Zadání pro výběrový kurz mezinárodního práva veřejného
Ak. r. 2004-2005
PVP – *Aktuální problémy mezinárodního práva veřejného*
Seminář č. 5

Počátek správy Západní Sahary Španělskem se datuje k roku 1884, kdy španělský král vyhlásil protektorát nad Rio de Oro. V této době bylo území Západní Sahary řídce zalidněno kočovnými kmeny, které více či méně pravidelně migrovaly po poušti. Od 80. let 19. století byla Západní Sahara spravována jako provincie Španělska. V roce 1963 OSN zahrnulo Západní Saharu na seznam nesamosprávných území a Valné shromáždění OSN vydalo v roce 1966 rezoluci, kterou vyzvalo Španělsko, aby přijalo nezbytná opatření k organizaci referenda o sebeurčení obyvatel Západní Sahary. V roce 1963 nejpočetnější skupina obyvatel Západní Sahary, tzv. Sahrawis, založila hnutí za nezávislost s účelem dosáhnout nezávislosti území mírovou cestou. Dne 17. června 1970 toto hnutí uspořádalo demonstraci za nezávislost, která byla tvrdě potlačena španělskou armádou. O tři roky později byla založena Polisarijská fronta (Polisario Front), aby bojovala za svobodu a nezávislost území.

Španělsko dalo najevo vůli implementovat rezoluci OSN až v roce 1974. Když si území Západní Sahary začalo nárokovat Maroko a Mauretánie, požádalo Valné shromáždění OSN Mezinárodní soudní dvůr (dále jen MSD) o posudek ve věci. Maroko se domáhalo, aby Západní sahara byla uznána jako integrální součást jeho území. Své územní nároky založilo Maroko na tom, že před kolonizací Západní Sahary Španělskem existovaly právní pouta mezi Marockým sultanátem a některými kmeny žijícími na území Západní Sahary.

V říjnu 1975 Mezinárodní soudní důr vynesl posudek ve věci Západní Sahary. Posudek se týkal právních otázek spojených s dekolonizací oblasti Západní Sahary bohaté na fosfát.

Mezinárodní soudní dvůr posoudil otázky Maroka takto:

1. na otázku, zda bylo území Západní Sahary v okamžiku kolonizace *terra nullius* odpověděl soud, že území obývané sociálně a politicky organizovanými kmeny reprezentovanými svými náčelníky (jako v případě Západní sahary v okamžiku kolonizace) nebylo *terra nullius.* Navíc, v roce 1884, kdy byla zahájena kolonizace, španělský král ve svém Nařízení z 26. prosince prohlásil, že bere Západní Saharu pod svou ochranu na základě smluv uzavřených s náčelníky místních kmenů a neprohlásil Západní Saharu za *terra nullius* způsobilou k okupaci.
2. na otázku týkající se právního pouta mezi kmeny žijícími v oblasti západní Sahary a Marockým sultanátem se MSD vyjádřil, že určitá pouta existovala, nicméně ta byla nedostačující k vytvoření pouta založeného na územní suverenitě mezi Marokem a Západní Saharou. MSD prohlásil, že nenašel takové vazby, které by mohly ovlivnit aplikaci rezoluce Valného shromáždění OSN 1514 týkající se dekolonizace území a především právo na sebeurčení obyvatelstva Západní sahary. Maroko tedy nemá právo vykonávat suverenitu na území Západní sahary.

Maroko i Mauretánie nerespektovaly posudek a začaly okupovat území Západní Sahary. Maroko vyslalo na území cca 300 tisíc svých občanů, kteří měli za úkol pod ochranou Marockých ozbrojených sil vpadnout na území Západní Sahary a usadit se tam. Rada bezpečnosti vydala neprodleně rezoluci 375, ve které požadovala stažení občanů Maroka a Mauretánie, tato výzva však nebyla respektována. Mauretánie se vzdala všech územních nároků v roce 1979. Maroko ovládá tři severní provincie Západní Sahary a jednu jižní, které se vzdala Mauretánie.

Polisarijská fronta bojovala s Marokem s přestávkami od roku 1975, od roku 1991 nedošlo k větším střetům. Situaci se snaží řešit jak OSN tak Organizace africké jednoty (OAU). Požadují především zastavení bojů, zahájení jednání a zorganizování řádného referenda o sebeurčení obyvatel Západní Sahary. Společný plán OSN a OAU je obsažen v rezolucích

Rady bezpečnosti 658(690) a 690 (1991), na základě kterých se zřídila Mise OSN pro referendum o Západní Sahaře (UN Mission for a Referendum on Western Sahara, MINURSO).

Referendum bylo nejprve plánováno na leden 1992, kvůli neshodám o seznamech voličů bylo odloženo. Důsledkem snahy Maroka blokovat referendum je Návrh rámcové dohody (tzv. Draft Framework Agreement, DFA), který je alternativním řešením k vyhlášení referenda. Obsahem je zhruba takové ujednání, že území bude po dobu pěti let od uzavření smlouvy nadále pod svrchovaností Maroka. Na konci tohoto období proběhne referendum o sebeurčení, v němž bude moci volit každý, kdo nepřetržitě pobývá na území Západní Sahary po dobu jednoho roku. To by umožnilo volit i marockým občanům.

V současné době se tedy nabízejí tyto možnosti řešení konfliktu:

1. uspořádání referenda o sebeurčení
2. uzavření Rámcové dohody (tzn. integrace Západní Sahary jako marockého území)
3. rozdělení území mezi dvě strany

Otázky:

1. Do kterého období spadají první stopy práva na sebeurčení?
2. Ve kterých mezinárodních dokumentech je zakotveno?
3. Jaký je obsah, kdo je subjektem oprávněným, kdo povinným a o jaký typ závazku se jedná? Může být subjektem jednotlivec?
4. Jak byl obsah definován Mezinárodním soudním dvorem?
5. Vzpomeňte si na příklad původních obyvatel. Požívají právo na sebeurčení?
6. Náleží obyvatelům Západní Sahary právo na sebeurčení a jaká jsou práva a povinnosti států uplatňujících územní nároky?

WESTERN SAHARA

Advisory Opinion of 16 October 1975

In its Advisory Opinion which the General Assembly of the United Nations had requested on two questions concerning Western Sahara, the Court,

With regard to Question I, "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?",

- decided by 13 votes to 3 to comply with the request for an advisory opinion;

- was unanimously of opinion that Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain was not a territory belonging to no one *(terra nullius)*.

With regard to Question II, "What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?", the Court

- decided by 14 votes to 2 to comply with the request for an advisory opinion;

- was of opinion, by 14 votes to 2, that there were legal ties between this territory and the Kingdom of Morocco of the kinds indicated in the penultimate paragraph of the Advisory Opinion;

- was of opinion, by 15 votes to 1, that there were legal ties between this territory and the Mauritanian entity of the kinds indicated in the penultimate paragraph of the Advisory Opinion.

The penultimate paragraph of the Advisory Opinion was to the effect that:

The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

For these proceedings the Court was composed as follows: President Lachs; Vice-President Ammoun; Judges Forster, Gros, Bengzon, Petrén, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh and Ruda; Judge *ad hoc* Boni.

Judges Gros, Ignacio-Pinto and Nagendra Singh appended declarations to the Advisory Opinion; Vice-President Ammoun and Judges Forster, Petrén, Dillard, de Castro and Boni appended separate opinions, and Judge Ruda a dissenting opinion.

In these declarations and opinions the judges concerned make clear and explain their positions.

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Course of the Proceedings

(paras. 1-13 of Advisory Opinion)

The Court first recalls that the General Assembly of the United Nations decided to submit two questions for the Court's advisory opinion by resolution 3292 (XXIX) adopted on 13 December 1974 and received in the Registry on 21 December. It retraces the subsequent steps in the proceedings, including the transmission of a dossier of documents by the Secretary-General of the United Nations (Statute, Art. 65,

para. 2) and the presentation of written statements or letters and/or oral statements by 14 States, including Algeria, Mauritania, Morocco, Spain and Zaire (Statute, Art. 66).

Mauritania and Morocco each asked to be authorized to choose a judge *ad hoc* to sit in the proceedings. By an Order of 22 May 1975 *(I.C.J. Reports 1975, p.* 6), the Court found that Morocco was entitled under Articles 31 and 68 of the Statute and Article 89 of the Rules of Court to choose a person to sit as judge *ad hoc,* but that, in the case of Mauritania, the conditions for the application of those Articles had not been satisfied. At the same time the Court stated that those conclusions in no way prejudged its views with regard to the questions referred to it or any other question which might fall to be decided, including those of its competence to give an advisory opinion and the propriety of exercising that competence.

Competence of the Court

(paras. 14-22 of Advisory Opinion)

Under Article 65, paragraph 1, of the Statute, the Court may give an advisory opinion on any legal question at the request of any duly authorized body. The Court notes that the General Assembly of the United Nations is suitably authorized by Article 96, paragraph 1, of the Charter and that the two questions submitted are framed in terms of law and raise problems of international law. They are in principle questions of a legal character, even if they also embody questions of fact, and even if they do not call upon the Court to pronounce on existing rights and obligations. The Court is accordingly competent to entertain the request.

Propriety of Giving an Advisory Opinion

(paras. 23-74 of Advisory Opinion)

Spain put forward objections which in its view would render the giving of an opinion incompatible with the Court's judicial character. It referred in the first place to the fact that it had not given its consent to the Court's adjudicating upon the questions submitted. It maintained *(a)* that the subject of the questions was substantially identical to that of a dispute concerning Western Sahara which Morocco, in September 1974, had invited it to submit jointly to the Court, a proposal which it had refused: the advisory jurisdiction was therefore being used to circumvent the principle that the Court has no jurisdiction to settle a dispute without the consent of the parties; *(b)* that the case involved a dispute concerning the attribution of territorial sovereignty over Western Sahara and that the consent of States was always necessary for the adjudication of such disputes; *(c)* that in the circumstances of the case the Court could not fulfil the requirements of good administration of justice with regard to the determination of the facts. The Court considers *(a)* that the General Assembly, while noting that a legal controversy over the status of Western Sahara had arisen during its discussions, did not have the object of bringing before the Court a dispute or legal controversy with a view to its subsequent peaceful settlement, but sought an advisory opinion which would be of assistance in the exercise of its functions concerning the decolonization of the territory, hence the legal position of Spain could not be compromised by the Court's answers to the questions submitted; *(b)* that those

questions do not call upon the Court to adjudicate on existing territorial rights; *(c)* that it has been placed in possession of sufficient information and evidence.

Spain suggested in the second place that the questions submitted to the Court were academic and devoid of purpose or practical effect, in that the United Nations had already settled the method to be followed for the decolonization of Western Sahara, namely a consultation of the indigenous population by means of a referendum to be conducted by Spain under United Nations auspices. The Court examines the resolutions adopted by the General Assembly on the subject, from resolution 1514 (XV) of 14 December 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples, to resolution 3292 (XXIX) on Western Sahara, embodying the request for advisory opinion. It concludes that the decolonization process envisaged by the General Assembly is one which will respect the right of the population of Western Sahara to determine their future political status by their own freely expressed will. This right to self-determination, which is not affected by the request for advisory opinion and constitutes a basic assumption of the questions put to the Court, leaves the General Assembly a measure of discretion with respect to the forms and procedures by which it is to be realized. The Advisory Opinion will thus furnish the Assembly with elements of a legal character relevant to that further discussion of the problem to which resolution 3292 (XXIX) alludes.

Consequently the Court finds no compelling reason for refusing to give a reply to the two questions submitted to it in the request for advisory opinion.

Question 1: "Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the Time of Colonization by Spain a Territory Belonging to No One (terra nullius)?"

(paras. 75-83 of Advisory Opinion)

For the purposes of the Advisory Opinion, the "time of colonization by Spain" may be considered as the period beginning in 1884, when Spain proclaimed its protectorate over the Rio de Oro. It is therefore by reference to the law in force at that period that the legal concept of *terra nullius* must be interpreted. In law, "occupation" was a means of peaceably acquiring sovereignty over territory otherwise than by cession or succession; it was a cardinal condition of a valid "occupation" that the territory should be *terra nullius.* According to the State practice of that period, territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius:* in their case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers. The information furnished to the Court shows *(a)* that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them; *(b)* that Spain did not proceed upon the basis that it was establishing its sovereignty over *terrae nullius:* thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.

The Court therefore gives a negative answer to Question I. In accordance with the terms of the request for advisory opinion, "if the answer to the first question is in the negative", the Court is to reply to Question II.

Question 11: "What Were the Legal Ties of This Territory with the Kingdom of Morocco and the Mauritanian Entity?"

(paras. 84-161 of Advisory Opinion)

The meaning of the words "legal ties" has to be sought in the object and purpose of resolution 3292 (XXIX) of the United Nations General Assembly. It appears to the Court that they must be understood as referring to such legal ties as may affect the policy to be followed in the decolonization of Western Sahara. The Court cannot accept the view that the ties in question could be limited to ties established directly with the territory and without reference to the people who may be found in it. At the time of its colonization the territory had a sparse population that for the most part consisted of nomadic tribes the members of which traversed the desert on more or less regular routes, sometimes reaching as far as southern Morocco or regions of present-day Mauritania Algeria or other States. These tribes were of the Islamic faith.

Morocco (paragraphs 90-129 of the Advisory Opinion) presented its claim to legal ties with Western Sahara as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory and an uninterrupted exercise of authority. In the view of the Court, however, what must be of decisive importance in determining its answer to Question II must be evidence directly relating to effective display of authority in Western Sahara at the time of its colonization by Spain and in the period immediately preceding. Morocco requests that the Court should take account of the special structure of the Moroccan State. That State was founded on the common religious bond of Islam and on the allegiance of various tribes to the Sultan, through their caids or sheiks, rather than on the notion of territory. It consisted partly of what was called the Bled Makhzen, areas actually subject to the Sultan, and partly of what was called the Bled Siba, areas in which the tribes were not submissive to him; at the relevant period, the areas immediately to the north of Western Sahara lay within the Bled Siba.

As evidence of its display of sovereignty in Western Sahara, Morocco invoked alleged acts of internal display of Moroccan authority, consisting principally of evidence said to show the allegiance of Saharan caids to the Sultan, including dahirs and other documents concerning the appointment of caids, the alleged imposition of Koranic and other taxes, and acts of military resistance to foreign penetration of the territory. Morocco also relied on certain international acts said to constitute recognition by other States of its sovereignty over the whole or part of Western Sahara, including *(a)* certain treaties concluded with Spain, the United States and Great Britain and Spain between 1767 and 1861, provisions of which dealt *inter alia* with the safety of persons shipwrecked on the coast of Wad Noun or its vicinity, (b) certain bilateral treaties of the late nineteenth and early twentieth centuries whereby Great Britain, Spain, France and Germany were said to have recognized that Moroccan sovereignty extended as far south as Cape Bojador or the boundary of the Rio de Oro.

Having considered this evidence and the observations of the other States which took part in the proceedings, the Court finds that neither the internal nor the international acts relied upon by Morocco indicate the existence at the relevant period of either the existence or the international recognition of legal ties of territorial sovereignty between Western Sahara and the Moroccan State. Even taking account of the specific

structure of that State, they do not show that Morocco displayed any effective and exclusive State activity in Western Sahara. They do, however, provide indications that a legal tie of allegiance existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory, through Tekna caids of the Noun region, and they show that the Sultan displayed, and was recognized by other States to possess, some authority or influence with respect to those tribes.

The term "Mauritanian entity" (paragraphs 139-152 of the Advisory Opinion) was first employed during the session of the General Assembly in 1974 at which resolution 3292 (XXIX), requesting an advisory opinion of the Court, was adopted. It denotes the cultural, geographical and social entity within which the Islamic Republic of Mauritania was to be created. According to Mauritania, that entity, at the relevant period, was the Bilad Shinguitti or Shinguitti country, a distinct human unit, characterized by a common language, way of life, religion and system of laws, featuring two types of political authority: emirates and tribal groups.

Expressly recognizing that these emirates and tribes did not constitute a State, Mauritania suggested that the concepts of "nation" and of "people" would be the most appropriate to explain the position of the Shinguitti people at the time of colonization. At that period, according to Mauritania, the Mauritanian entity extended from the Senegal river to the Wad Sakiet El Hamra. The territory at present under Spanish administration and the present territory of the Islamic Republic of Mauritania thus together constituted indissociable parts of a single entity and had legal ties with one another.

The information before the Court discloses that, while there existed among them many ties of a racial, linguistic, religious, cultural and economic nature, the emirates and many of the tribes in the entity were independent in relation to one another; they had no common institutions or organs. The Mauritanian entity therefore did not have the character of a personality or corporate entity distinct from the several emirates or tribes which comprised it. The Court concludes that at the time of colonization by Spain there did not exist between the territory of Western Sahara and the Mauritanian entity any tie of sovereignty, or of allegiance of tribes, or of simple inclusion in the same legal entity. Nevertheless, the General Assembly does not appear to have so framed Question II as to confine the question exclusively to those legal ties which imply territorial sovereignty, which would be to disregard the possible relevance of other legal ties to the decolonization process. The Court considers that, in the relevant period, the nomadic peoples of the Shinguitti country possessed rights, including some rights relating to the lands through which they migrated. These rights constituted legal ties between Western Sahara and the Mauritanian entity. They were ties which knew no frontier between the territories and were vital to the very maintenance of life in the region.

Morocco and Mauritania both laid stress on the overlapping character of the respective legal ties which they claimed Western Sahara to have had with them at the time of colonization (paragraphs 153-160 of the Advisory Opinion). Although their views appeared to have evolved considerably in that respect, the two States both stated at the end of the proceedings that there was a north appertaining to Morocco and a south appertaining to Mauritania without any geographical void in between, but with some overlapping as a result of the intersection of nomadic routes. The Court confines itself

to noting that this geographical overlapping indicates the difficulty of disentangling the various relationships existing in the Western Sahara region at the time of colonization.

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Western Sahara

Country Reports on Human Rights Practices - 2000
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The sovereignty of the Western Sahara remains the subject of a dispute between the Government of Morocco and the Polisario Front, an organization seeking independence for the region. The Moroccan Government sent troops and settlers into the northern two-thirds of the Western Sahara after Spain withdrew from the area in 1975, and extended its administration over the southern province of Oued Ed-Dahab after Mauritania renounced its claim in 1979. The Moroccan Government has undertaken a sizable economic development program in the Western Sahara as part of its long-term efforts to strengthen Moroccan claims to the territory.

Since 1973 the Polisario Front has challenged the claims of Spain, Mauritania, and Morocco to the territory. Moroccan and Polisario forces fought intermittently from 1975 until the 1991 ceasefire and deployment to the area of a U.N. peacekeeping contingent, known by its French initials, MINURSO.

In 1975 the International Court of Justice issued an advisory opinion on the status of the Western Sahara. The Court held that while some of the region's tribes had historical ties to Morocco, the ties were insufficient to establish "any tie of territorial sovereignty" between the Western Sahara and the Kingdom of Morocco. The Court added that it had not found "legal ties" that might affect the applicable U.N. General Assembly resolution regarding the decolonization of the territory, and, in particular, the principle of self-determination for its people. Most Sahrawis (as the majority of persons living in the territory are called) live in the area controlled by Morocco, but there is a sizable refugee population near the border with Morocco in Algeria, and, to a lesser extent, in Mauritania. The majority of the Sahrawi population lives within the area delineated by a Moroccan-constructed berm, which encloses most of the territory.

Efforts by the Organization of African Unity (OAU) to resolve the sovereignty question collapsed in 1984 when the OAU recognized the Saharan Arab Democratic Republic, the civilian arm of the Polisario Front. Morocco withdrew from the OAU in protest.

In 1988 Morocco and the Polisario Front accepted the U.N. plan for a referendum that would allow the Sahrawis to decide between integration with Morocco or independence for the territory. The referendum was scheduled for January 1992, but was postponed because the parties were unable to agree on a common list of eligible voters--despite the previous acceptance by both parties of an updated version of the Spanish census of 1974 as the base for voter eligibility. A complicated formula for determining voter eligibility ultimately was devised and, in August 1994, MINURSO personnel began to hold identification sessions for voter applicants.

The initial U.N voter identification effort ended in December 1995 and, after several fruitless efforts to persuade the two parties to cooperate, the U.N. Security Council formally suspended the identification process in 1996. The United Nations and friendly governments continued to urge the two parties to seek a political solution to the conflict. In March 1997, U.N. Secretary General Kofi Annan appointed former U.S. Secretary of State James Baker as his personal envoy to examine possible approaches

for a peaceful settlement. Baker visited the region, and negotiations between the Moroccan Government and the Polisario began in May 1997. In September 1997, representatives of Morocco and the Polisario met in Houston in the United States and consented to a series of compromise agreements on the 1991 U.N. settlement plan to hold a referendum under U.N. auspices. According to the Houston Accords, the identification of potential voters, the referendum campaign, and the vote were to take place by December 1998; however, operational considerations again delayed the scheduled referendum, and Annan's latest reports to the Security Council during the year expressed doubt that the referendum could be held before 2002.

In August 1998, MINURSO completed identification of voters in all uncontested tribal groupings. In November 1998, the U.N. Secretary General visited the region to examine ways to achieve compromise on several contested elements of the settlement plan in order to move the referendum process forward. After his consultations, the Secretary General proposed a series of measures in December 1998 to both parties. The measures proposed were aimed at establishing procedures among the parties to allow MINURSO to begin the identification process of three "contested tribes." After agreement between the parties was reached on the contested tribes, MINURSO began the identification process of an additional 65,000 potential voters. The identification process of the three contested tribes was completed in December 1999. Only 4 percent of the applicants in this phase of the identification process were deemed eligible to vote in the referendum. Roughly 80,000 appeals also have been registered by those who were deemed ineligible to vote after the first round of the identification process. Approximately 50,000 additional appeals were filed after the completion of the identification process for the 3 "contested tribes," bringing the total number of appeals to nearly 130,000. MINURSO has not yet begun to adjudicate appeals from the identification process, due to continuing differences between the parties over who should be eligible to appeal, on what grounds, and by what process.

As the end of MINURSO's mandate drew near in February, U.N. Secretary General Kofi Annan urged a review of the situation. Annan requested Baker to consult the parties to explore ways to achieve an "early, durable and peaceful" settlement to their dispute. Baker visited Algeria, Morocco, and the Western Sahara in April to consult with all of the interested parties. Baker sought to reconcile differences over the U.N. Settlement Plan or find other approaches that might resolve the dispute. He returned without a consensus and described the process as being in the same position as in 1997 and 1998. At the invitation of Annan, the Government of Morocco and the Polisario met in London in May and again in June in an attempt to resolve the parties' longstanding differences over the settlement plan, and to explore other avenues to resolve their dispute over the territory; however, little progress was made. In June Baker called on the parties to meet again, emphasizing that consideration should be given to finding a solution that reached a compromise between full independence for the territory and its full integration with Morocco. A technical meeting of the parties in Geneva in July to discuss the appeals process, confidence-building measures in the territory, and the fate of more than 1,600 Moroccan prisoner's of war (POW's) still held by the Polisario also failed to produce any breakthroughs. Annan made clear in three reports to the U.N. Security Council during the year that disputes between the parties over various issues in the Settlement Plan likely would delay the holding of the referendum for the foreseeable future.

Since 1977 the Saharan provinces of Layounne, Smara, and Boujdour have participated in local elections that are organized and controlled by the Moroccan Government. The southern province of Oued Ed-Dahab has participated in Moroccan-controlled elections since 1983. Sahrawis whose political views are aligned with the Moroccan Government fill all the seats allotted to the Western Sahara in the Moroccan Parliament.

The civilian population living in the Western Sahara under Moroccan administration is subject to Moroccan law. U.N. observers and foreign human rights groups maintain that Sahrawis have difficulty obtaining Moroccan passports, that the Government monitors the political views of Sahrawis more closely than those of Moroccan citizens, and that the police and paramilitary authorities react especially harshly against those suspected of supporting independence and the Polisario Front. The Moroccan Government limits access to the territory, and international human rights organizations and impartial journalists sometimes have experienced difficulty in securing admission.

After years of denying that Sahrawis were imprisoned in Morocco for Polisario-related military or political activity, the Government of Morocco released more than 300 such prisoners in 1991. Entire families, and Sahrawis who had disappeared in the mid-1970's, were among those released. The Government of Morocco has failed to conduct a public inquiry or to explain how and why those released spent up to 16 years in incommunicado detention without charge or trial. The former Sahrawi detainees have formed an informal association whose principal objective is to seek redress and compensation from the Government of Morocco for their detention. A delegation of this association continued to meet with various government officials, human rights organizations, members of the press, and diplomatic representatives in both Rabat and in Layounne during the year. They reported that little progress has been made in gaining the Moroccan Government's recognition of their grievances. However, in July the Government, through the Arbitration Commission of the Royal Advisory Council on Human Rights (CCDH), began distributing preliminary compensation payments to Sahrawis who had disappeared or been detained in the past, and their family members. The Government announced that it intended such initial payments to be provisional funds for Sahrawis with urgent medical or financial needs who had appealed for compensation by December 31, 1999, and that more compensation could be distributed pending the results of the Commission's review of petitions by Sahrawi claimants. However, only a small number of those Sahrawis who formerly had disappeared or been detained have filed compensation claims because of their perceptions that the process is flawed administratively and one-sided in favor of the Government.

In December 1999, Moroccan security forces that reportedly were dispatched from Rabat detained one Sahrawi in the Western Saharan city of Laayoune and two Sahrawis in the southern Moroccan cities of Tan-Tan and Agadir. The Government alleged that the three were spies for the Polisario Front. They reportedly were held for 8 days before their appearance in an Agadir court and before their families were informed of their detention. Family members and the Moroccan Association for Human Rights (AMDH) claimed that the arrests were a violation of human rights and due process, and proof that forced disappearances still occur in Morocco. A public trial was convened abruptly on May 30 after a lengthy and largely unpublicized police investigation that originally was to have culminated in a proceeding before a military tribunal. However, the case ultimately was tried in Agadir's court of first instance, and the three Sahrawis were convicted of threatening the internal security of the State and sentenced to 3 to 4 years in prison. According to a lawyer who represented the Sahrawis, during the trial the three defendants denied any relations with the Polisario Front, contradicting government allegations that the three confessed during their postarrest detention. During an appellate hearing on July 5, at the request of the public prosecutor all three were given 4-year sentences. On September 27, security forces in civilian dress detained a fourth Sahrawi at the Laayoune airport as he was about to board a flight to the Canary Islands. According to the Sahrawi's daughter, who witnessed the incident, two members of the security forces drove away with her father in a car with Casablanca license plates. Almost 10 days later, the Sahrawi reappeared in Agadir and was charged before the court of first instance for spying for the Polisario Front. Two days later, the fourth Sahrawi was sentenced to 4 years in prison for threatening the internal security of the State.

On April 5, a Moroccan civil court in the Western Sahara city of Laayoune sentenced five Sahrawi youth to prison terms of between 5 and 10 years for the "formation of a criminal association" after their alleged participation in a March 4 stone-throwing incident in Laayoune. Reliable sources said that the incident was spontaneous, unorganized, and lasted only 5 minutes.

The stone-throwing demonstration followed similar protests by Sahrawi students in several southern Moroccan and Western Sahara cities at the end of February and in early March, which security forces brutally dispersed in violent clashes. The February and March demonstrations came in response to the December 1999 incarceration of three Sahrawis accused of spying for the Polisario Front. Attendees at the trial, human rights activists, and an attorney for the five defendants criticized the handling of the trial, particularly the court's refusal to hear witnesses for the defense who allegedly could corroborate claims by at least two of the defendants that they were not present at the demonstrations. The court allegedly based its judgment on police reports and the testimony of two witnesses, one of whom reportedly could not identify positively the accused; the other was not present at the trial, but claimed that he saw in his rear view mirror a youth throwing a bottle at his car. The prosecution reportedly did not present a bottle as evidence nor did it present a witness who could testify that any of the five accused had thrown the bottle. The authorities claimed that the youths threw rocks at several vehicles, including one belonging to peacekeepers from the MINURSO contingent based in Laayoune, and attempted to set fire to a truck. However, the youths were

acquitted of the arson charge during the trial. An attorney for the youths, who maintained that the prosecution produced no evidence of an incriminating act, stated that "the verdict had nothing to do with justice." The attorney also alleged that the judicial police investigating the affair committed several illegal acts by unlawfully entering homes of the accused and detaining them, torturing them during their detention, and forcing them under duress to sign police reports, which they were not allowed to read and which contained falsehoods. The decision was appealed before the court of appeals in Laayoune, which reportedly sent it to the Supreme Court in Rabat. A hearing on the case had not been held by year's end. Families of the five youths also sent a letter to the Moroccan royal palace in May requesting a royal pardon; however, the King took no action by year's end.

In its annual human rights report released in June, Amnesty International noted that some members of the Moroccan security forces in Morocco and the Western Sahara who were involved in several cases of torture were arrested and prosecuted. However, the organization also noted that "in the majority of cases, investigations were either not opened into complaints and allegations of torture ... or were opened but dismissed without adequate investigation."

During the year, there were no new developments related to police abuses committed in the Western Sahara city of Laayoune in September and October 1999, when police authorities there used brutal force to break up demonstrations organized by students, unemployed graduates, miners, and former Sahrawi political prisoners who were protesting a variety of social grievances. Police detained roughly 150 persons during the protests in September 1999 and 31 in October 1999. Police subjected some of those who were detained during violence in September 1999 to systematic beatings and other forms of physical coercion. Most of those detained were released; however, 26 persons were charged and sentenced to 10 to 15 years in prison on charges of destruction of property during the protests. Despite appeals lodged by defense lawyers during the year, none of these sentences were reduced or overturned.

In the aftermath of the September 1999 protests, King Mohammed VI immediately replaced the governor of the province, relieved the local police chief of his duties, and dispatched military security forces to the city to help restore order. A new royal commission was dispatched quickly to Laayoune in early October 1999 to explain to local residents proposed new measures to decentralize authority in the region, which would allow local residents more choice in their affairs, and to announce a new election to choose members to a proposed new royal advisory council on the Western Sahara.

Despite the actions taken to restore confidence and order and to lessen tensions, renewed violence broke out in late October 1999. There were credible reports that the police provoked the violence, and there were further credible reports that police authorities unlawfully entered homes to arrest persons associated with the demonstrations in September 1999. Police reportedly detained 31 persons. Of these individuals, 10 persons reportedly were released within 24 hours and the remainder released within the following 2-week period. There was no investigation during the year into the excessive use of force by the police during either September 1999 or October 1999. There was also no progress during the year on local elections to choose members to the proposed new royal advisory council on the Western Sahara that the King had announced in October 1999.

A number of other Sahrawis remain imprisoned for peaceful protests supporting Saharan independence. Youths released in previous years report that the Moroccan police continue to monitor them closely.

The Polisario Front claims that the Moroccan Government continues to hold several hundred Sahrawis as political prisoners and approximately 300 as POW's. However, the Government of Morocco formally denies that any Sahrawi former combatants remain in detention. Representatives of the International Committee of the Red Cross (ICRC) have stated that Morocco indeed has released all Polisario former combatants. A committee that represents former Sahrawi prisoners also believes that the Government of Morocco no longer holds any of those Sahrawis who were detained illegally during the 1970's and 1980's. The committee based this determination on interviews with family members of individuals who had been detained during that period.

The Government of Morocco claims that 30,000 Sahrawi refugees are detained against their will by the Polisario in camps around Tindouf, Algeria. The Polisario denies this charge. According to

credible reports, the number of refugees in Tindouf far exceeds 30,000, but the allegation that they wish to leave remains unsubstantiated.

The ICRC reported that the Polisario now holds 1,481 Moroccan POW's. A group of 185 POW's was repatriated to Morocco in a humanitarian airlift conducted under ICRC auspices in November 1995. In April 1997, Polisario leaders offered to release 85 Moroccan POW's as a good will gesture during U.N. envoy Baker's first meetings in Tindouf, but Morocco and the Polisario could not agree on the conditions of their release. On February 25, the Polisario released 186 Moroccan POW's, many of whom had been in detention for more than 20 years. Another 201 were released to the ICRC and repatriated to Morocco on December 14. The U.N. settlement plan calls for the release of all POW's after the voter identification process is complete. Foreign diplomats and representatives of international organizations privately urged the Polisario throughout the year to release the remaining Moroccan POW's, and emphasized that their continued detention 9 years after the cessation of hostilities was a violation of their human rights. During visits to the POW camps outside Tindouf, Algeria in April and November, the ICRC determined that all the Moroccan POW's were in extremely bad health. There also are credible reports that the Polisario authority used the POW's in forced labor. The Polisario leadership has refused to comply with repeated requests that all of the POW's be released on humanitarian grounds, despite the fact that most of the POW's have been in detention for more than 20 years and that their health was deteriorating seriously due to the poor conditions under which they are held.

There were no new cases of disappearance for the fourth consecutive year in that part of the Western Sahara under Moroccan administration. While the forced disappearance of individuals who opposed the Government of Morocco and its policies occurred over several decades, the Government in 1998 pledged to ensure that such policies do not recur, and to disclose as much information as possible on past cases. Many of those who disappeared were Sahrawis or Moroccans who challenged the Government's claim to the Western Sahara, or other government policies. Many of those who disappeared were held in secret detention camps. Although the Government released more than 300 such detainees in June 1991 and in October 1998 issued an announcement on those who had disappeared, hundreds of Sahrawi and Moroccan families still do not have any information about their missing relatives, many of whom disappeared over 20 years ago (see Section 2.b. of the Morocco report). On July 17, the Paris-based International Federation of Human Rights Leagues (FIDH) published a communique in which it claimed that disappearances of Sahrawis in the Western Sahara could number up to 1,500, although conditions in the territory prevented full confirmation of this figure.

Freedom of expression and freedom of peaceful assembly and association remain very restricted in the Western Sahara. According to Amnesty International, Moroccan authorities continue to deny the registration of the independent newspaper Sawt Al-Janoub.

Freedom of movement within the Western Sahara is limited in militarily sensitive areas, both within the area controlled by the Government of Morocco and the area controlled by the Polisario. Both Moroccan and Polisario security forces sometimes subject travelers to arbitrary questioning. There were no reports of detention for prolonged periods during the year.

During the year, Amnesty International and news articles in Morocco-based media highlighted the deteriorating situation in Polisario Front camps near Tindouf in southwestern Algeria, where freedom of expression, peaceful assembly, association, and movement remain very restricted.

There is little organized labor activity in the Western Sahara. The same labor laws that apply in Morocco are applied in the Moroccan-controlled areas of the Western Sahara. Moroccan unions are present in the Moroccan-controlled Western Sahara but are not active. The 15 percent of the territory outside Moroccan control does not have any major population centers or economic activity beyond nomadic herding. The Polisario-sponsored labor union, the Sario Federation of Labor, is not active in the Western Sahara.

A group of phosphate miners participated in the demonstrations in Layounne in September and October 1999. They claimed that the government-owned phosphate company, for which they work, has failed to respect a contract that had been negotiated between the miners and the company's former Spanish management when Spain withdrew from the territory and relinquished control of the

mines to Morocco. The miners stated that they held a series of meetings in late 1999 with officials of the government-owned phosphate company after the demonstrations, but that no agreement was reached about enforcement of what they believed to be their contractually protected rights.

There were no strikes, other job actions, or collective bargaining agreements during the year. Most union members are employees of the Moroccan Government or state-owned organizations. They are paid 85 percent more than their counterparts outside the Western Sahara as an inducement to Moroccan citizens to live there. Workers in the Western Sahara were exempt from income and value-added taxes and received subsidies on such commodities as flour, oil, sugar, fuel, and utilities.

Moroccan law prohibits forced labor, which does not appear to exist in the Western Sahara.

Regulations on the minimum age of employment are the same as in Morocco. Child labor appears to be less common than in Morocco, primarily because of the absence of industries most likely to employ children, such as rug-knotting and other traditional handicrafts. A government work program for adults, the Promotion Nationale, provides families with enough income that children need not be hired out as domestic servants. Children in the few remaining nomadic groups presumably work as shepherds along with other group members.

The minimum wage and maximum hours of work are the same as in Morocco. However, in practice workers in some fish processing plants may work as many as 12 hours per day, 6 days per week, well beyond the 10-hour day, 48-hour week maximum stipulated in Moroccan law. Occupational health and safety standards are the same as those enforced in Morocco. They are rudimentary, except for a prohibition on the employment of women in dangerous occupations.

[End.]

MEMORANDUM ON THE QUESTION OF WESTERN SAHARA

Introduction

The question of Western Sahara is one of the most sensitive, if not the most sensitive, on the current agenda of the United Nations Security Council. It bears with it a triple dimension. First, it involves the right of self-determination, as a fundamental principle enshrined in the United Nations Charter. Second, as long as the conflict remains unresolved, the regional stability will continue to be at great risk. Third, the success or failure of the United Nations will enhance or compromise the credibility of the current international system. Just one of these single dimensions is of enough political weight for the Security Council to seriously engage in finding a last and just solution to the Western Sahara issue.

History proves that any solution that is against or ignores the right of self-determination cannot be a lasting one. This basic lesson, which has been tragically challenged by powerful and less powerful regimes, has always demonstrated its universal value and truth. The recent independence of East Timor constitutes a fresh confirmation of that assessment as well as the struggle engaged by the African peoples for freedom, which earned the recognition as a fight for the principle of self-determination, a key pillar of the international system represented by the United Nations.

From this perspective, Western Sahara case is not a new problem of a new nature. It is a plain, simple case of decolonization whose solution cannot be a new challenge to the historical old lesson. If Morocco made a clear mistake; the International Community should not do the same.

The promised referendum

Western Sahara was included in the UN list of the Non-Self-Governing territories in 1963 and the UN General Assembly had adopted in 1966 its first resolution requesting Spain, as administering power, to make the necessary arrangements for the organization of a referendum on self-determination for the people of Western Sahara.

In 1967 the first Sahrawi independence movement was founded to peacefully seek the independence of the territory. On June 17, 1970, the Sahrawi organized a peaceful demonstration, which was brutally repressed by the Spanish military forces. Three years later, on May 10, 1973, the Frente Polisario was created and the struggle for the liberation and independence of Western Sahara began.

Not until 1974 did Spain indicate its readiness to implement the UN resolutions, but soon Morocco and Mauritania claimed sovereignty over the Territory. The UN General Assembly asked for the opinion of the International Court of Justice ICJ).

The ICJ issued its verdict on October 16, 1975:

> *"The materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of General Assembly resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."*

The invasion

Despite the ICJ opinion, Morocco and Mauritania immediately moved to illegally occupy Western Sahara. With Moroccan government coercion and financial incentives around 300,000 Moroccans were organized, under protection of the Moroccan Armed Forces, to participate in the so-called "Green March" to invade and settle Western Sahara. The UN Security Council adopted resolution 375 (in 1975) by which it requested the immediate withdrawal of the Green March" from the territory. It was an empty request, for over twenty-five years has passed, and Morocco is still illegally occupying Western Sahara.

In November 14, 1975, under a covert treaty now known as the "Madrid Accords", the "Spanish Sahara" was partitioned between Morocco and Mauritania. To justify their military invasion and partition of the territory, the new invaders tried to present the Madrid Accords as a legal title that overrode the United Nation's resolutions and the principle of self-determination enshrined in the UN Charter.

However, as the UN Under-Secretary of Legal Affairs stated recently:

> *"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.*

The transfer of administrative authority over the territory to Morocco and Mauritania in 1975, did not affect the international status of Western Sahara as Non-Self-Governing Territory." (Letter to the President of the Security Council on 29 January 2002)

The invasion of Western Sahara led to a mass exodus of the Sahrawi civilian population over the eastern border of the Territory to escape Moroccan air strikes. These indiscriminate bombardments of the civilian population involved the use of both Napalm and cluster bombs. More than 160.000 Sahrawi refugees settled in tented camps close to the border, near the Algerian town of Tindouf where they have been living in dire conditions for the past 27 years.

In 1979 Mauritania signed a formal treaty with Polisario agreeing to withdraw all territorial claims to Western Sahara and formally recognized the Sahrawi Arab Democratic Republic (SADR) as the legitimate sovereign authority of Western Sahara.

Moroccan forces immediately moved to occupy the territory vacated by Mauritanian forces. That fait accompli was vigorously condemned by the UNGA resolutions 3437(1979) and 3518(1980). A protracted military struggle took place that involved Morocco's brutal repression of the civilian Sahrawi population remaining in the occupied territory, which was well documented by the international humanitarian organizations including Amnesty International, Human Rights Watch, and Federation International des Droits de l'Home.

In the early 1980's Morocco, unable to militarily win the war, undertook the construction of a 2,200 km defensive wall (berm) to protect its demoralized forces and to enclose the occupied territory with a view of initiating the exploitation of the Territory's mineral resources. This rock/sand installation stands approximately 3 meters high with regularly spaced garrisons, with the foreground covered with trenches and barbed wire and extensively defended with an estimated 3 million landmines. The new strategy was financially burdensome but not militarily effective against the Sahrawi forces.

The UN-OAU Settlement Plan

In 1985, the UN General Assembly adopted unanimously resolution 40/50 based on a draft, which was introduced by the President of Senegal, chairman of the Organization of the African Unity, (OAU) on behalf of the African States. Resolution 40/50 mandates the Secretary General to start discussions with Morocco and the Polisario Front with the aim to obtain their cooperation for the implementation of the resolution.

The UNGA resolution, which reflects the entire operative paragraphs of the resolution 104(XIX) adopted in Addis Ababa by the OAU summit, requested the two parties to start (a) direct negotiations to reach (b) a cease-fire, and (c) to agree on the modalities of a free and fair referendum on self-determination for the people of Western Sahara. The OAU resolution was not implemented due to Morocco's obstruction; however, it remained as a fundamental reference for any future engagement of the United Nations to peacefully resolve the conflict.

As a result, the UN and the OAU elaborated, in the summer of 1988, a settlement plan, which was agreed by both parties. The UN Security Council adopted the Settlement Plan in resolutions 658 (690) and 690 (1991), by which it mandated the establishment of the UN Mission for a Referendum on the Western Sahara (MINURSO). This eventually led to (a) the deployment of MINURSO; (b) the declaration of a cease-fire and(c) the beginning of the identification of eligible voters based upon the last Spanish census organized in the territory in 1974, with the aim of holding a referendum on February 1991 to determine the wishes of the Sahrawi people.

The Houston Accords

The facts have demonstrated that Morocco's acceptance of the Settlement Plan was rather a tactical move for achieving two main objectives of a hidden agenda.

On the one hand, it wanted a cease-fire, as a solution to the huge financial cost of the war. On the other hand, in December 1991, Morocco imposed upon the UN a substantial modification of the clauses concerning the electorate with a view to legitimizing an electoral fraud. In fact, Morocco attempted to add approximately 250,000 names to the voter list. Such a move led to the delay of the promised referendum for several years.

In September 1997, under the auspices of former US Secretary of State, James Baker III, Personnel Envoy of the UN Secretary General, the two parties signed the Houston Agreements, which constituted a major breakthrough of the impasse that enabled the Secretary general to inform the Security Council in his report S/1997/742 of November 1997:

> *"With these agreements, and the goodwill and spirit of cooperation shown during the talks, the main contentious issues that had impeded the implementation of the plan have thus been satisfactorily addressed. These achievements create the conditions to proceed towards the full implementation of the settlement plan, starting with the resumption of the identification process." (Paragraphs. 26 & 27)*

MINURSO finally accomplished the identification process and published in February 2000, the lists of those eligible to vote in the referendum. This important progress, achieved by the UN at the cost of six years of efforts and more than 500 million US Dollars, resolved the principal problem that had been stalling the Peace Process. All that was needed was to apply the remaining stages of the Settlement Plan and to organize the referendum.

Obstruction and disengagement of Morocco

Once again the Moroccan regime looked for ways to obstruct the process. It introduced 130,000 fake appeals on behalf of Moroccans who were already rejected by the UN Identification Commission to challenge the list of voters published by MINURSO.

The United Nations could have overcome that obstacle had the Security Council exerted its full authority to assure Moroccan cooperation with MINURSO, bearing in mind that the question of the appeals is a technical problem that can be resolved through the implementation of the UN Protocols and Directives governing the appeals, which were accepted by the two parties in May 1999.

Unfortunately, the Security Council did not use that authority thus allowing Morocco to continue its obstruction to the Settlement Plan and the referendum process with a view to replace it by an "alternative" formula. Indeed, Morocco declared openly, at the Berlin meeting of September 2000, that it was no longer prepared to cooperate with the UN in its efforts to organize the referendum. Mr. Baker and Mr. Annan, as stated in paragraph 48 of UNSG recent report of February 2002, have recognized that "Morocco was unwilling to go forward with the Settlement Plan". This recognition proves that Morocco has been misleading the International Community for ten years since it first accepted the settlement Plan in 1990-91.

It is well known that Morocco wants now to "discuss" only a solution that would guarantee the integration of Western Sahara into Morocco.

The "Draft Framework Agreement"

Between February 2000, the date of the accomplishment of the identification process and May 5, 2001, the day when the *Draft Framework Agreement* (DFA) was first presented to the Polisario Front, the Secretary General's reports suddenly started giving a bleak picture of the situation and stressing growing difficulties for the implementation of the Settlement Plan.

As a result of Morocco's attempts to block the referendum, Personal Envoy, James Baker III, explored other possible mechanisms to resolve the conflict. This has led to a gradual shift to what later was called the "Draft Framework Agreement", included in the UN Secretary General Report S/2001/613 of 20 June 2001.

Beyond its confusing label, the so-called "Draft Framework Agreement" is in fact a planned integration of the Territory into Morocco through a fake referendum. It is based on two main elements:

a) A transitional period of 5 years during which the Territory will remain under Moroccan sovereignty while different electoral bodies, including the Moroccan population residing in the Territory, will elect an Executive and Legislative council.

b) At the end of that period of time, "a referendum will decide the future of the Territory in which to be qualified to vote, a voter must have been a full time resident of Western Sahara for the preceding one year" (paragraph 5 of DFA). This provision will allow an electoral body made up by Moroccan settlers, different from the one already identified by the United Nations, to take part in a decisive referendum on self- determination that should be granted only to the people of Western Sahara.

It has been indicated that the Governments of two permanent members of the Security Council, have agreed to consider themselves, if be needed, as "guarantors of the performance of the agreement."

The Draft Framework Agreement's inconsistency

The DFA is an obvious attempt to satisfy Morocco's aspirations and legitimize its illegal occupation of Western Sahara. If the real motivations behind this radical change vis-à-vis the UN Settlement Plan are still unknown, it is, however, evident that the legitimacy and legality of the new formula go against the UN resolutions on Western Sahara and the verdict of the International Court of Justice which have stressed that Morocco has no legitimate claims over Western Sahara.

In this connection, a close consideration of the arguments and of the substance will show the inconsistency of the DFA.

A) On the one hand, three main "arguments" were used as a bridge to try to abandon the Settlement Plan as a step to introduce the DFA.

First: Processing 130,000 appeals lodged by Morocco will require at least 2 years, and, thus, the referendum could not be organized before 2002.

However, the DFA foresees a" referendum" in 5 years. It therefore seems inconsistent to be "impatient" with 2 years while showing "leniency" with 5 years, which is a longer

period of time.

Furthermore, had MINURSO been instructed to initiate the appeals process in February 2000 it would have already accomplished this task and the referendum would have been held.

Second: The absence in the Settlement Plan of "enforcement mechanisms" would allow the parties not to respect the results of the referendum.

This argument seems to refer to Morocco since the Polisario Front has always stressed that it will abide by the results of a free and fair referendum organized by the United Nations in conformity with the Settlement Plan. It is hard to believe that Morocco could challenge with impunity the results of a referendum it voluntarily accepted. Even so, the Security Council can take at an appropriate time all necessary measures, in conformity with the UN Charter, to make sure that the parties will respect the results of a referendum organized under its authority.

Putting forward the argument of absence of "enforcement mechanisms" as a major and insoluble problem in the way of the referendum, before the referendum even takes place, is tantamount to undermining the authority of both the Security Council and the Secretary General, and it encourages Morocco to continue obstructing the peace process.

Furthermore, as indicated above, two major powers, permanent members of the Council were ready to "guarantee" the implementation of the Draft Framework Agreement. In our point of view, it will be more understandable and easier to be ready to "guarantee" the results of a referendum endorsed by the UN Security Council in conformity with the settlement Plan and the Houston Accords, which were negotiated by the two parties under the auspices of a former US Secretary of State.

Third: The referendum on self-determination envisaged in the settlement Plan is a "winner-takes-all" solution.
The third argument means the replacement of the right of self-determination, cornerstone of the United Nations doctrine regarding the decolonization and the very substance of the Settlement Plan, by a mercantile approach (winners and losers) to judge the worthiness and the merit of the referendum on self-determination.

In fact, there is only a winner: the people of Western Sahara whose right to self-determination must be respected. The two parties, Polisario Front and Morocco, have voluntarily accepted the Settlement Plan and the referendum formula, which contains two options, independence of the Territory or its integration into Morocco. It seems bizarre and incongruous after 10 years of efforts aimed at moving forward the referendum process to invoke now the so-called "loser-winner' approach, which is by nature inherent to any free and fair referendum or elections, to try to justify the abandonment of the Settlement Plan.

The lack of coherence of the third argument does not need to be proven since the DFA itself will allow Morocco, an illegal occupying power, to "take all", to integrate all Western Sahara as a Moroccan territory at the end of a 5 year period through a fake referendum.

Morocco and those who advocate the merits of the DFA do not hesitate to allege that it "provides for self-determination". They argue that the final status of Western Sahara will be submitted to a "referendum". However, why be in favor of a" referendum" in the context of the DFA and at the same time be against the referendum in the framework of the Settlement Plan, which is the unique agreement between the parties and the unique solution endorsed by the Security Council and the International Community.

Against this background, the arguments used to justify the abandonment of the Settlement Plan, so as to introduce a thinly veiled formula of Morocco's integration plan, cannot withstand a close examination. Unfortunately, in the process, the UN resolutions, the MINURSO achievements such as the cease-fire, the identification of voters, the pre-registration of refugees, and the Proposals made on May 2001 by the Polisario aimed at facilitating the resumption of the referendum were deliberately minimized as well as the great value of the Houston Agreements.

B) On the other hand, the Polisario Front cannot accept the DFA as an alternative to the Settlement Plan since it is based on an evident denial of the right of self-determination of the people of Western Sahara, and legitimizes the occupation of Western Sahara by Morocco.

In this connection, it is worthy to remember that the purpose of the DFA, as formulated in the paragraph 30 of the Secretary General report S/2000/1029 of October 25, 2000, was to request the Government of Morocco, as "administrative power" (sic) to offer or support some devolution of governmental authority, for all inhabitants (settlers included) and former inhabitants of the territory, that is genuine, substantial and keeping with international norms".

It should be recalled that the International Court of Justice (opinion of October 14,1975) as well as United Nations Legal Department, (opinion of January 29, 2002), did not recognize Morocco's sovereignty over Western Sahara nor even the status of an administering power. However, the DFA approach considers (1) Western Sahara as a "Moroccan" Territory; (2) its inhabitants, the Sahrawi people and the settlers, as Moroccan" citizens; and (3) the right of self-determination and independence is being replaced by "some devolution of governmental authority" offered by what is de facto an occupying power.

As a result, the Security Council resolution 1359 of June 2001 did not endorse either the DFA or the Secretary General's report, which contained such a controversial formula. Even so, the Draft was discussed at the Wyoming meeting of August 2001.The Polisario Front reiterated its rejection to the Draft, as did Algeria, while Mauritania made it clear that it will support only a solution acceptable to the two parties. Morocco did not come to Wyoming, given the fact that the DFA was presumably elaborated in close coordination with it as can be deduced from the interview of King Mohamed VI to the French newspaper*, Le Figaro,* of September 4, 2001.

Taking into account what has been said above, the Draft Framework Agreement can be neither an "agreement" nor a "framework" to resolve the conflict of Western Sahara. Its "*capital sin*" lies in the fact that, on the one hand, it aims at replacing the unique agreed legal basis (the settlement Plan) by a unilateral approach that fits the occupying power desires. On the other, it allows a Moroccan population instead of the people of the Territory to decide, in a "fake referendum" to be held at the end of 5 years of transitional period, the final legal status of Western Sahara.

The advocates of the DFA have been stressing that some "amendments and improvements" within the transitional period may be possible. However, this is an irrelevant question given the fact that the problem is not related with some "flaws" on the technicalities of the transitional period foreseen in the DFA but with the very premises of the DFA itself, which ignores the very nature of the conflict of Western Sahara as a question of decolonization that must be resolved on the basis of the right to self-determination. The sole people legitimated by the international legality to decide the future of the territory is the Sahrawi people represented by the electoral body already identified by the United Nations. As a consequence, the Settlement Plan is still the best, credible and viable way to go forward in the direction of a lasting and just solution to the last colonial case in Africa.

Recent Developments

On February 19 of this year, the Secretary-General of the United Nations issued a report concerning the situation in Western Sahara. This report restated the past ten years of negotiations and concluded that there were four options available to the Security Council to consider and adopt one of them with a view to enforcing its implementation without seeking the concurrence of both parties. The four options were:

1) Implementation of the Settlement Plan (the Referendum Process) which is the unique solution accepted by the two parties and endorsed by the Security Council.

2) Implementation of the Draft Framework Agreement (the integration of Western Sahara as a Moroccan territory), after making adjustments to it.

3) Partition of the Territory between the two parties.

4) To proclaim the failure of United Nations and to decide withdrawal of the UN mission from Western Sahara.

The Secretary General recommended extending the UN Mission's mandate until April 20, 2002 in order for the Security Council to decide on a way forward.

During the SC consultations of February 27, 2002, Mr. Baker stated to the members of the Council that an independent Sahrawi state would be viable and would contribute to the creation of stability in the Maghreb.

The Security Council extended the mandate of the UN Mission and started in early March 2002 consultations with the parties and Security Council experts about the options proposed by the UN Secretary General and his Special Envoy Mr. James Baker III.

Morocco rejected all the options except the second one, the DFA. The Polisario Front, while stressing that the Settlement Plan remains as the unique solution accepted by the two parties and endorsed by the UN Security Council, expressed its readiness to continue its cooperation with the UN Secretary General and his Personal Envoy efforts as long as they are aimed at ensuring a just and lasting solution to the conflict and, therefore, they take into account the legitimate national rights of the Sahrawi people.

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On April 26, 2002, a permanent member of the Council had, against all odds, circulated a draft proposal based on option 2.
On April 30, 2002, the Security Council of the United Nations met to consider its position with regard to the report from the Secretary-General and the proposed alternatives to resolve the conflict. The Security Council chose not to make a hasty decision that would not lead to a lasting and just resolution of the conflict and instead opted to extend the mandate of the UN Mission (MINURSO) until July 31, 2002 to give further time for the consideration of the options presented. The Polisario Front highly appreciated that the Security Council took such a wise decision, which will certainly give a greater chance for peace.

Conclusion

The decolonization of the Western Sahara has been on the UN agenda since the 1960s and remains as a case in which the credibility of the UN and its decolonization efforts are at stake.

Morocco, for domestic reasons, invaded in 1975 Western Sahara and it is still using the conflict as a tool to deflect the internal opinion from social and economic problems. It has been illegally occupying the Territory for more than 27 years during which it engaged in a systematic violation of human rights in the occupied zones while offering the resources of the territory to foreign companies with a view to take advantage of its illegal occupation through exploitation.

The annexation by force of a territory must not be rewarded. It is quite disturbing to see attempts being made to use the UN, which is meant to be an instrument of peace and justice and has always been on the side of the colonized peoples, as an instrument to legitimize occupation and in the process violate one of its sacred principles: the right to self-determination.

It is also an irony that, while the UN handed over a fully independent East Timor to its people, there are attempts to adopt a totally different approach to an identical situation in Western Sahara.

The Sahrawi people must exercise in a fair, free and democratic manner their right to self-determination. Any other solution against this fundamental right will only lead to more instability and conflict in the region and will not contribute to the credibility of the UN.

June-July 2002

General Recommendation No. 21: Right to self-determination : . 23/08/96.

General Recommendation No. 21: Right to self-determination. (General Comments)

Convention Abbreviation: CERD

General Recommendation XXI

Right to self-determination

(Fortyeighth session, 1996) *

1. The Committee notes that ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession. In this connection the Committee wishes to express the following views.

2. The right to self-determination of peoples is a fundamental principle of international law. It is enshrined in article 1 of the Charter of the United Nations, in article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant

on Civil and Political Rights, as well as in other international human rights instruments. The International Covenant on Civil and Political Rights provides for the rights of peoples to self-determination besides the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion or to use their own language.

3. The Committee emphasizes that in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, approved by the United Nations General Assembly in its resolution 2625 (XXV) of 24 October 1970, it is the duty of States to promote the right to selfdetermination of peoples. But the implementation of the principle of self-determination requires every State to promote, through joint and separate action, universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations. In this context the Committee draws the attention of Governments to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly in its resolution 47/135 of 18 December 1992.

4. In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.

5. In order to respect fully the rights of all peoples within a State, Governments are again called upon to adhere to and implement fully the international human rights instruments and in particular the International Convention on the Elimination of All Forms of Racial Discrimination. Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of Governments. In accordance with article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination and other relevant international documents, Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens. Also, Governments should consider, within their respective constitutional frameworks, vesting persons belonging to ethnic or linguistic groups comprised of their citizens, where appropriate, with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.

6. The Committee emphasizes that, in accordance with the Declaration on Friendly Relations, none of the Committee's actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing

the whole people belonging to the territory, without distinction as to race, creed or colour. In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in An Agenda for Peace (paras. 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned.

General Comment No. 12: The right to self-determination of peoples (Art. 1) : . 13/03/84. CCPR General Comment No. 12. (General Comments)

Convention Abbreviation: CCPR

GENERAL COMMENT 12

The right to self-determination of peoples

(Article 1)

(Twenty-first session, 1984)

1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

2. Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely "determine their political status and freely pursue their economic, social and cultural development". The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.

3. Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties' reports should contain information on each paragraph of article 1.

4. With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.

5. Paragraph 2 affirms a particular aspect of the economic content of the right of self-

determination, namely the right of peoples, for their own ends, freely to "dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence". This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee's opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations". The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States' obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.