SPAIN'S LEGAL OBLIGATIONS AS ADMINISTERING POWER OF WESTERN SAHARA

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PURPOSE

The issue of the legal obligations of Spain as administering power is certainly peculiar because since 1976, Spain does not has effective power on the territory (although the maritime and aerial space present a very relevant problem). In this paper, starting from an essay of categorization of models of obligations of colonial powers vis-à-vis its colonies, we want to show the evolution of these models in the International law of the colonization until now. For this purpose, we will try to clarify what is the legal status of Western Sahara, discussing if it can be considered as the "administering power" of the territory. Taking into account the obligations now established for third countries and administering powers in the International Law we want to study what obligations are imposed on Spain and its degree of compliance.

I. ANTECEDENTS: THE OBLIGATIONS OF COLONIZATORS

I.1. The debate in the foundations of the International Law.

The foundations of modern International Law were set by Spanish scholars when reflecting on the colonisation of America (*Brown Scott*). It is not surprising to see arise in that very first moment the question about the lawfulness and conditions of the colonisation. Three different positions were taken into consideration.

According to the first, represented by the founder of the International Law, the professor of the University of Salamanca *Francisco de Vitoria* in 1539 a colonisation could be lawful provided that the colonizer should seek the good of the colonized:

"*Cum illa limitatione ut fieret propter bone et utilitate eorum et non tantum ad quaestum Hispaniorum*" (Vitoria, p. 119).

According to the second, presented by the professor of the University of Valladolid *Bartolomé de Carranza* in 1540 a colonisation is lawful, but only if it is provisory, so that in a short period of time the colonized people may recover their independence:

"*Should them (the barbarians) be instructed by honest men so that they don't return to their barbary; and when this task was accomplished after 16 or 18 years and*

the land be plain, because there is no risk that they return to their primitive way of life, they should be left in their original and own freedom because they don't need more trusteeship" (Carranza, p. 43).

But, opposed to them, the professor of the University of Alcalá *Melchor Cano*, introduced a third point of view in 1546. Starting from the idea that "for the wisdom or policy sake no State has authority to conquest another" (Cano, p. 105), Cano dissents from Vitoria and Carranza stating that "a sovereign cannot clearly conquest by force the barbarians for their welfare sake". Hence, Cano rejects the lawfulness of any colonization , even if under conditions:

"*I reject that the wise men from Spain should rule the ignorants of the barbarian peoples. It is necessary to consider all the circumstances, because maybe it's not convenient such a perfect policy for those stupid people*" (Cano, p. 109).

I.2. The obligations of the colonial powers according to the General Act of Berlin.

I.2.A. As it is known, the European powers decided to establish a general International Law on the colonial process in the Berlin Conference. It was then possible to choose between on of the three possibilities embodied in the theories of the three quoted authors: a) definitive occupation to promote the well being of the local population with annexation of the territory; b) transitory occupation to promote the well being of the population with further granting of independence; and c) forbid of any occupation.
When choosing the content of this principle, they implemented the first position but in a more radical way than formulated by Vitoria. Two points characterize this legal status:
a) the aim of **promoting the "moral and material well-being"** of the colonized people is recognized, but as a secondary aim subordinated to the profit of the metropolis; and
b) there was **no provision to grant the independence** to the colonized territories.

The *General Act of the African Conference, signed at Berlin on February 26, 1885*, was primarily intended to demonstrate the agreement of the Powers with regard to the general principles which should guide their commercial and so called civilising action in the little-known or inadequately organised regions of Africa. According to its Article VI:

"*All the powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their* ***moral and material well-being*** *and to help in suppressing slavery, and especially the Slave Trade. They shall, without distinction of creed or nation, protect and favor all religious, scientific, or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization*".

Moreover, the General Act provided in its article XXXIV a system to organize the occupation of the African continent:

"*Any power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them and assume a protectorate . . . shall accompany either act with a notification thereof, addressed to the other Signatory*

Powers of the present Act, in order to enable them to protest against the same if there exists any grounds for their doing so".

I.2.B. This colonial Law was applied to the territory of "Rio de Oro" (in the Western Sahara) which was set under the Spanish rule some months before the General Act.
In November 28, 1884, the representatives of the independent Sahrawi tribe in Rio de Oro signed a Treaty of protectorate with the representative of the Kingdom of Spain where it was stipulated that:

"*we have transferred to them the territory called Uadibe or Cape Blanc, in the coast, so that it may lie by the sole protection of the government of HM the King of Spain, Alphonse XII*" (French version in C.I.J., *Mémoires*, t. II, p. 89: Spanish original version in Diego Aguirre, *Historia del Sahara Español*, p. 163).

In December 26 1884, a royal order to the Representatives of the King of Spain in the foreign countries confirms that Spain accepts to establish a "protectorate" on the region of Rio de Oro between cape Blanco (20º 51' N-10º 56' W) and cape Bojador (26º 8' N-8º 17' W), that is, on the centre and south of the Western Sahara (French version of this text in C.I.J., *Mémoires*, t. II, p. 96; Spanish original version, Diego Aguirre, *Historia del Sahara Español*, p. 164). This decree was enacted *before* the entry into force of the General Act. The Kingdom of Morocco did not express any reservation or protest before the Spanish declaration of protectorate (C.I.J., *Mémoires*, t. I, p. 288).

I.3. The obligations of the colonial powers after the World War I.

The World War I brought some changes on the Colonial Law. The main consequence was that the dominions of the defeated powers were submitted. Some of those dominions (the German ones) were in Africa. And then, the colonial Law related to Africa was split in two regimes.

I.3.A. As far as the colonies of the non defeated powers were concerned, the International Law applied to their colonies still was the General Act of Berlin, with the new modifications introduced in 1919. The *Convention Revising the General Act of Berlin*, February 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890 was signed at Saint-Germain-en-Laye, *September 10, 1919*. The 1919 Convention does not introduce any substantive changes on the legal regime established in Berlin in 1884. It says that under the control of the new authorities "the evolution of the native populations continues to make progress". According to the new draft of the article 11:

"*The Signatory Powers exercising sovereign rights or authority in African territories will continue to watch over the preservation of the native populations and to supervise the improvement of the conditions of their* ***moral and material well-being****. They will, in particular, endeavour to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea*".

I.3.B. But, as far as the territories depending from the defeated powers were concerned, a new Law was set into force, namely the *Covenant of the League of Nations June 28, 1919*. Its article 22 contained the new law on colonization for those territories.
The first paragraph of the Article introduce the general principles which were the same established in the General Act of Berlin 1884, i.e.,

a) the obligation **to promote the "well-being"** of the colonized people; and
b) the metropolis have **no obligation to grant independence** to those territories.
Hence no differences are in this point for the colonies ruled under the General Act of Berlin 1884 and the Covenant of the League of Nations 1919. Certainly, the Covenant spoke, for the first time, about the fact that the ancient colonies of the States who lost the war were territories "not yet able to stand by themselves". However, no obligation was imposed to grant independence even if it comes a moment where they could be able to stand by themselves:

"*To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples* ***not yet able to stand by themselves*** *under the strenuous conditions of the modern world, there should be applied the principle that the* well-being and development of such peoples *form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant*".

But some important differences were introduced in the next paragraphs. Those differences were that:

a) Those colonies were not under the sovereignty of a State but under the tutelage of the League of Nations:

"*The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as* Mandatories *on behalf of the League*";

b) The character of the mandate differed "according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances". The degree of authority, control, or administration to be exercised by the Mandatory should, "if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council".

c) and finally, that some obligations were imposed on the Mandatories:

"*In every case of mandate, the Mandatory (should) render to the Council of the League of Nations an* annual report *in reference to the territory committed to its charge.(…) A permanent Commission (should) be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates*".

II. THE CHARACTER OF THE OBLIGATIONS IMPOSED UPON THE ADMINISTERING POWERS UNDER THE UN CHARTER

II.1. The obligations of all the UN members regarding the non autonomous territories.

II.1.A. The new Law of the UN be distinguished three types of colonial territories: a) "Mandates" (inherited from the League of Nations); b) "trust territories" (trusteeships newly established by the UN); and c) "non autonomous territories" (the colonies established before the UN Charter). The Western Sahara, a colony established before the approbation of the UN Charter was qualified then as "non autonomous territory". Two stages can be distinguished on the consideration of this issue. In the first one, there is no special recognition of the obligations of the UN members regarding of the non autonomous territories, while in the second, it was developed an obligation erga omnes to respect their right of self-determination.

II.1.B. In the first stage, just after the approval of he UN Charter, no specific obligations of the member States were established regarding the non autonomous territories. Certainly, the Charter was a step beyond the former treaties on Colonial Law. But initially this change affected only the United Nations as such and not their member States. No reference is made in the article 2 of the UN Charter to an obligation for the Member States regarding the colonies if not involved in the colonization process. But the article 1.2 imposes on the United Nations as a whole the obligation "to develop friendly relations among nations based on *respect for* the *principle* of equal rights and *self-determination of peoples*".

II.1.C. However, in a further stage, some new obligations arose for the UN member States. The obligations imposed on the third States to implement the respect of this right are of two kinds: political and economical.

II.1.C.a. Politically, the third States are obliged to observe, respect and promote the right of self-determination. The development of the principle of self-determination by the resolutions of the General Assembly and the case-law of the International Court of Justice has lead to impose obligations not only to the UN as such, but also to all the Member States even if not involved in a colonization. As a result, it has been declared that the "self-determination" is not only a general *principle* of the Law of the UN, but also a *right* of the peoples that from now on have a separate, own *international* status. This transformation of the self determination **from being a principle to be a principle and a right** has an important consequence, i.e., that, as a right, has a character erga omnes that necessarily implies a correspondent obligation for all the UN members to respect it.

The "Declaration on the granting of independence to colonial countries and peoples" (GA Resolution 1514 (XV)) states that "*All States* shall observe faithfully and strictly the provisions of the … present resolution".

The "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations" (GA Resolution 2625 (XXV)):

"Every State *has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle*".

"*the territory of a colony (...) has,, under the Charter, a status separate and distinct from the territory from the State administering it; and such* ***separate and***

distinct status *shall exist until the people of the colony (…) have exercised their right of self-determination in accordance with the Charter*".

This legal evolution has been confirmed by the ICJ that has stated that:

"*In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable*" (*East Timor (Portugal v. Australia),* para. 29).

II.1.C.b. Economically, the fight against colonialism developed a new obligation previously ignored. The "Programme of Action for the full implementation of the Declaration on the granting of independence to colonial countries and peoples" (GA Resolution 2621 (XXV) 1970) established the obligation to avoid any economic practice in the non autonomous territory on behalf of the colonial power as it is a **major** obstacle to achieve the decolonization:

"*Member States shall wage a vigorous and sustained campaign against activities and practices of foreign economic, financial and other interests operating in colonial Territories and on behalf of colonial Powers and their allies, as these constitute a major obstacle to the achievement of the goals embodied in resolution 1514 (XV). Member States shall consider the adoption of necessary steps to have their nationals and companies under their jurisdiction discontinue such activities and practices; these steps should also aim at preventing the systematic influx of foreign immigrants into colonial Territories, which disrupts the integrity and social, political and cultural unity of the peoples under colonial domination*".

This obligation, imposed to all UN State members as an obligation regarding all the non autonomous territories was *explicitly referred also to the Western Sahara* in GA Resolution 3292 (XXIV) (1974):

"(the General Assembly) *Reiterates its invitation to all States to observe the resolutions of the General Assembly regarding the activities of foreign economic and financial interests in the Territory and to abstain to contribute by their investments or immigration policy to the maintenance of a colonial situation in the Territory*"

II.1.D. We may then conclude that the third States have *not only* an obligation to respect politically the separated, different and specific status of then "non autonomous territories", *but also* to prevent any economic action blurring it or supporting the continuation of the colonial rule. This obligation exists also regarding those third States that claim to have some legal ties with the "non autonomous territory" before it was colonized by the administering power. This is self-evident if we consider that even the Administering power, which was entitled with a legitimate and valid title to occupy the territory has its title affected by the principle of self-determination.

II.2. The obligations of the administering powers.

II.2.A. As it happened with the obligations of all the member States, the regulation of the obligations of the administering powers regarding its colonies has know an evolution on several stages. On the first stage a progress was made in comparison to the earlier International Law because the obligations were not only social-economical (promotion of well-being), but also political (development of "self-government"). In the

second stage, both obligations, the social-economical and the political, were deeply developed.
If we could express it, in theoretical terms, we could say that on the first stage, the UN Charter set a frame which was between the classical *Francisco de Vitoria* model (promotion of the well-being of the colony as condition to the annexation) and the *Bartolomé de Carranza* model (promotion of the well-being of the colony and obligation to grant further independence).. But in the second, it seems that it was the *Melchor Cano* model the one who was taken into account (granting of the independence without further delay).

II.2.B. In the first stage, the frame of the colonial Law regarding the colonial powers on the non autonomous territories was mainly contained in the article 73 of the Charter. As it has been previously said, this system means a step forward in comparison with the legal regime of the colonies established in the Covenant of the League of Nations, because together with the already existent obligations within the social or economical sphere, it added obligations within the political one.
These two obligations are expressed this way in the article 73:

a) The colonial authority must promote the social, economical and educational "**well-being**" of the colonized people:

"*Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter,* the well-being of the inhabitants of these territories *, and, to this end:*
a. *to ensure, with due respect for the culture of the peoples concerned, their (...),* economic, social, and educational advancement*, their just treatment, and their protection against abuses;*
(...)
d. *to promote constructive measures of* development*, to encourage* research*, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the* social, economic, and scientific *purposes set forth in this Article;*
e. *to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to* economic, social, and educational conditions *in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply."*

and

b) that colonial authority must develop **the "self-government" of the territory** (see also art. 76.b for the "trust territories"):

"Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government *(...) accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:*

a. to ensure, with due respect for the culture of the peoples concerned, their political*, (…)* advancement*, their just treatment, and their protection against abuses;*
b. *to develop* self-government*, to take due account of the political aspirations of the peoples, and to assist them in the* progressive development of their free political institutions, according to the particular circumstances *of each territory and its peoples and their varying stages of advancement".*

II.2.C. In a second stage, started in 1960, these two obligations were deeply developed: first, the political; and then the economical. The political obligations of the administering power knew a sudden and transcendental shift when the "Declaration on the granting of independence to colonial countries and peoples" (GA Resolution 1514 (XV, 1960)) was passed. On the opposite, the economical obligations had a slower reshape.

II.2.C.a. As far as the political obligations are concerned, the "Declaration on the granting of independence to colonial countries and peoples" (GA Resolution 1514 (XV, 1960) is extremely severe. After considering that the self-determination is not only a "principle" of the UN, but also a "right" of the peoples, it imposes on the administering powers the obligation to start immediately the process of independence without any conditions. However, this process must be made in accordance with the freely expressed will of the peoples:

"***Immediate*** *steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained* ***independence****, to transfer all powers to the peoples of those territories,* ***without any conditions or reservations****, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom*".

This new obligation was more extensively regulated in the GA Resolutions 1541 (XV) 2625 (XXV). These resolutions consider the possibility that the colonized people may choose freely between several options: full independence, free association with or integration in any other State.

II.2.C.d. The economic obligations were developed since the "permanent sovereignty over their natural wealth and resources", first declared in the GA Resolution 1314 (XIII), was applied also to the non autonomous territories. The consequence was that the administering power was specially subject to respect the economic rights of the non-self governing territories to enjoy its resources. The GA Resolution 44/84 (1989) said that the General Assembly:

"*Reiterates that any administering Power that deprives the colonial peoples of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources, or subordinates the rights and interests of those peoples to foreign economic and financial interests, violates the solemn obligations it has assumed under the Charter of the United Nations*;"

But the economic obligations of the administering Powers were further developed in several GA Resolutions.

Firstly, it was introduced the obligation to take effective measures to safeguard and guarantee the inalienable rights of the peoples of the Non-Self-Governing Territories to their natural resources (since GA Resolutions 48/46 -1994-).

"*Urges the administering Powers concerned to take effective measures to safeguard and guarantee the inalienable rights of the peoples of the Non-Self-Governing Territories to their natural resources, and to establish and maintain control over the future development of those resources, and requests the administering Powers to take all necessary steps to protect the property rights of the peoples of those Territories*;"

Then, it was established the obligation that the economic activities (GA Resolution 62/120) and specially extended to the marine activities (GA Resolution 62/113) of the administering Power should not "adversely affect the interests of the peoples"),:

"*Calls upon the administering Powers to ensure that economic and other activities in the Non-Self-Governing Territories under their administration do not adversely affect the interests of the peoples but instead promote development, and to assist them in the exercise of their right to self-determination*"

"*Calls upon the administering Powers to ensure that the exploitation of the marine and other natural resources in the Non-Self-Governing Territories under their administration is not in violation of the relevant resolutions of the United Nations, and does not adversely affect the interests of the peoples of those Territories*;"

III. THE STATUS OF SPAIN AS ADMINISTERING POWER

Three different stages can be distinguished in order to know what is the status of Spain in the Western Sahara. Whereas in the first stage (until November 19, 1975) there is no doubt on its quality of "administering power", since that moment doubts have been cast on its legal status because of the developments of the case.

III.1. Before 19th November 1975.

In 1961, just a few years after its admission to the United Nations, Spain accepted to consider the Western Sahara officially as a non self-governing territory i.e. as a colony. In 1963 Spain accepted the inclusion of the issue in the agenda of the Fourth Commission (Piniés, p. 91 ss.). Thereby it became involved in the decolonisation process in accordance with the United Nations Charter.

The United Nations subsequently recognized Spain as the administering power of the Western Sahara. The first UN General Assembly Resolution that referred to Spain as the "*administering Power"* (*puissance administrante*) of the Western Sahara was Resolution 2072 of 17 December 1965. In paragraph 2 of this resolution the General Assembly urgently requested "the Government of Spain, as the administering Power, to take immediately all necessary measures for the liberation of the Territories of Ifni and Spanish Sahara from colonial domination."

This quality of Spain as the administering Power of the Western Sahara was reiterated by several subsequent General Assembly Resolutions: Resolutions 2229 (20 December 1966), 2354 (19 December 1967), 2428 (27 December 1968), 2591 (16 December 1969), 2711 (14 December 1970), 2983 (14 December 1972) and 3162 (14 December

1973).

III.2. Between 19th November 1975 and 26th February 1976.

III.2.A. On 14 November 1975, six days before Franco's death, Spain signed an Agreement with Morocco and Mauritania. This Agreement consisted of a "political declaration" transmitted to the United Nations and some secret annexes. The "Declaration of Principles between Spain, Morocco and Mauritania on the Western Sahara" Agreement (*United Nations Treaty Series*, 1975, p. 258) became commonly known as the Madrid. In this Agreement Spain agreed to constitute a tripartite (Spain-Morocco-Mauritania) interim administration to which all the responsibilities and powers of Spain as "administering power" were transferred. In the first paragraph of the Agreement, Spain confirmed "its resolve to decolonize the Territory of Western Sahara by terminating the responsibilities and powers which it possesses over that Territory as administering power." According to the second paragraph of the Agreement, Spain committed to "proceed forthwith to institute a temporary administration the Territory". Morocco and Mauritania were to participate, in collaboration with the *Djemaa* (assembly of Saharawi notables/sheikhs). All responsibilities and powers arising from Spain's status as administering power over the Western Sahara were transferred to these two states. It was also agreed that two Deputy Governors nominated by Morocco and Mauritania should be appointed "to assist the Governor General of the Territory in the performance of his function." Finally, paragraph 2 of the Agreement announced that the Spanish presence in Western Sahara was going to be terminated by 28 February 1976 "at the latest". The Madrid Agreement entered into force on 19 November 1975, once Spain passed the law stipulated in paragraph 6.

III.2.B. The Madrid Agreement provoked a sharp debate in the General Assembly in November 1975. As a result of this debate two resolutions were passed, both on 10 December 1975.

UN General Assembly Resolutions 3458(A) qualified Spain *five* times as "administering power", twice in the Preamble and three times in the main text. This carried special relevance as this qualification was made *after* the Madrid Agreement was signed. In other words, in its Resolution 3458(A) the UN General Assembly ignores the Madrid Agreement and considers it as not written insofar it does not take in consideration the transfer of the status of administering power to the tripartite entity (Spain-Morocco-Mauritania).

UN General Assembly Resolution 3458(B) took note of the tripartite Agreement but *did not endorse* it insofar it requested the interim administration to act differently as proposed in the Madrid Agreement. Resolution 3458(B) requested the interim administration not simply to consult the Djemaa as the Madrid Agreement stated, but to consult "all the Saharan population originating in the territory" and "to take all steps to ensure that all the Saharan population in the territory will be able to exercise their inalienable right to self-determination through free consultations organized with the assistance of a representative of the United Nations appointed by the Secretary-General"(paragraph 4).

The consideration of these two resolutions leads to the conclusion that the UN General Assembly did not endorse the Madrid Agreement, and that Spain was still considered to be the administering power. UN General Assembly Resolution 3458(A) simply ignored the Madrid Agreement and Resolution 3458(B) although quoting it (only "took note" of it) ignored it because it requested a referendum that the Madrid Agreement did not contain. According to the UN Spain was still to be considered the administering power of the Western Sahara.

But there is another argument to assess that itself, one of the signatories of the Agreement, Spain, did not consider it valid.

II.2.C. On *26 February 1976*, the Permanent Representative of Spain to the United Nations sent a letter to the Secretary General[1] of major relevance. The letter stated that the Spanish Government, with immediate effect and definitely terminated its presence in the Western Sahara. In this document Spain deemed it necessary to put two statements of major relevance on record:

"*(a) Spain considers itself henceforth exempt from any responsibility of an international nature in connection with the administration of the said Territory, in view of the cessation of its participation in the temporary administration established for the Territory;*

(b) the decolonization of the Western Sahara will be reached when the opinion of the Saharawi population was validly expressed".

The Spanish note was *not protested neither by Morocco nor Mauritania*. This letter is an international act extraordinary relevant to consider this issue, because it is the evidence that Spain still was in that period the "administering power" of the Western Sahara. By this note, Spain, did not only tried to get rid unilaterally of its responsibilities and status of administering power, but also interpreted unilaterally or reconducted it to the international legality to establish that no decolonization was made of the territory through the Madrid Agreement. And if the statement (b) was made *unilaterally* by Spain, and not by the tripartite administration, and was not protested by Morocco and Mauritania it is because Spain explicitly, and Morocco and Mauritania implicitly, considered that the Western Sahara was not decolonized.

III.3. After 26th February 1976.

III.3.A. According to the previous ideas it is undoubtful that the Western Sahara was not decolonized through the Madrid Agreement. And this is confirmed with the fact that the issue of Western Sahara is still in the Agenda of the 4th Commission of the General Assembly. The question, then is: who is the administering power after that date?

III.3.B. Morocco has still invoked the Madrid Agreement as a title for its presence in the Western Sahara as "administering power" (as far as I know, for the last time that Morocco formally invoked the Madrid Agreement was on *2 February 2006*[2]). However

1 *UN Doc.* A/31/56 S/11997. For the printed text, see Official Records of the Security Council, Thirty-first Year, Supplement for January, February and March 1976; Published also, in the newspaper *ABC* (27-II-1976), p. 15-16 and in De Piniés, *La Descolonización española*, pp. 809-810.

2 Letter addressed on *2 February 2006* to the UN Secretary-General by Moroccan Minister of Foreign Affairs Mohamed Benaissa. The Moroccan Press Agency (MAP) and the newspaper *Le Matin* have

a careful analysis of the Agreement reveals that this Moroccan claim is highly questionable for different reasons.

Firstly, Spain's responsibilities and powers as administering power were not transferred to Morocco in that Agreement but to a tripartite entity "in which Morocco and Mauritania will participate" alongside Spain. Consequently, it is incorrect to state that the Madrid Agreement gave Morocco any element of a status as administering power. That quality was not given by the Madrid Agreement to Morocco but to a tripartite entity composed by Spain, Morocco and Mauritania.

Secondly, the tripartite administration not only assumed the powers but also the *responsibilities* that corresponded with those of Spain as administering power. The most important of these responsibilities, according to international law, was the task of decolonising the territory through a self-determination referendum as demanded by UN General Assembly Resolutions. While this task was not included in the Madrid Agreement itself, General Assembly Resolution 3458(B) did mention it clearly again when referring to the Agreement. Accordingly, the Madrid Agreement failed to deliver one of the main responsibilities to be discharged of, that is the holding of a self-determination referendum. One could even argue that, since the Madrid Agreement neglects this major responsibility of the administering power, it should be regarded invalid.

Thirdly, it is also appropriate to recollect that the tripartite administration was meant to be temporary (interim). Hence, by definition it was to finish in the very moment Spain would abandon the territory, that is, before 28 February 1976. Spain even abandoned the territory two days before, on 26 February 1976. This means that after 26 February 1976 the tripartite administration came to an end since one of the parties was absent. The Madrid Agreement did not preview how the two remaining actors could assume the rights of the tripartite administration. The delegation of powers that Spain conceded to the tripartite administration did not consider sub-delegations.

Consequently, after 26 February 1976 the tripartite administration ceased to exist and since administration was not (to be) delegated, Morocco and Mauritania were no longer co-administrators of the territory. Since 26 February 1976 Morocco is neither administering power nor co-administrator.

III.3.C. The Treaty on borders between Morocco and Mauritania from April 14th 1976 (*United Nations Treaty Series*, 1977, p. 118-119) proceed to the partition and annexation of the Western Sahara. The annexation partition of the Western Sahara is stipulated in Article 1 while the annexation is established in the article 2 (where both parties speak about "sovereignty"). Both parties intended to do this partition and annexation:

"*in conformity with the Declaration of Principles, signed in Madrid on November 14th 1975 which transferred to the interim administration participated by Morocco and Mauritania with the collaboration of the Djemaa, the responsibilities and powers which Spain had on the Sahara*" (Preamble of the Treaty).

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reproduced several passages of this letter.
[See http://www.lematin.ma/journal/article.asp?id=natio&ida=57241].

However, the basis for this partition and annexation is void. The main reason is that it is made on April 14th 1976, several months after ended (on February 26th 1976) the interim administration. This means that the Treaty was made lacking from any legal basis to justify the presence of Morocco and Mauritania in the territory after February 26th 1976.

III.3.D. The UN had clearly stated that Morocco is neither sovereign (as pretended in the Treaty from April 14th 1976) nor "administering power" neither in part, nor in the whole territory of the Western Sahara. This analysis was confirmed by the law of the United Nations. When confronted with the question of the Western Sahara after Spain had abandoned the territory, the UN General Assembly clearly qualified the presence of Morocco in the Western Sahara as "continued occupation" [UNGA Res. 34/37 (para. 5 and 6) of 21 November 1979 and 35/19 (paras. 3 and 9) of 1 November 1980.].

Furthermore, the letter dated 29 January 2002 from the UN under-Secretary-General and Legal Counsel Hans Corell to the President of the Security Council, confirmed these conclusions as follows:

"*Morocco however, is not listed as the administering Power of the territory in the United Nations list of Non Self Governing Territories, and has, therefore, not transmitted information on the territory in accordance with Articles 73 (e) of the United Nations Charter*" (UN Doc. *S/2002/161,* n. 6, section 7.)

III.3.E. After February 26th 1976 there is no UN resolution stating that Spain is "administering power" of the Western Sahara. However, this does not mean a lack of acts of the UN recognizing this status. In every report of the UN Secretary-General about the "Information from Non-Self-Governing Territories transmitted under Article 73(e) of the Charter of the United Nations" Spain was consistently referred to as the administering power of the Western Sahara (see ultimately, A 61/70 [2006] and A/62/67 [2007]).

Moreover, the UN under-Secretary-General and Legal Counsel Hans Corell, also confirmed in his opinion the quality of Spain as "administering power" of the territory:

"*The Madrid Agreement did not transfer sovereignty over the territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred*" (UN Doc. *S/2002/161, section 6*).

III.3.F. However, Spain still has not completely abandoned the administration of the territory. Spain still holds some administering competences on the Western Sahara on two fields: airspace and search and rescue regions.

As far as the airspace is concerned, *the airspace of the Western Sahara is included in the Spanish airspace*, and more precisely in the "Canary Islands Flight Information Region UA"[3]. This means that Morocco precise that Spain should grant it permission

[3] http://www.aena.es/csee/Satellite?cid=1047658457254&pagename=subHome&SMO=1&SiteName=

for flights in this territory. This explains why when the Moroccan air force wanted to do some military exercises in the Western Sahara (airspace over the coast between El Aaiun and Dakhla-Villa Cisneros), asked permission to the Spanish one. The press informed that between September 6th and December 31st 2004, the Spanish Air Force established some restrictions to the air traffic in this region in order to facilitate those military exercises[4]

Regarding the *maritime space*, in the frame of the SOLAS convention ((International Convention for the Safety of Life at Sea), the *International Convention on Maritime Search and Rescue* (signed in Hamburg in April 27th 1979 and entered into force on June 22nd 1985) divides the international waters into various "search and rescue regions" (SAR regions). Certainly, the Annex of this last treaty, establishes that

"*the delimitation of search and rescue regions is not related to and shall not prejudice the delimitation of any boundary between States*" (Annex, paragraph 2.1.7).

According to the ocean atlas published by the International Maritime Organisation (IMO) one of the Spanish "SAR regions", that of Canary Islands, comprehends all the coast of the Western Sahara[5]. This certainly does not include the Western Sahara inside the Spanish boundary, but it is an indice that the waters of the Western Sahara, though not being under Spanish sovereignity are not submitted to the Moroccan administration.

III.3.G. Lately, the government in Spain, since Rodriguez Zapatero was appointed as prime minister, radically changed the traditional position of the state, insofar it considers Morocco as the administering power of the Western Sahara. The Zapatero government is the first Spanish government after Franco's death that qualified Morocco as Western Sahara's 'administering power'. A number of high official representatives of the Spanish government have repeatedly insisted that Morocco is the territory's administering power. In June 2005 Spanish foreign affairs minister Miguel Ángel Moratinos uttered as many as four times that the Madrid Agreement "gave Morocco its quality as administering power recognised by United Nations". Statements to this extent were made on 22 June 2005 in the Senate, on 27 June 2005 in the Tele 5 channel program 'La Mirada Crítica', on 29 June 2005 in the Spanish Congress and on 7 August 2005 in the city of Asilah, Morocco. In turn, Agustín Santos, Executive Assessor for Parliamentary Matters at the Spanish Ministry of Foreign Affairs alluded to the "Moroccan authorities, as the Western Sahara administering power" (Reference of these acts in Ruiz Miguel, p. 310).
However, as far as I know, this did not mean that the airspace of the Western Sahara or the search and rescue competence in the waters of Western Sahara have been transferred to Morocco.

IV. THE SPAIN'S LEGAL OBLIGATIONS AS ADMINISTERING POWER: DOUBTS AND RESPONSIBILITIES

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[4] This information was Publisher in several news: Press releases from Agencia Canaria de Noticias-CAN (7-10-2004) [http://es.groups.yahoo.com/group/sahara-info/message/2965], La Opinión de Tenerife (11-10-2004) [http://es.groups.yahoo.com/group/sahara-info/message/2962]

[5] http://www.oceansatlas.com/unatlas/issues/emergencies/gmdss_sar/SARMAP.PDF

IV.1. The situation of the Western Sahara, then, is very close to the case of East Timor, although not exactly similar. Like in that case, the "administering power" (Spain, Portugal) lost its effective dominion at least on the territorial space of the country. When argued the case of East-Timor before the International Court of Justice [*East Timor (Portugal v. Australia)*], nobody contended that Portugal still was the "administering power" of the colony, although, like in the Western Sahara case, no General Assembly resolution mentioned it after 1975. But, between both cases there is a difference: the occupying power does not occupy all the territory; and people colonized founded its own State (the SADR) which controls a part of the territory and is recognized by an important number of States. This special context of the Western Sahara case raises the question about what are the obligations of Spain as administering power and the degree of compliance with them. As argued before, on the administering powers are imposed two main kinds of obligations: ones of political character (to immediately steps towards the independence of the colony) and others of social, economical and cultural character.

IV.2. Spain is firstly subject to the obligations imposed to all member States of the United Nations, among them: to observe, respect and promote the right of self-determination, and to keep the separate and distinct character of the Western Sahara to avoid any obstacle to the future self-determination. But then, it also has special obligations as administering power. According to the General Assembly Resolution 1514 (XV) Spain, has the obligation to take:

"***Immediate*** *steps (...) to transfer all powers to the peoples of those territories,* ***without any conditions or reservations****, in accordance with their freely expressed will and desire".*

In the Western Sahara question, the problem is that part of the territory occupied and the occupying power rejects to hold a free referendum to know if the people of Western Sahara wants the independence, although its right to the independence has not only being stated by the General Assembly, but also by the International Court of Justice that did not see any obstacle to apply the Resolution 1514 (XV) to the Western Sahara.

The question is what are the obligation of Spain in this case? As it was said in the letter dated 26th February 1976:

"*(b) the decolonization of the Western Sahara will be reached when the opinion of the Saharawi population was validly expressed*".

But, what could be done if the opinion of the Sahrawi population cannot be validly expressed? In my opinion, the *right* of self-determination of a people cannot be obstacled by the fact that the administering power cannot hold a referendum to know the freely expressed will of the *whole* colony.

It could be contended if, in such a case, when the part of the people not suffering occupation express its will to hold the referendum, Spain has an *obligation* (and not only a right) to recognize, even if provisory, the State proclaimed by the people who has a right to independence and wants to express that will. But, what is not contended is that, in such a case, the UN have a responsibility towards the people of Western Sahara. And certainly, the resolutions of the GA reaffirm it (see, lately GA Resolutions 58/109 [2003], 59/ 131 [2004], 60/114 [2005], 61/125][2006], 62/116 [2007]):

"(the General Assembly) *Reaffirming responsibility of the United Nations towards the people of the Western Sahara*"

IV.3. As it occurs with the political obligations, Spain is subject to the economic, social and educational obligations that all the members of the international community. Among these, it is important to quote:

"*Member States shall wage a vigorous and sustained campaign against activities and practices of foreign economic, financial and other interests operating in colonial Territories and on behalf of colonial Powers and their allies, as these constitute a major obstacle to the achievement of the goals embodied in resolution 1514 (XV). Member States shall consider the adoption of necessary steps to have their nationals and companies under their jurisdiction discontinue such activities and practices; these steps should also aim at preventing the systematic influx of foreign immigrants into colonial Territories, which disrupts the integrity and social, political and cultural unity of the peoples under colonial domination*". (Resolution 2621 (XXV) 1970).

But, Spain as administering power is also subject to these obligations:

"*Reiterates that any administering Power that deprives the colonial peoples of Non-Self-Governing Territories of the exercise of their legitimate rights over their natural resources, or subordinates the rights and interests of those peoples to foreign economic and financial interests, violates the solemn obligations it has assumed under the Charter of the United Nations*;" (GA Resolution 44/84 (1989))

"*Urges the administering Powers concerned to take effective measures to safeguard and guarantee the inalienable rights of the peoples of the Non-Self-Governing Territories to their natural resources, and to establish and maintain control over the future development of those resources, and requests the administering Powers to take all necessary steps to protect the property rights of the peoples of those Territories*;" (GA Resolution 48/46 (1994)).

"*Calls upon the administering Powers to ensure that economic and other activities in the Non-Self-Governing Territories under their administration do not adversely affect the interests of the peoples but instead promote development, and to assist them in the exercise of their right to self-determination*" (GA Resolution 62/113) (2007))

"*Calls upon the administering Powers to ensure that the exploitation of the marine and other natural resources in the Non-Self-Governing Territories under their administration is not in violation of the relevant resolutions of the United Nations, and does not adversely affect the interests of the peoples of those Territories*;" (GA Resolution 62/113) (2007)).

If the fulfilment of the political obligations of the administering power was difficult in the context of the Western Sahara, it seems that it is not so in respect to the economical obligations. There is now an ongoing process of spoliation of the natural resources of the Western Sahara (phosphate and fisheries). We find also the establishment of economic initiatives by the occupying power in order to obtain benefits from the sand, the agriculture and the tourism. In all these activities, Spain is involved.

The maritime resources are being profited by Morocco with the complicity of Spain through the *Fisheries* Agreement signed by the European Union and Morocco [Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco; OJ L141 of 29/05/2006, p.1]. Spain voted in favour of such an agreement

and actively lobbied in favour of it. As it has been clear now the Agreement: a) included the waters of the Western Sahara; b) those waters did not receive a separate and distinctive treatment from those of Morocco; c) the economic compensations of the EU did not benefit the local Saharawi population; and d) a huge majority of the people involved in the Agreement in the Western Sahara (mainly 95%) were not Saharawi citizens included as such in the census of the United Nations to vote in the referendum of self-determination. It is then extremely clear that this agreement is a major obstacle to the self-determination of the Western Sahara (Milano).

As far as the *phosphates* are concerned, all the benefits of its exploitation revenue to a firm owned by Morocco. Even if in this sector there is bigger percentage of Saharawi workers than in the Fisheries agreement, but there is not any provision which reserves only for the Sahrawis these jobs, despite the high unemployment rate of the native population. Hence the import of phosphates contributes to obstacle the self-determination. There are several foreign firms importing Sahrawi phosphates, and among them a Spanish firm (FMC Foret) which did not find any constriction to do it from the Spanish government.

The *sand* is also a product spoiled from the territory and mainly imported by Spain. And here also, it is not clear that the benefits revenue on the local population, taking into account the absence of information because Morocco do not comply with the obligation to inform established in the article 73.e of the UN Charter. As far as the *agriculture* is concerned, the problem is like in the fisheries and phosphate sectors that the labels of the products do not specify that the product is originated in a territory separated and distinct from Morocco. Finally, the occupying power is trying to build a *touristic* infrastructure, but also here there is no evidence at all that the benefits revenue in the local population because there is no exigency to give the jobs to the local native population officially considered by the United Nations as members of the Saharawi people. There are also Spanish firms involved in these projects (further information: Western Sahara Resources Watch, www.wsrw.org).

IV.4. The problems arisen in the process of decolonization of Western Sahara present distinctive features. Although it is clear the non-compliance of Spain of its legal obligations as "administering power" of economic character, there is a difficulty to appreciate what are the political legal obligations of Spain. This is why it should be necessary to ask the International Court of Justice for an advisory opinion. I think that the General Assembly should ask the International Court of Justice some questions which can be formulated in this way:

1. Is still Spain the administering power of the Western Sahara according to the United Nations resolutions?
2. If it is still so, does it has the responsibility to hold a referendum of self-determination?
3. If Spain cannot comply with such an obligation, shall the United Nations have the responsibilities that corresponded to Spain as administering power of the Western Sahara to hold a referendum of self-determination?

V. CONCLUSIONS

Since the foundations of the International Law three models have been formulated to determine the position of a colonial power regarding its colony: a) obligation to promote its well-being compatible with its annexation; b) obligation to promote its well-being

and obligation to grant it the independence; and c) obligation to grant it the independence without further delay.
The history of the colonial Law shows how the different models have been implemented. The first model was adopted in the colonial Law derived from the General Act of Berlin 1885. This was also the model of the colonial Law in the Covenant of the League of Nations, although here for the first time reference is made to the possibility that a people could be able to stand by itself. With the foundation of the United Nations, a transformation has been produced regarding the obligations of third parties and administering powers. Nowadays, there is no doubt that there is a legal obligation to grant, as soon as possible the independence to the colonized people if this is its wish freely expressed. This political obligation is complemented with a progressively stricter obligation to avoid any economic activity which may obstacles the independence of the non autonomous territory.
The legal status of Spain in the Western Sahara has known three different stages: On the first (until November 1975) it was undoubted its quality of "Administering power" de facto and de iure; on the second (November 1975-February 1976) its legal position of Administering power was blurred by a de facto and probably illegal "tripartite administration" (Spain-Morocco-Mauritania); on the third (February 1976 until now), Spain unilaterally abandoned its position as "Administering power", but the UN did not accept this abandon, so that it is considered a "de iure" Administering power, although still exercises some "de facto" administration also.
Even if its position is mainly a "de iure" Administering power, Spain has obligations, political and especially economic, that must be fulfilled. The developments of the case show that there have been some economic and legal issues where Spain had to take position vis-à-vis these obligations. The most well-known is the fisheries agreement between the UE and the Kingdom of Morocco affecting the waters of the Western Sahara. The evidence is that Spain is not complying its legal obligations as administering power and so it can be held responsible for the violation of its obligations contained in the International Law. The special characteristics of the case make it highly recommendable to ask the International Court of Justice for an advisory opinion about how can Spain (or other administering power being the case) fulfil its political obligations vis-à-vis the Western Sahara to facilitate the decolonization of the territory.

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