⁴⁷ Upstream Online, 24 June 2002.

Company to sign an offshore gas exploration contract with the Burmese junta in 1990. Following intensive campaigning by the UK Burma Campaign, the UK government, through its Foreign Secretary, stepped in and in 2002 repeatedly called upon Premier to end its activities in the country. For a corporation defined by the NGO *Friends of the Earth* as "a company specialising in going into areas even other oil companies might think twice about—such as precious natural environments that are supposed to be protected, and countries with oppressive political regimes"¹⁴⁹, the Saharawi deal could thus be a timely opportunity to improve its image. Moreover, both companies, Fusion and Premier were in severe need of the injection of fresh cash: Premier was at the time of the deal in full restructuring process and Fusion was yet to benefit from the findings in Mauritania.

Fighting above one's league? However, such a maverick policy carried significant risks as Barry Morgan of Upstream Online noted: Fusion “will certainly be hoping the realpolitik of the global village does not ride roughshod over the legal and moral rights of indigenous peoples. It also has a lot to lose”¹⁵⁰. And, Fusion did eventually lose a lot, or at least its initial owners did...Indeed, the situation was further complicated in December 2003 by the acquisition of Fusion Oil by British-based **Sterling Energy Plc.** through a hostile take-over. Sterling, a recently created oil and gas company with interests in the Gulf of Mexico and the Philippines, had been seeking to shift its focus to other regions of the world and in particular to North Africa. This acquisition, hotly contested by the founding directors of Fusion Oil¹⁵¹, led the visibly satisfied Sterling Chairman to boast the resulting benefits for his company and its shareholders, including the possibility to participate in up to 20 wells offshore West Africa for a “negligible cost”¹⁵². Thanks to this take-over, the company stated that in 2003 it had “exceeded all expectations in terms of growth and future prospects” and expects the acquired wells to carry a “significant impact on the value of the company”. The fact that Fusion was on the verge of making considerable benefits with the wells in Mauritania is highly likely to have been a decisive element in the take-over. The take-over also revealed dissatisfaction among the shareholders and in particular with its largest one,

¹⁴⁸ Ibid.

¹⁴⁹ <http://www.foe.co.uk>

¹⁵⁰ Upstream Online, 4 June 2002.

¹⁵¹ As described to me by Jonathan Taylor in an email exchange.

¹⁵² <http://www.sterlingenergyplc.com>

Westmount, and in the company itself with the strategy pursued by the Fusion Board of directors¹⁵³. Overall, the take-over reveals that Fusion Oil had kindled the appetite of other players and that its maverick directors may not have proven tough enough for the fight and not convincing enough to placate the more traditional shareholders. While they have founded a new company, **Ophir Energy**, it remains to be seen whether the ex-Fusion team will be able to resume co-operation with SADR on the same scale. Indeed, Fusion/Sterling posts on its website the exploration options in the Western Sahara thereby indicating that the TCA remains valid, as was confirmed by Polisario European co-ordinator, Mohammed Sidati¹⁵⁴.

C) “Corporate diplomacy”: TNCs and international conflicts

i. The Moroccan strategy

I will now address the reasons behind the Moroccan decision to sign the reconnaissance licenses, thereby adding a new complicating factor to the conflict. Among these one may identify a series of economic incentives for developing activities in Western Sahara:

1) *Energy development plan*. From a purely economic perspective, hydrocarbon exploitation ranks high on Rabat’s current priority list as witnessed by the elaboration and launch of a large scale strategic plan for Moroccan oil and gas development over the past few months. The legislation on hydrocarbon exploitation was revised in 2004 on more favourable terms for TNCs¹⁵⁵. Moroccan Energy and Mines Minister Boutaleb announced that his country planned to switch from a coal/fuel mix to natural gas-fuelled power supplies by 2008¹⁵⁶. Owing to the current state of the Moroccan E&P infrastructure and technology in contrast with such ambitions (Riché notes that the annual research budget of ONAREP is of \$5 mln while a single drilling costs \$15 mln), Morocco would certainly need to realise major investments in this sector. This would require considerable foreign participation, which is already in the process of being realised as attested by more than 60 oil and gas agreements, which have been signed over the past three years. Significantly, the total number of international companies in

¹⁵³ Westmount Chairman and Fusion Director said the decision to sell its shares to Sterling was the result of “mounting disappointment in the performance of our investment in Fusion”.

¹⁵⁴ interview in Brussels, 10 May 2004.

¹⁵⁵ Cf RICHE (July 2004).

¹⁵⁶ Upstream Online, 29 April 2004.

Morocco has been raised to 19 through 72 agreements. Evidently, the deal with Total and KerrMcGee can be placed within this plan of attracting foreign corporations to provide Morocco with the considerable skills and investment required for its energy development strategy. Significantly, KMG has announced its intention to invest “at least US\$ 2 million in the Boujdour area¹⁵⁷.”

2) *Oil boom*. In a country facing severe financial and economic difficulties, the steady increase of the price of oil on the global markets has undoubtedly contributed to make oil extraction an attractive source of revenue.

3) *Favourable regional context*. Morocco was also keen to take advantage of the fact that the African continent has become the recent focus of interest for E&P with the ongoing instability in the Middle East and the recent findings in Mauritania¹⁵⁸. The increased presence and investment of corporations in other countries of the region provided greater comparative advantage to the potential Saharawi reserves.

4) *Alternative source of revenue*. The extensive depletion of fisheries in Saharawi waters and to a lesser extent of the phosphate deposits has encouraged the makhzen to look for alternative sources of revenue. As seen above in chapter I, this is all the more important in the light of the fact that the exploitation of Saharawi resources is at the very heart of the occupation of the territory since it both contributes to financing the costly occupation and represents a key element in sustaining loyalty to the monarchy. To some extent, Saharawi oil and gas could hence be seen as the lifesaver of the Moroccan monarchy and of its occupation of the territory.

ii. Corporate diplomacy.

However convincing the economic reasons behind the decision to kick-off the process of exploitation of Saharawi oil may be, one cannot neglect the specific context of the Western Sahara conflict. Indeed, the selection by the State-owned ONAREP of two US and French companies and the rejection of a Spanish bidder, **Repsol**¹⁵⁹, for the exploration licenses cannot be taken as a decision merely based on economic grounds and immediately takes on an evident political dimension. I will argue that these companies were deliberately chosen because of their home countries, France and the USA, in what may be considered as "corporate diplomacy".

¹⁵⁷ IHS Energy report, 25 June 2004.

¹⁵⁸ Afro News, 12 March 2003. See also, KNIGHT (2002).

¹⁵⁹ cf. MARTIN (2002).

Firstly, Morocco, as many (if not most) countries, has regularly used business interests to forward its foreign policy goals. Indeed, observers note that in addition to its diplomatic efforts at bilateral and multilateral levels, Rabat has actively sought to legitimise its annexation of the Saharawi territory via commercial deals with companies with headquarters in key Northern States, which would then be locked into recognising the sovereignty over the territory or rewarded for their diplomatic support. This strategy is particularly evident in the sectors of armament as witnessed in the Moroccan decision to grant the British armament industry lavish contracts for the edification and modernisation of the Berm, the "defence wall" dividing the territory¹⁶⁰. Naturally, the involvement of the UK industry (in this case *Royal Ordnance*), necessarily approved by London, makes it difficult for the Foreign Office to condemn the military occupation and the edification of this "Maginot line" across the desert. Similarly, Rabat has actively sought French military co-operation in its activities in Western Sahara. Annick Miske-Talbot reports on the intensive level of co-operation, which includes the provision of French military advisors, aid in the construction of the Berm and a costly software for war simulation. It is now a well-established fact that French military planes took direct part in the military operations against the Polisario on the side of the Moroccan forces in 1977-1978.

These two sectors have not been selected randomly. Indeed, armament as well as hydrocarbons are highly sensitive areas, which are source of close monitoring if not direct involvement of governments. They also carry significant socio-economic weight, in terms of jobs and revenue (Total for example is the largest French company) but also in terms of political influence-in France for example, the two leading media groups in France, Dassault and Lagardere, are also the leading French suppliers of armament¹⁶¹. Therefore, it appears logical that Morocco would carefully identify the recipients of lucrative contracts in two areas such as these. Similar practices can be found in other sectors such as the phosphate industry, where Morocco sought to barter the access by foreign countries and companies to the phosphates in exchange of diplomatic gains.

¹⁶⁰ cf. Annick Miske-Talbot (2001) and www.waronwant.org. In 2001, UK NGO War on Want launched a campaign against the sale of thirty 105mm guns for the refurbishing of the Berm. Such a decision by the UK government to provide heavy weapons to an occupying power is in clear violation of international law (no consultation with the UN), the EU code of conduct on arms exports and the UK arms policy.

¹⁶¹ RAMONET (2002) and BENILDE (2003). Lagardere is the first publishing house (Hachette, Fayard, Grasset, Stock...) and owns much of the local and regional press and magazines (Nice-Matin, La

iii. A "Solomon oil deal".

Regarding the exploration deals, the King Solomon-like share of Saharawi waters to a US and a French company carries evidently a prevailing political dimension. Some specialists have described this deal as the "Azoulay Plan" according to the name of the main economic advisor to the Moroccan King, Jewish-Moroccan and French André Azoulay¹⁶². This Shakespearian character through his close personal relationship with both the current French and Moroccan heads of state allegedly conceived a plan according to which the Saharawi oil would be shared equally between France and the US with the specific goal of gaining a definite recognition of the Moroccan annexation of the territory. According to Tomas Barbulo, the aim was to get US diplomatic approval to the option of an autonomy of the territory (and thereby the abandonment of the application of the right to self-determination), while the French government, which had already de facto recognised Moroccan control, would be rewarded for its support¹⁶³. He concludes that the exploration deal consists in "the sale of a country in order to force international legality" (p25). Polisario representative Mohammed Sidati told me he shared such a perception of the contracts and remarked that according to him, Rabat was increasingly convinced that the most efficient way of gaining international recognition of the annexation of the territory was precisely through economic interests rather than traditional diplomacy. He commented that the main diplomatic target of the contracts was in fact the USA since the choice of Kerr-McGee sought to strong-arm Washington into tolerating the annexation which it had until then always been reluctant to do so.

Regardless, the deal appears to have been carefully timed to have an impact on the concurrent diplomatic discussions at UNSC level, when Baker had put on the UNSC table four options- the original settlement plan (referendum on independence or integration), the framework agreement, partition of the territory and the departure of MINURSO, which the 15 members had to choose from. With the aim of influencing the decision of the UNSC, Morocco had launched an intensive diplomatic campaign towards the member states and the corporate deals can be considered as an integral if

Provence, Paris Match, Elle, Télé 7 Jours, Pariscope...). Dassault is the first French press group (Valeurs actuelles, le Figaro, L'Express, le Progrès de Lyon, La Voix du Nord...).

¹⁶² For more on Azoulay cf. Barbulo, Cembrero and Miske-Talbot op cit. Allegedly, Azoulay was also behind the polemical decision of the French telecommunications firm Vivendi to overpay by 3,5 billion dollars its acquisition of Maroc telecom, thereby injecting a hefty sum into the depleted Moroccan budget (Miske-Talbot).

¹⁶³ BARBULO (2002). For more on the close ties between Rabat and the the French political establishment cf. CEMBRERO (2001, 2003) and SAINT MAURICE (2000) pp 145-159.

not the essential part of this effort. In September 2001, Mohammed VI himself openly admitted that Morocco had "worked hard, during eighteen months and in the strictest confidentiality, in order to have eleven members of the UNSC recognise the legitimacy of Moroccan sovereignty over Western Sahara"¹⁶⁴. As further illustration of the close ties between the contracts and international diplomacy, the leading Spanish oil and gas company Repsol was rejected twice when it expressed its interest in the exploration licenses in the midst of a critical period in Spanish-Moroccan relations. Victoria Martin interpreted this as a decision to punish Spain for its position on the Western Sahara dossier and to reward France and the USA¹⁶⁵.

iv. "Texan diplomacy"

Several observers have evoked the existence of close ties between UNSG Personal Envoy James Baker and the US oil industry and have deduced that the US diplomat has been carrying out a covert policy of promoting the interests of the US industry in the region, of which the deal with Kerr-McGee would be the most flagrant illustration. According to these conspiracy theorists, the deal would be a means to reward Baker for his lenient approach to the self-determination issue or as a means to cajole the "Texan Republicans" of which he is a member¹⁶⁶.

Undeniably, James Baker is a close personal friend of the Bush family, whose oil-tainted perception of and behaviour in public office has become common knowledge and more recently, even a source of movie awards on the French Riviera. US journalist, Wayne Madsen, wrote a stimulating, albeit somewhat inconclusive piece on the ties between Baker and Kerr-McGee and revealed that the James Baker Institute at Rice University in Houston funded a study called "Strategic Energy Policy: challenges for the 21st century" whose co-author was Matt Simmons, a member of the Board of Directors of KMG. Madsen also reports that James Baker's former spokesperson at the Department of State and Treasury and close personal friend, Margaret Tutwiler, currently serves as the USA Ambassador to Morocco. He quotes a former associate of Tutwiler saying that; "she was obviously placed [in Morocco] by Baker and his oil buddies to help cut oil deals". In January 2003, Madsen deduces that "because of war in

¹⁶⁴ Interview of Mohammed VI in Le Figaro, 4 September 2001.

¹⁶⁵ in MARTIN (2002).

¹⁶⁶ Among his many functions, James Baker III is Senior Counsel for the Carlyle Group (the US 10th largest defence contractor), Counsel for Intelligence Policy and in charge of restructuring the Iraqi debt. For more thought-provocative information on James Baker see www.hereinreality.com/baker.html

Iraq and the Venezuelan situation, Baker is under increased pressure from his friends in the Bush administration to bring about the commencement of oil drilling off Western Sahara. Hence the sudden new interest by Baker in a WS “peace deal”.

While the available evidence remains fairly slim to confirm such allegations, it is clear that a Houston-based Republican diplomat, head of a Research Institute focusing on strategic energy issues could hardly be unaware of and indifferent to the strong pressures from the industry to explore the Saharawi reserves. Also, Internet research rapidly reveals direct links between his Houston-based law firm Baker & Botts, which specialises in energy matters, and Kerr-McGee. For example, B&B Attorney Mark Rowley represents the interests of KMG in Saudi Arabia¹⁶⁷. Also, the presence of Roland Dumas, a former French Minister of Foreign Affairs with direct links to Total (and recently heavily sentenced for illegal dealings with the company) on the Executive Board of his Institute does tend to indicate that James Baker would have been well aware of the efforts of Rabat to sign exploration contracts with both Total and Kerr-McGee.

As a counterpoint, Baker's close ties with the oil industry should only have encouraged the US diplomat to succeed in his mission of finding a final solution to the conflict and thereby ending the legal uncertainty precluding the major companies from investing further in the area. In this sense, the resignation of James Baker on 11 June 2004 can barely be seen as serving the interests of the big oil companies if it entails the further postponement of a final solution.

v. Evaluation of the corporate diplomacy

All in all, how effective was this corporate diplomacy led by both sides in conflict? And how did it affect the process of self-determination? While it is too early to assess the effectiveness of the "privatisation" of the conflict into a proxy war between the two sides through corporate rivals, it is clear that the Paris-orchestrated failure of the UNSC to draw the necessary consequences from the UN Legal opinion (i.e. to sanction the companies involved in the exploration process) indicates that France remains more than ever interested in a protracted status quo (i.e. tacit and gradual approval of the annexation). Since UNSC sessions are as opaque as crude oil, it is difficult to provide

¹⁶⁷ <http://www.bakerbotts.com>

any precise account of the (real) positions of the key players¹⁶⁸. However following a three hour debate on the UN legal opinion in February 2002, the Security Council effectively took no action to prevent Morocco from allowing foreign companies to prospect the oil in the area and did not annul the contracts as the Polisario had requested¹⁶⁹. UNSC Chair at the time, Mexican President Zinser, remarked that such a decision “was not within the Council’s mandate”. According to Upstream Online, France, the USA, Bulgaria, Britain and Norway sought to avoid the topic of the contracts while Ireland, Russia, Colombia and Singapore sought to discuss at length the Legal opinion¹⁷⁰. Subsequently, the unanimous vote by the UNSC in favour of the Baker Peace Plan (Resolution 1495, 31 July 2003) which supported an autonomous regime for 4-5 years followed by a referendum does to some extent represent a failure of the Moroccan diplomacy, including its corporate aspect, in convincing the UNSC members to drop the requirement of a self-determination consultation. Notwithstanding the effectiveness of the Moroccan corporate diplomacy at UN level, it did succeed in reaching official government backing by Washington and Paris of these exploration deals. Indeed, both exploration licenses were signed in the presence of senior representatives of the French and US diplomatic services, by respectively US Ambassador Tutwiler and Mr. Derrec, Head of the Finance and Economic section of the French embassy in Morocco, thereby engaging the responsibility of both states behind both contracts.

With regards the corporate diplomacy of the Polisario, the assessment is even more difficult to make at this stage. Clearly, the signature of the TCA with an oil corporation with good media visibility and with a young, brash leadership did succeed in getting some (specialised) media attention to the conflict. However, in contrast with the capturing effect of the Moroccan corporate diplomacy in chancelleries, the TCA with Australian and UK TNCs has not yet led to a tangible change in policy in London and Canberra. Interestingly though, there appears to have been a prior tacit support from the UK in the Fusion deal with the SADR. Indeed, when asked about the reasons for the UK FCO to have suggested contacting the Polisario, Fusion Managing director Stein noted that “[he didn’t] think advising [them] to talk with the Polisario was formal

¹⁶⁸ On the positions of the EU and individual European Member States on the Western Sahara conflict, cf. VAQUER (2003) and FERNANDEZ (2003).

¹⁶⁹ Upstream Online, 8 and 21 Feb. 2002.

¹⁷⁰ Upstream Online, 8 Feb. 2002.

Foreign and Commonwealth Office policy”. However, he added, “you will find within the government of the UK and within the civil service a hell of a lot of sympathy and support for the Saharawi people”¹⁷¹. The initial suggestion to contact the Saharawis is a notable, albeit discreet, gesture from the UK in favour of the right to self-determination of the Saharawi people. It remains though to be confirmed and extended on a more tangible level in multilateral fora.

Conclusion: self-determination as a corporate issue

Overall, the deals have added a new dimension to the conflict: after military and then diplomatic warfare, both parties are now engaged in feuding "corporate diplomacy". The Fusion deal with the SADR represents a rare event in the oil business and as such can be considered as a bold political statement; a trans-national corporation supporting the self-determination of a people against all odds. Also, the originality of the TCA resides in the fact that in this deal, private (corporate) interests meet collective ones, that of a people seeking self-determination: while gaining media and shareholder attention and moral prestige (and of course, an option on possible future exploitation), Fusion contributes to support the Saharawi people in their struggle for self-determination by providing technical expertise and moral support with an impact on the international scene. Conversely, the Rabat exploration licenses also connect the private interests of Total and KMG with foreign policy interests- that of the Moroccan monarchy: by signing the potentially lucrative contract with the occupying power and by fuelling Moroccan claims over the territory and locking in their home countries in recognising the *fait accompli*, Total and Kerr-McGee directly violate and impede the realisation of the right of the local population to self-determination. Lastly, independently of the effectiveness of Moroccan corporate diplomacy, the reconnaissance contracts represent for Rabat an easy source of cash to help finance the illegal occupation or/and the *makzhen* governance: Total spokesperson Patricia Marie affirmed that Total's contract with ONAREP included financial provisions to the state-owned company¹⁷².

¹⁷¹ Upstream Online, 16 October 2003.

¹⁷² Phone interview, 14 July 2004 (Marie did not disclose the details of the financial aspect of the deal). This is most likely the case also for the deal with Kerr-McGee (unconfirmed).

IV. Oil and gas TNCs as targets: making the corporate sector accountable?

“On entend moins les victimes des multinationales que les victimes des tortionnaires politiques. Pourtant elles sont aussi très nombreuses”.

“Il existe une sorte de “marché de la loi”, les multinationales ont tendance à aller vers les pays où celle-ci est la moins contraignante, ces pays coïncident bien souvent avec des lieux d’exploitation de ressources naturelles”

William Bourdon

Once established that natural resources are a central element of the conflict (chapter 1), that the Saharawis have an inalienable right over these resources according to international law (chapter 2) and that this right is clearly violated by Morocco with the active participation of foreign TNCs (chapter 3), we are then naturally led to the following question: what are the means at the disposal of the Saharawi people to assert their (violated) rights over their natural resources and to seek remedies from those liable for the violation of these rights?

As seen above, legal and political proceedings at the international level against Morocco (namely at the ICJ and UNSC) hardly represent *at present* a conceivable option due to the lack of political will of States to enforce international law. At "domestic level", the Moroccan judiciary also fails to provide a credible and acceptable avenue for redress (which would de facto legitimise Moroccan sovereignty over the annexed territory). Thus, faced with the improbability of directly addressing Moroccan liability, it hence appears of particular interest to consider the issue of the accountability of the TNCs, which partake in the illegal exploitation of Saharawi natural resources, and the indirect responsibility of their home states.

This section will consider the legal framework and precedents of the fairly recent notion of “corporate accountability”¹⁷³ and seek to apply it to Western Sahara. Given the limited possibilities for enforcing corporate legal accountability, this section will then consider an alternative approach through the analysis of “corporate

¹⁷³ I will use the distinction provided by Piccolotti and Taillant: "*accountability* is legally binding, whereas *responsibility* pertains to an ethical obligation to act in a certain way, but which has no binding legal obligations. *Responsibility* refers to company voluntary efforts to act in the best interest of society while *accountability* refers to the legal obligation to do so" in Piccolotti and Taillant, 2002, p 10.

responsibility”, and compare the effectiveness of voluntary code of conducts defined by corporations and “name and shame” public campaigns led by the NGO sector. The civil society campaign against Norwegian exploration company TGS Nopec will serve as an example to consider the following questions: What are the key elements of this campaign? What lessons can be drawn for civil society when seeking to prevent TNCs from escaping accountability for acts committed abroad?

A) Towards corporate accountability?

The notion of corporate accountability is fairly nascent and faces stiff opposition to its enforcement and development from the prevailing (Northern, government and corporate) proponents of an unregulated global economy. This notion stems from the premise that since TNCs are global actors, whose powers often impinge on that of States and whose activities affect human and global welfare, corporate behaviour should be made accountable to international (and domestic) rules and conventions, and in particular to human rights law. Such an approach to corporate accountability is coined by Jem Bendell as the "democratisation of corporations", which posits that "people and communities should be able to influence organisations or persons that affect them, especially when they affect the material foundations of self-determination"¹⁷⁴. The Universal Declaration of Human Rights already in 1948 had directly stated in its preamble the applicability of this fundamental document to corporations (as “other organs of society”). Yet, what does this notion mean practically in terms of direct and indirect obligations for the corporate world?

i. The notion of corporate accountability

Indirect obligation. It is of common knowledge that over the past few decades, TNCs have emerged as key players in the current globalisation process. Their ever-increasing economic, financial and political power has been gradually eroding that of States and in particular those from the developing South, where corporations can have a notable and at times negative impact on the enjoyment of human rights. However, international and domestic legal systems worldwide have yet to integrate this phenomenon. States and

their agents remain the primary holders of international legal obligations. Yet, it is increasingly recognised that States are also under the obligation to prevent abuses by natural *and* legal persons such as private enterprises and to provide victims with means of redress (also referred to as the principle of *Drittwirkung*). Recent developments in jurisprudence (e.g. in the USA, *Doe vs. UNOCAL* case; at the ECHR the case of *Loizidu vs. Turkey*, 28 July 1998) and in soft law (e.g. General Comments by the UN ESCR committee) have extended the application of this indirect obligation wherever the violation is committed and not just within the territory of the State.

Evidently, such a system is based on the assumption that states possess the necessary resources and the will to ensure that actors such as TNCs respect international law. As pointed out by Steven Ratner, such an assumption may easily be challenged since the state may not be in a position to monitor corporate behaviour and enforce obligations for several reasons, including *inter alia* the desire of developing states to welcome foreign investment, the possible use by the state of corporate resources in its own abuse of human rights and also the fact that some firms have become ever more independent of government control¹⁷⁵. Northern jurisdictions also face barriers when seeking to address corporate accountability. Among the numerous legal barriers, one may note the “corporate veil” (i.e. the creation of separate corporate entities to escape liability), the choice of legal forum, extraterritorial application of legislation and sovereign immunity¹⁷⁶.

Direct obligation. Owing to these shortcomings in making corporate power liable through State responsibility, NGOs and institutions have called for the development and enforcement of direct corporate liability, whereby international law prescribes obligations directly upon corporations and establishes a regime of responsibility for the violations they might commit. Also, according to the nascent principle of corporate “complicity”, TNCs might be considered complicit in human rights violations committed by state authorities¹⁷⁷. However, direct corporate obligations remain to be generally accepted and significantly introduced into international law. Indeed, Ratner identifies an “inconsistent posture among decision-makers over the role of corporations in the international legal order”: he notes that while they accept that business enterprises

¹⁷⁴ Bendell p44. NB: Self-determination here is defined as an individual and collective right, which includes the right of people to create caring, sustainable communities and to control their own resources, economies and means of livelihood (definition by David Korten quoted by Bendell).

¹⁷⁵ RATNER, p 11.

¹⁷⁶ For details, see PALMER (2003), pp 11-13.

have rights under international law (e.g. non-discriminatory treatment, political rights), most governments remain somewhat ambivalent about accepting corporate duties and in particular duties that corporations might have towards individuals in states where they operate¹⁷⁸. For her part, Sarbjit Nahal concludes on the current absence of provisions in the EU states and at EU level for holding corporations directly accountable “for the full range of human rights in any systematic way”¹⁷⁹.

As a result of these shortcomings, corporate activity in the developing world is largely unaccounted for in both host *and* home countries, and generally speaking, TNCs remain largely free to violate international norms. And this at times, with the tacit approval or even the support of the host States where their activities are carried out.

ii. Corporate accountability at a test: Total on trial

How is corporate accountability actually put into practice? Owing to the above-mentioned deficiencies in international and domestic law when dealing with TNCs and extra-territorial jurisdiction, it comes thus as no surprise that the cases brought against corporations are few and far between. Nonetheless, the growing awareness among civil society groups of the impunity of the ever-powerful corporate players has led to recent pioneering legal actions. As an example, I will focus on one of the TNCs involved in Western Sahara, *Total*, which incidentally happens to be one of the rare targets of these vanguard legal actions. Indeed, cases have been lately brought against Total in Belgium, the USA and France for its activities in Burma, which allegedly have involved the use of forced labour provided by the military junta for the construction of a pipeline in the region of Yadana. It appears therefore of interest to offer a brief overview of the charges brought against the French multinational as an illustration of this nascent notion of corporate accountability and the current limitations facing its implementation.

The most significant of the three legal proceedings against Total is in the home country, **France**, where Human Rights lawyer William Bourdon and his NGO Sherpa brought a legal suit in August 2002 on the behalf of two Burmese nationals, who claim the company benefited from forced labour in 1995-96 on the Yadana construction

¹⁷⁷ Cf. ICHR report.

¹⁷⁸ RATNER, p20.

¹⁷⁹ NAHAL p 23.

site¹⁸⁰. The plaintiffs claim that Total and its local subsidiary recruited and paid Burmese troops, facilitated forced labour on the construction site and to have done so in spite of repeated denunciations of the situation by different organisations, such as ILO. The legal basis is a French text of 1944, which assimilated forced labour organised by Nazi Germany with the crime of “unlawful confinement” (*crime de séquestration*). The choice of this particular charge stems from the fact that forced labour does not correspond to any breach in French domestic law. The lawyer claims that the criminal responsibility of the heads of the company, Thierry Desmaret and of the local Total subsidiary, Hervé Madeo, is “obvious”, and carries a maximum sentence of 20 years of jail according to the article 224 of the French penal code. The judge of the Nanterre Tribunal has so far heard Hervé Madéo as well as a witness, who deserted the “TOTAL battalion” in charge of controlling the workers and one of the plaintiffs.

Beyond seeking justice for the two plaintiffs, this case was brought by Bourdon with the deliberate goal of raising awareness on the legal loopholes regarding criminal responsibility of multinationals and to “draw a red line between the victim, whatever her condition and location, and the headquarters of the multinational, which gives the orders and benefits from the crimes”. And, this case, which has met with considerable media attention, has already pointed out to some key defects in French domestic law¹⁸¹. These shortcomings highlight the crying need for legislation on criminal responsibility of private companies to emerge, and one, which does not restrain the judges in their extraterritorial jurisdiction.

In the **USA**, a case was brought under the Alien Tort Claims Act¹⁸² by several Burmese nationals before the Federal court of Los Angeles in 1997 against the Yadana consortium (which includes TOTAL, its US partner UNOCAL and local companies PTT and Moge) for indirect liability for torture, forced relocation, forced labour, rape and murder committed against these villagers by government troops. Following heavy pressure from the French government (the French government submitted an “amicus curiae” request to reject the case on the basis of extraterritoriality and French interests),

¹⁸⁰ This section is based on my interview with Sherpa representative, Ms. Daoud, an interview of Bourdon in *Le Nouvel Observateur* and FIDH and Total web sites.

¹⁸¹ For example, Bourdon notes that: in contrast with the US legislation, French law does not provide with protection measures for the plaintiffs in such cases and hence, the two plaintiffs have been kept in a secret location in South East Asia; French law does not sufficiently characterise/qualify crimes against humanity for Bourdon to base his case upon; French legislation does not allow a legal person to be condemned for a crime; a company cannot be sued for acts of complicity if the local subsidiary hasn't been condemned by the local jurisdiction in *Le Nouvel Observateur*.

the local judge declared his lack of jurisdiction regarding the activities of the French company¹⁸³. However, the US federal district court in LA concluded that corporations and their executive officers can be held legally responsible under the Alien Tort Claims Act for violations of international human rights norms in foreign countries and that US have authority to adjudicate such claims, and after a series of appeals, the trial resumed on 4 February 2003 in Los Angeles¹⁸⁴. Yet, as the Total web site notes, the US court has since “been moving extremely slowly and fitfully” and the case (according to the NGO *Earthrights*, the first in US history in which a corporation will stand trial for human rights abuse committed abroad) is still pending.

In April 2002, a case was brought against TOTAL and its senior executives (including Thierry Desmaret) in a **Belgian** court on the basis of the universal jurisdiction law in the case of grave crimes committed abroad. In this case, the plaintiffs accused TOTAL of complicity in crimes against humanity by investing in Burma, bringing moral and financial support to a regime held responsible for grave human rights violations, including systematic forced labour. Under heavy US pressure, the Belgian parliament significantly watered down the Universal jurisdiction law in August 2003, which now only applies to Belgian nationals or people resident in Belgium¹⁸⁵. An arbitration court was expected to consider whether the political refugee status of one of the plaintiffs entitles him to be considered a Belgian national and hence able to press charges against Total.

Total has rejected all charges as “exaggerated, dogmatic and unsubstantial” (Total web site), and has actively engaged in a public relations strategy to justify its activities in Burma, as witnessed by its specific web site on the issue, which “rather than respond to the unwarranted criticism, [wants] to restore balanced debate on whether a responsible multinational can contribute positively to the economic and social development of a country that faces sharp internal divisions”. The strategy has included the commissioning of Bernard Kouchner, co-founder of *Médecins sans Frontières*, to write a report for a hefty sum on the situation (his final report rejected the claims of the use of forced labour).

¹⁸² A US act from 1789, which holds US government officials and corporations liable for wrongs committed against non-US citizens (Bendell 2004, p25).

¹⁸³ In Lettre d’information trimestrielle, Feb. 2003, Collectif “Total ne doit pas faire la loi”.

¹⁸⁴ For more information cf. www.earthrights.org/unocal

¹⁸⁵ see Total file on the Friends of the Earth web site.

iii. Corporate social responsibility

In contrast with the slow developments in the field of direct corporate liability, corporate social responsibility (CSR) has met with widespread popularity and attention from both the institutional and private sectors. Under growing pressure from civil society groups, as well as from shareholders and consumers, large TNCs started in the 1990s to draft guidelines for their activities, which were enshrined in “codes of conduct”. These codes, as defined by Ratner, are “voluntary commitments made by companies, business associations or other entities, which put forth standards and principles for business activities”¹⁸⁶. This movement had been launched earlier by the leading international and regional organisations with limited success¹⁸⁷. It had been initiated by the UN in 1974 with the creation of a Centre for Transnational Companies to prepare a draft code of conduct, that was completed in 1983 and a revised one in 1990, which emphasised the need for foreign investors to obey host country law, to follow host country economic policies and to avoid interference in the host country’s domestic political affairs. As a response, the more corporate-friendly Organisation for Economic Co-operation and Development (OECD) drafted in 1976 its own *Declaration on International Investment and Multinational Enterprises*, which contained much fewer obligations on TNCs. The International Labour Organisation (ILO) in 1977 presented its own document entitled the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. Noteworthy is the fact that neither of these widely endorsed instruments is legally binding.

At the UN level, its Secretary General launched in 1999 the Global Compact initiative bringing together corporate and civil society representatives to discuss CSR and to “embrace and enact” nine basic principles with respect to human rights¹⁸⁸. Recently, the UN Sub-Commission for Human Rights proposed “*Norms on the responsibilities of TNCs*” which includes a UN monitoring and verification system. At a regional level, the European Parliament, in a resolution in 1999, called upon the European Commission to develop a “European multilateral framework governing companies’ operations world-wide”, which would create a legally binding framework for regulating activities of European TNCs in developing countries (including a

¹⁸⁶ RATNER (2001), p 39.

¹⁸⁷ for an extensive review of these various initiatives see GOMEZ ISA (2004).

¹⁸⁸ See <http://www.globalcompact.org>

independent monitoring body). However, this resolution remains essentially on paper since the European Commission has "shown little inclination to regulate the external conduct of TNCs based in the Community"¹⁸⁹.

What is the value of these self-regulatory documents? Total states that the code of conduct for the Yadana project has "legal value since it is appended to every agreement signed with subcontractors working on the project and is binding on them". However, this "legal value" is purely contractual and cannot be used by an individual victim of the activities of the firms. Also, codes of conduct are at pains to appear as providing for reliable and effective mechanisms in guaranteeing the respect of the enshrined principles. For example, KMG has established an elaborate reporting system in case of suspected violations of the Code of Ethics (including an anonymous and confidential hotline) and affirms that violations of the code are considered "serious offences that may result in disciplinary action, up to and including discharge, as well as possible legal action or penalties". However, TNCs unmistakably shun from establishing fully externally verified enforcement mechanisms and providing effective legal value to these codes.

Needless to say that such an approach does not come across as the most victim-friendly mechanism in preventing the violation of international law by corporations. In fact, these voluntary corporate initiatives can be perceived essentially as public relations exercises which reduce the corporation's vulnerability to possible consumer campaigns or boycotts and divert public attention away from binding legal accountability to looser social responsibility. Regarding multilateral initiatives, one can only agree with Ratner that the end of the Cold War and the rise of globalisation witnessed a clear shift in favour of corporate rights and investor friendly codes of conduct. He states that "for the corporations, the relationship with the citizenry became a matter of getting the best terms out of the employment contract. The citizenry's human rights were the government's responsibility, not theirs. In short, the race to the bottom was on"¹⁹⁰. In brief, these multilateral initiatives "were doing little or nothing to address corporate power" (Bendell, 2004), since under pressure from Northern governments and corporate lobbying, these documents failed to place binding obligations on TNCs and states. Nonetheless, CSR does play an important role in setting standards for an industry as well as in raising awareness and expectations vis-à-vis the firm itself. As Muchlinks

¹⁸⁹ NAHAL p22. European Parliament Resolution A4-00/98, January 1999.

¹⁹⁰ RATNER (2001), p 10.

(2001) notes, the codes of conduct “at the very least create a moral expectation that the codes will be observed”.

B) Corporate accountability and Western Sahara

In the light of this brief overview of the notion of corporate accountability, how would it apply to Western Sahara and to TNCs, such as Total and KMG, involved in the occupied territory?

i. Indirect and direct legal accountability

As this stage in the proceedings in the trials against Total and in the developments of international law, several key elements may be highlighted for our discussion on corporate accountability and its possible application to the exploitation of natural resources in Western Sahara.

Direct legal challenges against TNCs would offer minute possibilities of relief for possible victims of TNCs at this stage of development in international law. In the case of Western Sahara, it seems unlikely that any proceedings against corporations might be considered by a domestic judge (in France, Spain etc.). Indeed, the rare cases against TNCs which were considered admissible concerned the worse types of crimes (e.g. US Alien Tort claims; crimes against humanity for nazi-era corporations; “corporate killing” in the UK). Since this represents the most accessible avenue at this stage for addressing corporate liability, such claims are seemingly unsuitable for corporate activities in Western Sahara. In addition, the limited information on and access to this territory represent significant hurdles for any future investigation. However, the extensive damage caused to the eco-system by the enterprises involved in the fisheries and the labour discrimination in the phosphate industry appear to offer potential legal bases for proceedings against foreign enterprises.

Regarding the specific oil and gas TNCs, the (alleged) current stage of their activities - initial seismic study, hardly entails corporate liability, which as such could be brought before a court. However, any “further exploitation” (which involves drilling) and then exploitation will have to be carefully scrutinised according to the litmus test defined earlier in chapter II. The traditional practice of Rabat when dealing with resource exploitation would indicate that Saharawis are unlikely to ever benefit from (and be

involved in) any future oil exploration and exploitation as long as ONAREP remains in charge. Noteworthy is the fact that Total appears very conscious of the tight margin of maneuver offered by the dubious distinction made in the 2002 Legal Opinion and has stated its stern intention to consult the UN if it decides to press ahead with the oil exploration, thereby limiting NGO negative campaigns or even possible legal or political actions¹⁹¹. Notwithstanding the nature of Total and KMG's activities, the financial aspect of the reconnaissance contracts however does raise some serious questions as to the pertinence of the UN Legal opinion. Indeed, if both TNCs did indeed supply ONAREP with financial commissions for the contracts (as is highly likely), the distinction made by the Legal Opinion is hardly tenable since in that case the occupying power benefits directly *and* exclusively from corporate involvement in the illegally acquired territory, independently from the nature of these activities, and thereby violating the basic principles of the *erga omnes* rights of non autonomous peoples.

Through the home state? Hence, in the absence of an accessible, legal framework imposing direct obligations upon corporations, plaintiffs will require skilful and creative interpretation of the current legislation to convince a court of the admissibility of their case. As a result, the most accessible avenue for redress appears to remain through indirect obligations of the home State - as a caveat, Western Sahara as an illegally occupied territory poses a problematic identification of the "host state" for TNCs involved in the area: is it the administrative power de jure, Spain, or the party to the contract/ administrative power de facto, Morocco? In the case of TNCs involved in the exploitation of natural resources, the possible avenues and international human rights law to be considered under indirect home State obligations would be: a) the contentious procedure of the ILO (in particular the violation of the right to equal opportunity and non-discriminatory treatment inscribed in ILO standards); b) the ECHR (e.g. right to property). The recent recognition by the Strasbourg Court of the extra-territorial application of the Convention in the *Loizidu vs. Turkey* case (1998) may possibly be argued in favour of a Saharawi case; c) International environmental conventions (degradation of the environment); d) UN Special Rapporteurs and UN Commission on Human Rights (e.g. country reports on the home states). In any event, the Charter of Economic Rights and Duties of States adopted by UNGA in 1974 carries considerable

¹⁹¹ Interview with Patricia Marie July 2004. Marie noted that such a decision will depend on the results of the seismic study.

soft law duties. For example, it clearly states under article 16.2 that “No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force”. The presence of French and US government representatives at the signature of the exploration licenses is in clear violation of this provision.

Political hurdles. In spite of the avowed liberal attitudes of both corporate leaders and government officials, the French and US government interventions in the Belgian and US trials clearly demonstrate the watertight relations between a large corporation and its home State and that the latter will not shun from defending “its” TNC abroad (at taxpayers’ expense). When applied to Western Sahara, this only confirms the phenomenon (and the pertinence) of “corporate diplomacy” discussed above: it appears indeed that to some extent, oil corporations dictate the diplomacy of their home states rather than the other way round. The behaviour of the French government is all the more ironic when confronted with its statement on Total’s activities in Western Sahara when Paris rejected its responsibility arguing that the company was privately owned. In addition, the intervention of the French government in favour of Total reveals a peculiar perception by certain States of the independence of the judiciary and hints at the difficulties facing the establishment of an independent judiciary system capable of enforcing corporate accountability. Claims in Northern domestic courts against corporate activities in Western Sahara will thus inevitably face tough opposition from the home governments such as the USA and France, which have strong strategic and business interests in avoiding such proceedings.

ii. Corporate social responsibility

Corporate social responsibility and code of conducts did not prevent Total and its colleague Kerr-McGee from engaging in legally dubious conduct in spite of the fact that in the case of KMG, the cornerstone of its code of conduct is described as “compliance with the law”. Also on an ethical level, under the section “International Political Activity”, the KMG code notes that “the company is committed to meeting high ethical standards in its world-wide operations. This includes treating everyone fairly and with respect, maintaining a safe and healthful workplace, and improving the quality of life wherever Kerr-McGee does business”. Its code of conduct and ethics defines the fundamental principles which “guide [its] business conduct and help [its]

employees perform with integrity”: respect for the individual, ethical business dealings, safe working practices, responsible corporate citizenship, responsible care for the environment and continuous improvement¹⁹². Similarly, the web site of Total stresses its commitment to adhere to international and national legality and underlines its Code of Conduct, its participation in the UN Secretary General’s Global Compact initiative and its Ethical Guidelines. Such a contrast between words and acts in the case of Western Sahara would tend to support the view that CSR is in fact largely a window-dressing exercise, which fails to pass the “practical test” of legality and ethics.

In contrast, following the campaign against TGS Nopec for its activities in Western Sahara, the company revised significantly its code of conduct, which now contains a specific reference to “international operations” which states that prior to conducting business in a potential “conflict area” of the world, the business decision makers should consider the “TGS Conflict area decision making checklist prior to engaging in those projects”. This noteworthy checklist has been adopted from various institutions including the Norwegian MFA and Storebrand¹⁹³.

In the absence of an elaborate international and domestic corps juridique and codes of conduct, what are then the means at the disposal of victims or engaged citizens to oppose illegal or unethical activities by multinationals in Western Sahara? It appears that political and moral rather than legal tools represent the most effective alternative in somehow striving to confront the responsibility of multinationals in this territory, through corporate accountability campaigns by civil society and completed by government intervention.

C) Negative campaigns as the last resort? The Norwegian campaign against TGS Nopec

¹⁹² www.kerr-mcgee.com/ir/governance/ir_gov_ethics.htm KMG notes that “each employee receives the code of conduct and ethics upon joining the company, and compliance is a condition of employment”.

¹⁹³ Point 2 of the checklist asks whether the company’s activity “fully complies with our Norwegian corporate obligations, our US legal obligations and the laws of the countries within which we perform services?”. Point 3-is the company acting in a manner supportive of the UN Universal Declaration of Human rights and its principles throughout our business operations?” (this is of particular pertinence in the case of Western Sahara since self-determination is inscribed in UDHR). Point 4 questions whether the “goals of the company’s activities are acceptable from a stakeholder’s perspective?” Point 5 asks what types of harmful side-effects can we foresee? Do we cause more harm than good in the host country? Are we unintentionally complicit in someone else’s wrongful acts?”.

As an example of the new corporate accountability movement within civil society, this last section will focus on the campaign led by the Norwegian Support Committee for Western Sahara (hereafter the Committee) from May 2002 to June 2003 against the Norwegian company TGS Nopec, which had been subcontracted by Total and Kerr-McGee to map the continental shelf of Western Sahara. This section will largely follow the typology of civil society engagement adopted by Jem Bendell and will consider the Norwegian campaign as "forcing change tactics", defined as those targeting corporate reputations to provoke a policy change¹⁹⁴.

i. The campaign

The Norwegian Company, **TGS NOPEC** won a tender launched by Total and Kerr-McGee to perform the physical collection of the seismic data in the offshore area of Boujdour and Dakhla in Western Sahara. While the company's stock is traded in Oslo and is considered as a Norwegian company, its headquarters are in Houston. Its web-site indicates that TGS is "a leading global provider of non-exclusive seismic data and associated products to the oil and gas industry" and "specialises in the planning, acquisition, processing, interpretation, and marketing of non-exclusive surveys worldwide"¹⁹⁵. TGS started its seismic survey offshore Western Sahara in May 2002 and completed it in January 2003 and handed over all the data collected to ONAREP and the two foreign companies in March 2003¹⁹⁶.

The inception of TGS' activities in the occupied territory led the Committee¹⁹⁷ to initiate a campaign against the seismic Exploration Company (roughly from October 2002 to April 2003). The Committee is a membership organisation essentially led by students with close relations with a handful of NGOs, including SAIH (Norwegian Students' and Academics' International Assistance Fund), STL (Norwegian Association of Students), Norwegian Peoples Aid and the Norwegian Church Aid. A small team of only four persons actively worked on the campaign.

The Polisario had sent letters to TGS asking the Norwegian company to withdraw from the territory's waters and denounced the TGS deal as "both dangerous

¹⁹⁴ Bendell, p14.

¹⁹⁵ <http://www.tgsnopec.no>

¹⁹⁶ TGS press release, 18 March 2003.

¹⁹⁷ The committee had been active since 1993 but the launch of the campaign led it to be formally created in September 2003. According to the 2002 annual report of the committee, "this came as a result of high

and illegal, increasing the risk of further conflict, destabilisation and suffering in the entire region". Referring to the company's home state, the Polisario denounced this "shady deal, which implicates all Norwegians" and which "seriously damages the image of Norway as a defender of international legality and human rights, since it contributes to justify an illegal occupation and theft of natural resources"¹⁹⁸.

The Campaign against TGS was placed within a larger campaign by the international pro-Saharawi solidarity movement against the illegal exploitation of resources in the occupied territories. Its main aim was to pressure TGS into ending its activities in the territory and a secondary goal was to raise the awareness among the general public on the conflict of Western Sahara. The campaign combined a wide range of activities and targeted a wide range of actors.

In terms of **strategy**, the Norwegian support committee combined traditional and more original or modern tools for campaigning:

- 1) Local, traditional methods included **demonstrations** (e.g. outside TGS-NOPEC's annual meeting in Oslo), **petitions** (directed to TGS and its major shareholder the Norwegian Pension Fund, which was signed by over 30 Norwegian NGOs) and the use of the local and national **media** (over two hundred articles in Norwegian and international press reported on the campaign¹⁹⁹).
- 2) The campaign sought to provide it with international "institutional" recognition through the successful lobbying for the awarding of the **RAFTO** award in 2002 to Saharawi activist Sidi Mohammed Daddach. This enabled the latter to bring up the campaign at the award ceremony for greater publicity²⁰⁰.
- 3) The creation of the news service **Sahara Update** (established as a leading information web-site on Western Sahara)²⁰¹.
- 4) **Threats of legal suits**. The Support Committee stepped up the legal pressure against TGS by threatening to sue the company "in Norway and abroad", to "provide a test case of the legality of such operations in occupied territories". The committee also warned that TGS would even be obliged to pay damages²⁰².

activity and increased interest from activists and the opinion, which made it necessary to formalise the Committee".

¹⁹⁸ Upstream Online, 6 June 2003.

¹⁹⁹ Interview with Erik Hagen, June 2004.

²⁰⁰ for more information on the Rafto prize cf. <http://www.rafto.no>

²⁰¹ For more information cf. <http://www.saih.no/skvs> ; <http://groups.yahoo.com/group/sahara-update>

²⁰² Afrol News, 21 Feb. 2003.

Similarly, the campaign targeted a wide range of **pressure points**:

1) **The political parties and government.** The Committee together with Sidi Mohammed Daddach held a meeting with the Norwegian Prime Minister to raise the issue. Several politicians relayed the campaign within political circles and public institutions. For example, the Committee called upon a member of Parliament, Hallgeir Langeland of the Socialist Party, to raise the issue in Parliament, asking for the opinion of the MFA Jan Petersen. Langeland also nominated the Polisario for the Nobel peace prize. Two meetings were held between the Committee, TGS and the Parliament's Foreign Affairs Committee. More significant was the involvement of the Deputy Foreign Minister Vidar Helgesen. At an ethical investment conference on 13 February 2003 organised by TGS shareholder Storebrand, Helgesen, outlined the view of the Norwegian government on this issue²⁰³. Mr. Helgesen questioned the legality of TGS' operations, which he said was "problematic because the Moroccan claims on Western Sahara is disputed and the population there demands self-determination". Helgesen concluded that Norwegian authorities could "not recommend this type of exploratory activities in which TGS are involved even if Morocco still has not taken a final decision to whether it is actually going to exploit the possible resources" and that "Norwegian business should restrain itself when it comes to activities in localities disputed by international law"²⁰⁴ (sceptics have pointed out that in fact such a position would allegedly have been influenced by an unresolved territorial dispute with Russia over oil-rich areas).

2) **The shareholders:** While "traditional" campaigns against corporations usually target the consumer and appeal to his/her civic responsibilities (in boycotting a product or a brand), in the case of TGS Nopec the specific activity (exploration) and the type of company involved (a specialised, engineering firm) called for a different type of campaign; the Norwegian committee aimed at where the money was, i.e. the stock-exchange and targeted its main actors, the shareholders, as a lever on the company leadership to influence its activities.

Being the largest external shareholder in TGS (out of a total of 2500) with 7% of the shares and under government control (a government appointed board of directors), the Norwegian National Pension Fund became one of the prime targets of the campaign.

²⁰³ Committee annual report 2002.

²⁰⁴ Report on the meeting mainly from Afrol News, 13 Feb. 2003.

The committee sent a letter to the Norwegian MoF asking the ministry to order the Fund to divest from TGS. Initially, the Fund ignored the Committee's calls to divest from TGS. However, the intervention of the Norwegian government through the voice of its deputy Foreign Minister allegedly made the board change its mind on the engagement of TGS²⁰⁵. In a statement made on 21 February 2003 (only a week after the deputy foreign minister's statement) the Director of the Fund, Tore Lindholdt, stressed the ethical problems of investing in a company that has been said to violate international law and demanded that TGS react to the protest, thus adopting the legal analysis of the Norwegian government. Nonetheless, the Fund refused to divest in TGS, noting that it wanted to be able to influence the company from within and hoped to be in a position to change TGS' policy in Western Sahara. A similar position was adopted by its second shareholder, investment management fund, Storebrand, which preferred to enter in to a dialogue with TGS rather than divest (which due to the size of its shares-4%-would also have had a significant impact on the price of the share)²⁰⁶. The Committee also targeted other "visible" shareholders such as a church, a football player and a university scholarship fund²⁰⁷.

3) The industry. Following the campaign against TGS NOPEC, the Committee then issued open letters to deter other seismic companies from operating offshore Western Sahara. A letter sent to 51 seismic exploration companies world-wide informed them of the "political risks" at stake in the region and made it clear that any company involved with Total and KerrMcGee would become targets of "massive negative public relations, shareholder sell-outs and possible law-suits"²⁰⁸.

iii. Assessment of the campaign

Key role of government. Following an initial flat rejection of the claims made by civil society advocates²⁰⁹, TGS Nopec progressively adopted a more flexible tone attesting to the gradual impact of the campaign. The decisive pressure point appears to have been

²⁰⁵ Afrol News, 21 Feb. 2003.

²⁰⁶ interview with Storbrand's Head of SRI, Mr. Skancke.

²⁰⁷ Interview with Erik Hagen.

²⁰⁸ Afrol News, 27 May 2003.

²⁰⁹ For example, in a press release in November 2002, the entire Board of TGS indicated that it believed that the "company had operated responsibly and ethically on this matter within the realm of international law and according to UN guidelines". And denounced the "publicity campaign organised by certain political interest groups in Norway" against the group that were based on "assumptions, speculation about future events and innuendo as opposed to facts".

the intervention of the Norwegian Foreign Ministry. A press statement issued on 18 March 2003 by TGS demonstrated the newly adopted caution of the firm: it stressed that “it has the right to license the data already collected, but has no agreement to participate in or profit from any future exploratory drilling or production or exploitation of mineral resources from the area”. It mentioned the Deputy Foreign Minister’s statement and stated its appreciation of the “complexity of the political issues and respects the views of the Norwegian authorities. As a result the company has decided not to undertake any new projects in Western Sahara without a change in political developments”. Lastly, TGS committed itself to “improve its procedures for risk evaluation on potential projects in disputed areas of the world and will actively seek advice from Norwegian authorities when in doubt”. TGS even went as far as recognising its mistake in having agreed to this contract and admitted that with hindsight, “the company should not have been so impudent as to shoot seismic” in the disputed area and committed itself not to carry out any further work in the area even if needed”²¹⁰. However the company never interrupted the ongoing mapping process and did ultimately hand over the results to ONAREP, Total and KMG (and not to Polisario).

From stakeholders to shareholders. The campaign on the stock exchange appears to have been successful: around 25 shareholders divested from TGS and the value of its shares sunk by two-thirds within a year. In addition to the perception by the Committee, that the arguments of the divesting companies were ethically grounded, one may add that the shareholders may simply have based their decision to divest on financial grounds: to sell before the others do. Stavanger Afsenblad divested at a loss of \$100,000. Other shareholders to divest were the municipality of Aas in November 2002, Sandefjord and Stavanger municipalities and the newspaper Bergens Tidende. Leading Norwegian insurance company and the country’s leading stock market analyst, Storebrand Ltd., put strong pressure on TGS to change its approach on the issue. Also, the Swedish ethical investment fund, Banco Fondsvorvaltning divested its stock and excluded TGS from their investment portfolio. This campaign did not only affect TGS. Indeed, the fund broker enterprise and the largest Norwegian shareholder in KerrMcGee, Skagenfondene, sold its 100 000 shares in the company at an estimated loss of \$2 million. Interestingly, it justified such a decision on the basis of ethics yet did also admit that the “risk of being part of KerrMcGee [was] considerably greater than

²¹⁰ Afrol News, 21 February 2003.

predicted”²¹¹. Erik Hagen from the Norwegian Committee stressed the crucial role of the media, both at a local and national level, in pressuring the shareholders into reacting to the campaign. He also noted that the campaign had been focused on ethical/political rather than legal arguments²¹².

Setting a precedent for the industry. Exploration company Multiwave committed not to get involved in the area due to a “desire to maintain high ethic standards” and to avoid risking “something comparable” to the campaign against TGS²¹³. Similarly, Petroleum Geo Services (PGS), Norway’s leading seismic exploration company, declared it had no intention to operate in Western Sahara²¹⁴. The campaign also led several Norwegian counties, funds and other institutions to elaborate (or to revise) ethical investment guidelines.

Overall evaluation of the campaign. Three main elements can be identified:

(1) Greater awareness. Campaign activist Ronny Hansen considered the campaign as “a great success” in the sense that thanks “to the broad and good media coverage it has elevated both knowledge and attention concerning the conflict” and that “key politicians are getting involved in the conflict and have put the issue higher on their agenda”²¹⁵. However, the Committee admitted in its 2002 annual report that the “campaign did not reach its ultimate goal of stopping TGS-NOPEC’s surveys and the company has handed over the data to the oil companies” and regretted that the Pensions Fund had not sold its shares.

(2) Legal developments. The legal analysis provided by the Norwegian government under pressure from the campaign is in clear contrast with the ambiguous opinion by the UN Legal Counsel and sets an influential precedent both in terms of the exploitation of natural resources in non autonomous territories and in terms of the official positioning of a Northern country regarding the Western Saharan conflict.

(3) Spillover effect. Interestingly, concurrent and subsequent to the campaign, several advocacy groups or individuals around the globe relayed the efforts of the Norwegian campaign by sending out letters to the oil and gas TNCs involved in Western Sahara

²¹¹ Afrol News, 27 May 2003.

²¹² Interview with Erik Hagen, 30 June 2004.

²¹³ Afrol News, 6 June 2003.

²¹⁴ Afrol June, 6 June 2003.

²¹⁵ Committee Annual Report, 2002.

(for example Richard Knight, an African and Human Rights consultant, sent two letters to denounce Kerr McGee's activities in Western Sahara and to the Securities and Exchange Commission²¹⁶ which had listed KMG activities as being off the coast of Morocco and not Western Sahara). More recently, a campaign was launched against UK based Wessex Exploration via the Internet and largely refers to the advocacy action against TGS Nopec as a "success story" and a model.

iii. Drawing lessons from the campaign

The socio-economic infrastructure. Drawing on the experience of the Norwegian campaign, one may conclude that the effectiveness of negative campaigns depends to a large extent on pre-existing socio-economic factors. Indeed, the Norwegian campaign appears to have benefited from a fairly favourable context: (a) a strong awareness among the population on ethical and moral issues and related expectations concerning the economic activities of their home corporations; (b) Owing to the fact that Norway is a leading oil producer and home to several seismic exploration TNCs, the Norwegian public, government and private sector would evidently be more sensitive to campaigns targeting an oil exploration company and more vulnerable to negative public exposure; (c) Norway is a rich country, whose shareholders or enterprises can compensate temporary and minor financial losses by gains elsewhere. Questioned on the feasibility of such a campaign in other European countries, MEP Margot Kessler, Chair of the Inter-group for Western Sahara, commented that Norway had a strong tradition of public campaigns and that TGS was a well-known company in the country, while such a campaign would be more difficult in countries such as Germany, where the State is traditionally reluctant to interfere in issues of economic development and trade and the population is less reactive to public campaigns of this type²¹⁷. As a counterpoint, it is interesting to note that the investment fund Storebrand reported no complaints from its clients regarding its shares in TGS²¹⁸. This absence of consumer pressure would tend to corroborate Peter Muchlinski's sharp observation that "where firms are concerned with human rights, it appears that this is not because they will definitely go out of business

²¹⁶ Letter sent by Knight to Kerr-McGee on 26 April 2002. Cf. Knight's web site.

²¹⁷ Interview, June 2004.

²¹⁸ Interview with Storebrand SRI Director.

otherwise, but because they feel that their public place on the market and/or their brand image requires it”²¹⁹. This appears as a key point when designing a negative campaign.

Size and nature of the corporate target. In addition to the socio-economic context, a second key element when designing campaigns appears to be the size and nature of the corporate target. A TNC on the stock exchange offers possibility to target shareholders as in the case of TGS. Noteworthy is the fact that, while in traditional campaigns, the new “responsible” behaviour advocated does not induce a loss for the consumer (beyond the use of the product itself), a campaign calling upon shareholders to divest means *per se* a financial loss as opposed to the initially expected benefits. The challenge of such a campaign is therefore to convince shareholders to divest on moral grounds (participating in illegal activities by the company) or, from a less idealistic or more realist perspective, to convince shareholders that the campaign will effectively lead other shareholders to sell out and therefore that the value of the shares will eventually fall and that it is better to sell now rather than later and thereby limit the losses. Evidently, such campaigns will be once again more effective in rich, developed countries and in a favourable financial context (where losses from divesting can be rapidly recouped by alternative investments).

Key government intervention. The size (i.e. influence) of the TNC appears as a critical factor in determining government intervention, which as in case of TGS (and Premier Oil in Burma) proved key to the success of the campaign. This raises a certain paradox whereby the states, which have established this unregulated global system, that guaranteed TNCs full impunity from litigation, remain the ultimate arbitrators of corporate accountability. In the case of Western Sahara, the importance of French investment in Morocco appears unlikely to lead Paris to call for an interruption of investment in Western Sahara and risk a diplomatic-commercial feud with its southern ally. Similarly, the geo-strategic importance of Morocco in the US plans of a Great Middle East (and more generally in its fight against Islamic terrorism) as illustrated by the recent designation of Rabat as a “special non NATO partner” also reduces the likelihood of official government intervention on the issue of US corporate activity in the occupied territory. Similarly, the UK, as the second largest investor in Morocco (UK FCO figures), could hardly jeopardise these investments over dubious exploration

²¹⁹ MUCHLINSKI, p 39.

activities of a minor limited company such as Wessex Exploration. This harsh reality of the double standards of *Realpolitik* is evident when comparing the UK policy on trade and investment in Burma and Morocco. Indeed, the UK Trade and Investment web site²²⁰ states that “ the UK does not encourage trade with or investment in Burma. Nor do we offer any commercial services for companies wanting to do business with Burma. We do not give financial support for trade promotion activities and we do not organise trade missions. As the Prime Minister stated on 25 June 2003, trade with Burma is not appropriate when the regime continues to suppress the basic human rights of its people”. In contrast, the UK Trade and Investment office does not mention once the Western Sahara conflict on its presentation of Morocco and cites extensively the various advantages of investing in the country and offers services to invest in the country.

The free-rider problem. Regardless of these key factors, in the case of limited companies such as Wessex Exploration, campaigns on the stock exchange and appeals to ethical investment are inappropriate and other forms of campaigning are required. Moreover, while campaigns by civil society using "forcing change" tactics may be effective when targeting high-profile multinational corporations potentially concerned about their reputation, such campaigns may have a limited impact on smaller companies, with limited visibility such as Wessex. This raises serious questions regarding the possibility of TNC “free-riders” with low public profile, no branded goods, no shareholders and little moral scruples, profiteering from this system of limited corporate accountability.

Conclusion: corporate accountability, still more a process than reality

The international legal framework for corporate accountability remains largely unsatisfactory due in part to the persistence of the prevailing mindset and the traditional legal system conceived under the perspective of establishing and enforcing State obligations. In a largely unregulated process of economic globalisation, where TNCs are increasingly affecting human welfare, the protection of international human rights for example continues to depend essentially on States, which are in fact unwilling or unable to challenge corporate power. One alternative approach is thus to establish a regulatory framework specifically for corporate accountability, designating TNCs as duty holders,

²²⁰ www.trade.uktradeinvest.gov/burma and .../morocco

which can easily be taken to domestic courts in host or home countries. The recent cases against Total provide an opportunity to take stock in the nascent (and fastidious) developments in this approach. As an alternative to binding legal mechanisms for corporations, the latter and (Northern) corporate-friendly institutional bodies or governments have sought to develop the notion of corporate social responsibility, however these voluntary and non binding initiatives have proved much less effective than media campaigns by civil society in ensuring responsible corporate behaviour. As such, the negative campaign against Norwegian company TGS Nopec represents a vivid example of the potential effectiveness, but also the limitations, of such accountability movements.

Conclusion

“It is for the people to determine the destiny of the territory and not the territory the destiny of the people”.

Judge Dillard, ICJ Western Sahara Advisory Opinion, 1975, Separate Opinion

Faced with the harsh realities of the neo-imperialist occupation of the Western Sahara by Morocco, which according to USA ambassador Frank Ruddy has “turned [the territory] into a Colorado-sized concentration camp”²²¹, the international community and in particular the members of the UN Security Council have remained disturbingly mute over the past quarter of a century. This silence can hardly be attributed to deficiencies in the international legal doctrine but instead to a severe lack of political will to enforce the latter beyond symbolic declarations of good intentions. Indeed, over the past decades the United Nations and various international bodies have developed an elaborate doctrine of international law regarding the right to self-determination of non-autonomous peoples, such as the Saharawis, which encompasses an inalienable right over their natural resources. Yet, in practice, the vast majority of States have so far failed to respect and protect these fundamental principles when dealing with the last African territory to be decolonised. Of course, these same States have never ceased to regularly reaffirm their “solemn attachment” to these principles whenever the conflict has been mentioned since 1975. In particular, their failure lies in their reluctance, if not their stubborn refusal, to control the activities of their corporations, which partake in the plundering of the resources of the Western Sahara together with the Moroccan makzhen. Evidently, this foreign corporate involvement only contributes to further complicate the conflict and to delay its settlement by reinforcing the deeply entrenched interests of the Moroccan elite in the territory and by providing additional arguments to the Saharawi advocates of a return to armed conflict, which remain strikingly rare but could only gain force with the continuation of the economic plundering.

Through a combination of legal and geopolitical perspectives on the issues related to the exploitation of Western Saharan resources in general and oil in particular, this research paper has sought to demonstrate to what extent the increasingly powerful transnational corporations can negatively affect the welfare and the self-determination of a people and more generally to what extent TNCs can affect conflict resolution and

the conduct of international politics, while the means to enforce corporate accountability remain limited. While it is too early in the legal proceedings against Total (and Unocal) to draw any conclusions, these lawsuits certainly represent a first step in what appears as a long process ahead of ending the existence of legal no-man's-lands, where corporations benefit from absolute impunity and where victims are deprived of means of redress. Also, TNCs appear too powerful for voluntary codes of conduct or vague notions of corporate social responsibility to provide sufficient regulation of their activities. Rather, the case of the oil and gas TNCs involved in Western Sahara provides an illustration of the need for global governance and for direct state and international regulation of corporate activities. In the mean time however, it appears unnecessary to reinvent the wheel: States should simply comply with their international obligations such as UNSC and UNGA resolutions and ILO conventions, use political voice, as in the case of the UK government regarding disputed corporate activities in Burma, and not fall prey to the logics of *Realpolitik* when facing the protracted conflict of Western Sahara and the plundering of its natural resources by external powers and transnational corporations. As shown by the example of the Norwegian Support Committee for Western Sahara and its campaign against TGS Nopec, civil society holds a key role in the emergence of this new corporate accountability movement and in reminding individuals, corporations and governments of their ethical *and* legal obligations. Then and only then, will the international community avoid the shameful drift from indifference to acceptance of the annexation of the Western Saharan territory and finally ensure the enforcement of the right to self-determination of the Saharawi people.

Bilbao-Paris, 15 July 2004

²²¹ RUDDY (1998).

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