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The taking of the Sahara: the role of natural resources in the continuing occupation of Western Sahara

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The role of natural resources in the continuing 'question' of Western Sahara is not fully understood. In recent years, the development of the territory's resources has been at issue in efforts to arrive at self-determination for the Saharawi people. Misconceptions about the effect of such development persist, however, because of a lack of credible information and limited analysis of the connection of resources to the stalled process of self-determination and the territory's occupation. The present analysis surveys the history, problems resulting from and consequences of the exploitation of resources in a Western Sahara that has for 40 years been under armed occupation. It begins with Spain's colonizing of Western Sahara and involvement with its resources before turning to the territory's abandonment to Morocco and Mauritania following which Spain retained some resource rights. Revenue from extraction of the two primary resources since 1975 is then assessed and compared to the costs to occupy Western Sahara. The relevant international law is considered, including the right of non-self-governing peoples to sovereignty over natural resources, and the application of international humanitarian law. Rationales for Morocco's extraction of resources are examined, the evidence revealing that the activity is pursued as a basis for the settlement of Moroccan nationals in the territory to better serve an ostensible annexation project, and generate acceptance for territorial acquisition in the organized international community. The prospects for application of the law and the place of natural resources in the resolution of the question of Western Sahara are finally contemplated.

Keywords: Western Sahara; international law; occupation; natural resources

> The restraints which are implicit in the non-recognition of South Africa's presence in Namibia … impose on member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.[1]

In the final months of 2015 the pillage of resources from Western Sahara continued uninterrupted while the people of the territory marked 40 years of occupation. The taking has been constant: fish from the richest coastal area in Africa, the Canary Current Large Marine Ecosystem, along with the large-scale export of phosphate mineral rock. The year had, for a time, brought the start of seabed petroleum drilling on the territory's Atlantic coast. These and other resources continue to be removed despite the protests of the territory's original inhabitants, the Saharawi people, who insist such acts violate their sovereign right of ownership to the resources. For their part, the United Nations and the states most interested in Western Sahara have remained silent.

Only in recent years has the question of resources in Western Sahara received attention. There has been little analysis of how the production and export of resources may contribute to Morocco's annexation of the territory. When it comes to ensuring for the Saharawi people their right to

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1 International Court of Justice, *Namibia Advisory Opinion*, 1971 ICJ Reports 16, para. 124.

self-determination – the obligation of all states and collectively the organized international community – the implications of exporting resources from the territory have featured infrequently even as the Saharawi have been emphatic in their opposition. As with the right of sovereignty over natural resources for a non-self-governing people, so has the requirement of international humanitarian law (IHL) that prohibits the plunder of natural resources gone unremarked.[2] Under occupation, the exploitation of Western Sahara's resources has been substantial and occasionally revealed as unsustainable, with some fish stocks in the territory's coastal waters near collapse in the late 1990s.[3] Equally serious, the exploitation of fish, phosphate, and production of minor agricultural resources, together with salt and sand, has impeded the prospect of self-determination for the Saharawi people, entrenching the status quo of occupation.

The 'question' of Western Sahara, as the United Nations describes it, is one about the right of the Saharawi people to exercise their choice of self-determination as the inhabitants of the former colony of Spanish Sahara. A long delayed self-determination referendum and the active conflict between the Frente Polisario and Morocco from 1975 until 1991 (which included Mauritania until 1979) have been the principal features of such a question. However, serious human rights abuses (including the maltreatment of the Saharawi population in Moroccan-occupied areas, forced disappearances and the introduction of settlers into the territory) remain significant. That there has been comparatively limited concern about the territory's resources and what the taking of them entails for an occupation and the stalled self-determination of the Saharawi people should not be surprising.

Western Sahara's principal natural resources are phosphate mineral rock from the Bu Craa mine and fish from a highly productive area of the Atlantic Ocean.[4] Possible land and seabed petroleum reserves may yet add to this. In the 30 years after invasion, the fishery was the most highly valued. After 2008 phosphate became the leading resource as a result of its sudden increase and then a sustained historically high market price. It has become apparent that, as with earlier decolonization cases such as Namibia and East Timor, the exploitation of natural resources perpetuates the occupation of Western Sahara and thereby delays its people's self-determination. In light of the territory's increasing potential for mineral resources and petroleum, there is a greater need to understand how the exploitation of resources is part of the 'question' of Western Sahara.

The present analysis surveys the history, problems resulting from, and consequences of the exploitation of resources in a Western Sahara that has for 40 years been under armed occupation. It begins with Spain's colonizing of Western Sahara and involvement with its resources before turning to the territory's abandonment to Morocco and Mauritania, following which Spain retained some resource rights. Revenue from extraction of the two primary resources since 1975 is then assessed and compared to the costs of occupying Western Sahara. The relevant international law is considered, including the right of non-self-governing peoples to sovereignty

2 Morocco occupies three-quarters of Western Sahara which has an area of 266,000 km^{2}within colonial frontiers established by France and Spain. Mauritania and Morocco partitioned Western Sahara in April 1976. Mauritania quit the territory in 1979 upon concluding a peace treaty with the Saharawi national liberation movement, the Frente Polisario (the Popular Front for the Liberation of Saguia el-Hamra and Río de Oro). Morocco then occupied the area left by Mauritania.The term 'occupation' is used in its ordinary meaning in international affairs and law, noting the UN General Assembly's declaratory use of it in the case of Western Sahara and the conclusion of the International Court of Justice in 1975, discussed below, that Morocco did not have any legal basis for a claim to the territory.

3 The Canary Current Large Marine Ecosystem on the coast of northwest Africa is the third most globally productive fishery. UNFAO, 'Protection of the Canary Current Large Marine Ecosystem' (undated), http://www.canarycurrent.org/resources/publications (accessed December 1, 2014).

4 Phosphate rock exports from the Bu Craa (Bou Craa; بوكراع) site by the Moroccan state-owned Office Chérifien des Phosphates (OCP SA) through its subsidiary operating entity, PhosBouCraa, are planned to continue at 2.6 million tonnes/year, averaging 2.2 million tonnes in recent years, with a notable peak of 2.78 million tonnes in 2011, OCP SA *Prospectus – 17 April 2014* (a debt-financing prospectus issued on the Irish Stock Exchange), 95 [OCP 2014 *Prospectus*] (unpublished, copy on file with author). The coastal fishery is carried out by Moroccan, European Union member state, Russian and Japanese vessels, the latter joining for a seasonal tuna fishery in October 2014.

over natural resources, and the application of international humanitarian law. Rationales for Morocco's extraction of resources are examined, the evidence revealing that the activity is pursued as a basis for the settlement of Moroccan nationals in the territory to better serve an ostensible annexation project, and generate acceptance for territorial acquisition in the organized international community. Finally, the prospects for application of the law and the place of natural resources in the resolution of the question of Western Sahara are contemplated.

I. Natural resources in Africa's last colony

The history of foreign involvement in Western Sahara's resources is one of appropriation by outsiders. From the time the Saharawi were colonized, they never enjoyed the entire benefit of the coastal fishery or the later mining of phosphate rock, even as the two commodities came to be exploited at industrial levels. The year 1885 marked Spain's formal establishment of the colony, ostensibly for a Canary Islands fleet which had fished the coast for centuries. Spain's early concern for a territory it obtained by Europe's division of Africa at the Conference of Berlin was negligible. Only after 1895 did it build settlements, in the north at el Aauin (Laayoune) and mid-coast at Dakhla (Villa Cisneros), and it would not consolidate possession of the territory until the 1930s.[5] Geological surveys in the 1940s revealed promising phosphate deposits at Bu Craa in the northern part of the territory. In 1962 Spain decided they should be developed, enacting the necessary legislation and constructing a 100-kilometer conveyor belt to transport the phosphate to a loading facility at the coast near el Aauin.[6] By the time Spain decided to leave Western Sahara, Bu Craa was producing 2.7 million tonnes per year after it started operation in 1973. Long after it gave up the territory, the Spanish government would retain a 35% share in the enterprise.[7]

To understand why Western Sahara's natural resources have received little attention, the means by which Spain abandoned its colony must be recalled.[8] The formal pretext was the November 1975 Madrid Accords.[9] That treaty allowed Mauritania and Morocco to occupy the territory (something that was by then already underway) and noted that the three states would assure the Saharawi people their right to self-determination. The Accords were meant to give Spain legitimacy in quitting the Sahara, and an acceptance that its colony could be annexed by two neighboring states, whatever provision was made or not for the rights of the Saharawi people. The Accords were contrary to international law, for Spain did not have the right to transfer away the Saharawi people's territory or delegate the conduct of their self-determination to

5 The territory's frontiers were established by the *Convention pour la délimitation des possessions françaises et espagnoles dans l'Afrique occidentale,* 1900, 92 BFSP 1014; the *Convention between France and Spain respecting Morocco*, 1904, 102 BFSP 432; and the *Treaty between France and Spain regarding Morocco,* 1912 (1913) AJIL 7 at Supplement 81.

6 'The phosphate mined at Boucraa is sedimentary [i.e. is apatite] and consists of two layers of phosphate … Mining of the second layer, which is less rich [in phosphoric content] and contains more silica, is expected to commence in 2014, following the completion of the necessary processing infrastructure.' No part of the Bu Craa enterprise appears set for capital improvement or expansion in coming years. See OCP 2014 *Prospectus*, 81–2.

7 The government of Spain divested its ownership in 2002. The entire corporate interest is now held by OCP SA, which became an incorporate entity in 2008, assuming control of all phosphate extraction and export activities in Morocco from the government agency of the same name.

8 Western Sahara is a case of unique dualities in its factual and legal setting. It (its people) are characterized as non-self-governing, and so Western Sahara in law and by UN declaration is a colony. But is also a place under armed occupation, given the absence of a legal claim to the territory by the occupying state. The territory proper has two present de facto sovereigns, a 'government in exile' that is the Saharawi Republic and Morocco. It has a divided original population, one part under occupation, the other self-governing refugees. And, as discussed below, two bodies of law apply to the development and export of its resources.

9 *Declaration of Principles (Tripartite (Madrid) Accords (Mauritania/Spain/Morocco))* (November 14, 1975), 14 ILM 1512.

others.[10] The tragedy of Western Sahara resulted out of Spain's failure to act consistently with international law and what were by then the many successful decolonization cases.

The Madrid Accords accomplished more than simply a territorial cession. The treaty created the basis for exploitation of the territory's resources, if unwittingly, up to the present. With the Accords were protocols revealed only after 2009. The first allowed Spain continued access to the Saharan fishery, an arrangement that continued until Spain joined the European Economic Community (the EEC) in 1986. (Control of member state fishing was and is through the Common Fisheries Policy that began with the 1957 Treaty of Rome.) Morocco agreed that Spain could have 20 years of fishing for as many as 800 vessels in 'Saharan waters' with fine-tuning to be done in specific treaties after 1976.[11] A second protocol ratified Spain's ownership share in the Phosboucraa enterprise and detailed arrangements for Morocco to receive assistance with geological exploration, the building of vessels to transport phosphate (*roca fosfatos*), tourism and agriculture. The third protocol continued arrangements for fishing in Mauritanian waters, which had been open to Spanish vessels after the country's independence in 1964.[12] The division of the territory's ocean resources has been discussed by Driss Dahak, a Moroccan law of the sea advisor and UNCLOS (UN Convention on the Law of the Sea) negotiator. He describes how Spanish–Moroccan fisheries cooperation was made part of the Accords because Morocco considered itself obliged to accept Spain's demands given the 'particular political circumstances' of the time.[13] Subsequent fishery treaties between the two states were short-lived, revisited in June 1979, December 1979, April 1981, December 1982 and August 1983. The last provided for reciprocal commitments, with Spain to continue with access and Morocco to receive 'assistance in the technical domain and the financing of projects'.[14] A similar arrangement continues under the present 2006–07 European–Morocco fisheries treaty.

After Spain joined the EEC, the first Brussels-directed treaty came into operation in 1988.[15] It had a four-year term, during which Morocco was to be paid 282 million European Currency Units (ECU). Subsequent treaties were agreed upon in 1992 (310 million ECU) and 1995 (500 million ECU). The treaties with Morocco ended for a time in 1999 when no agreement for renewal could be reached because of concerns over the sustainability of fish stocks.[16] In retrospect, the amounts paid were remarkable; more than 1 billion ECU for 11 years of access to the Saharan fishery. This is explained in part by the volumes of fish taken, the redistributionist and developmental goals of the EEC/EU common fisheries policy, and perceptions of the importance of the Saharan fishery to the Canary Islands economy.

Morocco and Spain also reportedly considered dividing the continental shelf between the Canary Islands and the Saharan coast. (Mauritania and Morocco did so through their April 1976 treaty, above.) However, the two states did not apparently begin to negotiate maritime

10 The *Madrid Accords* arguably lapsed on February 26, 1976 when Spain withdrew its remaining presence in Western Sahara. They were undoubtedly abrogated when Mauritania and Morocco partitioned the territory that April under the *Convention concerning the State Frontier Line established between the Islamic Republic of Mauritania and the Kingdom of Morocco*, April 14, 1976, 1977 UNTS 117 (in force November 10, 1976).

11 *Madrid Accords* first protocol, 1975. The protocol provided for joint oversight with a review five years into its 20-year term and compensation for Spanish government property connected to the fishing industry left in the territory.

12 Respectively, the second and third protocols to the Madrid Accords.

13 D. Dahak, *Les Etats Arabes et le Droit de la Mer*, Tomes I et II (Rabat: Les Editions Maghrébines, 1986), 409. Dahak notes that a 1977 fishing agreement was not ratified by Morocco in response to 'Spain declaring after 1976 that it had only ceded administration of the territory, and not its sovereignty'. Ibid., 410, translation.

14 Ibid., 411 (footnote omitted). The 1983 agreement prescribed a first annual catch limit of 136,602 tonnes, to be reduced for conservation reasons in following years by 5%, 10% and 14%.

15 *Agreement on Relations in the Sea Fisheries Sector between the European Community and the Kingdom of Morocco*, OJ L181 (June 23, 1988).

16 T. Shelley, *Endgame in the Western Sahara: What Future for Africa's Last Colony?* (New York: Zed Books, 2004), 74. During these years, the ECU exchange rate averaged US$0.84. On the 1995 treaty see G. White, 'Too Many Boats, Not Enough Fish: The Political Economy of Morocco's 1995 Fishing Accord with the European Union', *Journal of Developing Areas* 31 (1997): 313.

boundaries in the area. The concept of extended maritime jurisdictional areas was only then emerging, with many states awaiting the result of the UN Law of the Sea Conference in the middle of developmental meetings.[17] The issue is of renewed interest in recent years, with both states authorizing seabed petroleum exploration in waters south and east of the Canary Islands in 2014 and 2015.

Today, the direct involvement of third states in Western Sahara's natural resources remains limited to the fishery. Mauritania has no connection with the territory's resources except indirectly by an extended continental shelf claim that appears to encroach on the Saharan seabed.[18] The government of Spain has relinquished its interest in Phosboucraa, the local operating subsidiary of Morocco's Office Chérifien des Phosphates (OCP SA), the government phosphate mining, marketing and export entity recreated as a corporation in 2008. No other state is involved with production or commercial trade of the territory's phosphate. After 2000, petroleum development in Western Sahara had been limited to exploration, including seismic surveys. This changed in December 2014 with the American firm Kosmos Energy Ltd. starting seabed drilling northwest of Dakhla at the Gargaa (El-Khayr, or CB-1) deepwater site.[19] Commercial involvement with the Saharan fishery is through a 2013 Morocco–Russia treaty (a renewal of earlier ones dating from 2006) and the resumed[20] EU–Morocco Fisheries Partnership Agreement (the FPA) that first operated from 2007 until December 2011.[21]

The Frente Polisario, as the national liberation movement for the Saharawi people and government of the Saharawi Arab Democratic Republic, constantly protests at the taking of the territory's natural resources. It does so in matters large and small. The Frente Polisario condemned the FPA to the European Commission when its first protocol was set to expire in February 2011. A November 2010 letter from Mohamed Sidati, the Frente Polisario's EU delegate, to the then EC Fisheries Commissioner Maria Damanaki is typical:

17 '[T]he negotiations for the Madrid Accord … provided that "The experts of the two countries will meet prior to 31 December 1975 for the purpose of mapping the median line between the coasts of the two countries' and that the government of Spain had expressed reservations about petroleum exploration permits issued by the government of Morocco in 1971 in areas between Morocco and the Canary Islands, considered by Spain as having exceeded an equidistance line between the coasts of the two countries"'. Dahak, *Les Etats Arabes et le Droit de la Mer*, 239 (translation, footnote omitted).

18 The claim to an extended continental shelf (ECS) was first defined in a preliminary submission to the UN Commission on the Limits of the Continental Shelf (CLCS) in May 2009, and further detailed in September 2014. The claim most likely encroaches into Western Sahara's seabed area as there is not yet a territorial sea boundary or an exclusive economic zone (EEZ) boundary between the two states at Cape Blanc. In December of the same year, Spain delivered to the CLCS its ECS claim for the seabed west of the Canary Islands that also appears to overlap with a presumptive Saharan seabed. Morocco has protested at the claim, and the government of the Saharawi Republic has, in turn, protested at Morocco's protest on the basis that it could only be advanced with Morocco in (the illegal) possession of the relevant Saharan coastline. See Letter of Ahmed Boukhari, Frente Polisario representative to the UN at New York to the UN Secretary-General (April 12, 2015) (unpublished, copy on file with the author).

19 Kosmos Energy Ltd. undertook extensive seabed surveys in 2012–14, and has suggested to investors that up to 1 billion equivalent-to-petroleum barrels may be present in its Boujdour Offshore block. In completing test well assessment in March 2015, the company noted petroleum was present but not economically viable for the time being, http://www.kosmosenergy.com (accessed March 20, 2015).

20 In September 2014.

21 See the *Agreement between the Government of Russian Federation and the Government of The Kingdom of Morocco for a Marine Fisheries Partnership*, 2010 (unpublished, copy on file with the author) and *Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco*, July 28, 2005 (entered into force March 7, 2007) (the FPA), http://eur-lex.europa.eu (accessed December 1, 2014). The operative protocol to the FPA was extended in February 2011 as its four-year term was about to expire. That December, the European Parliament ended the extension. In 2013, a new protocol was reached, entering into force in July 2014 with fishing beginning that September. It has a term of four years and will see Morocco annually paid €30 million. EU fishing in Saharan waters – not geographically defined under the FPA's protocols – has been criticized. See J. Smith, 'Fishing for Self-determination: European Fisheries and Western Sahara – The Case of Ocean Resources in Africa's Last Colony', *Ocean Yearbook* 27 (2013): 267.

> [We] repeat our previous communications to the Commission that *fishing by European vessels in Western Sahara's waters pursuant to an arrangement with the Kingdom of Morocco is contrary to the interests and wishes of the people of Western Sahara, and is therefore contrary to international law*.[22]

In June 2014 the SADR (Saharawi Arab Democratic Republic) government wrote to the government of New Zealand with a request that it prohibit the import of phosphate rock by two companies.[23] In January 2015, the president of the SADR wrote to UN Secretary-General Ban Ki-moon to protest at seabed oil drilling, calling for intervention by the UN Security Council:

> The Saharawi government concludes that the present petroleum activity is illegal and impedes progress toward the conduct of a 'free and fair referendum' as that has been accepted by the parties. (See report of Secretary-General 18 June 1990, UN document S/21360, paragraph 47(g).) The activity underscores to the Saharawi people that a violation of well settled, universally [accepted] rules of international law is allowed to continue. That suggests the organized international community is unwilling to ensure the paramount obligation of self-determination flowing from Article 73 of the UN Charter.[24]

II. The plunder of the Sahara

A starting point to assess what has resulted from 40 years of resource extraction in an occupied Western Sahara is to consider the value of what has been taken, and assess that in light of the economic cost of annexing the territory. To this end, a survey of how the two originally occupying states dealt with resources is useful before turning to the matter of the resources' value. For its part, Mauritania realized virtually no resource income, having garrisoned and fought for its part of the territory at great financial and political cost. Assessing the economic rents taken by Morocco reveals little better result for that country. The kingdom has incurred significant direct cost to maintain an occupation which, even in recent years of high phosphate market prices and assured foreign flag fishing, has been a demand on its state treasury.

The more consequential impact, however, has been that of creating a semblance of normalcy to what is a project of annexation. Resource exports allow Morocco to foster the international community's acceptance that it is legitimately in possession of the territory. That a majority of the population in the occupied part of the territory are now Moroccan settlers who benefit most from the resources is overlooked. In some respects, the issue can only be discounted by states and the UN, because to engage it as the law requires would demand addressing the legality of an occupation itself. The significance of Western Sahara's resources for Morocco has been far-ranging, on a parallel with resource exploitation in South African-occupied Namibia and Indonesian-annexed East Timor.

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22 Emphasis in original. The 2010 letter added: 'The waters adjacent to the coast of Western Sahara are NOT Morocco's, as confirmed by the declaration by the Saharawi Arab Democratic Republic (SADR) of an Exclusive Economic Zone on 21 January 2009 … Exploitation by EU vessels of Western Sahara's fisheries resources, without the prior consultation and consent of the representatives of the Saharawi people, is in direct conflict with the non-derogable right of the Saharawi people to exercise sovereignty over their natural resources, and is therefore in violation of international law, including international human rights law and the relevant principles of the Charter of the United Nations' (unpublished, copy on file with the author). On the history of the Frente Polisario and development of the Saharawi state, see S. Zunes and J. Mundy, *Western Sahara: War, Nationalism, and Conflict Irresolution* (Syracuse, NY: Syracuse University Press, 2010).

23 Letter of SADR Minister of Foreign Affairs to the New Zealand Minister of Foreign Affairs, 'The import to New Zealand of phosphate from occupied Western Sahara', June 12, 2014. Morocco responded with a June 16 letter to New Zealand, requesting the SADR's letter be disregarded. Morocco's letter was disclosed through a Twitter account in November 2014 by someone with access to its ministry of foreign affairs diplomatic cables, 'Le Makhzen'. (The correspondence is unpublished, copies on file with the author.)

24 Letter of SADR president Md. Abdelaziz to UN Secretary-General Ban Ki-moon, January 26, 2015, http://www.spsrasd.info (accessed April 1, 2015). The Secretary-General noted the letter in his annual report to the UN Security Council, 'Report of the Secretary-General on the Situation Concerning Western Sahara' (April 10, 2015) UN doc. S/2015/246, para. 62.

The activities to support resource extraction have been manifested in several ways, including a substantial military presence and the construction of civil and military works, such as port facilities at el Aauin and Dakhla. Morocco does not hold the territory by force alone. Rather, it has introduced an ever-larger population of settlers into Western Sahara who partly rely on resource development for employment and to create a local production economy.[25] Morocco's capacity to support its settlers in Western Sahara, to be clear, does not turn only on the exploitation of natural resources. But given the lack of industry, manufacturing, higher education facilities and market services for a largely urbanized population of what is now about 400,000 people (including the Saharawi), resources have a central role in the pursuit of a seemingly viable local economy.

Allowing, if not promoting, the settlement of Moroccan nationals, arguably the most acute 'problem on the ground', does two things to delay Saharawi self-determination. The first has been to confuse the demographic of those properly entitled to vote in a self-determination referendum. The second is to introduce a population, a part of which might prefer or be compelled to be relocated should Saharawi independence result. The result has been paralysis, with the ability of the UN to ensure a proper referendum now seriously doubted. An increasing Moroccan population coupled with a denial of self-determination, founded in part on the exploitation of natural resources, is clearly a valuable result for Morocco.

A calculation of the value of resources taken from Western Sahara since 1975 is possible. Some gaps in the data exist, because they are not available on the public record or because they cannot be sufficiently assessed to be credible. Export volumes of phosphate rock, also checked against the decline in reserves at the Bu Craa mine site, together with known market values for the commodity, allow a ready calculation. The value of the fishery from 1975 through 1988 is more obscure. After 1988, that value can be derived from the payments under the EC/EU–Morocco fisheries treaties and later the Russia–Morocco treaties. Of course, allowance has to be made for fisheries other than those under the EU and Russian treaties, for example by locally operated vessels (with some registered in flag of convenience states) after the first FPA protocol was ended in 2011 and a brief tuna fishery conducted by Japan in late 2014.[26] It should be noted that little European and no recorded Russian fishery since 1975 has taken place in waters immediately adjacent to those of Western Sahara, that is, to the north in the area between Spain's Fuerteventura Island and the mainland of Morocco. Fisheries 'with Morocco' take place in the highly productive waters of the Canary Current area on the mid-coast of Western Sahara and to the south.

Therefore, the following calculation is proposed in order to arrive at a net present value resulting from the exploitation of the Saharan fishery since 1975, as of 1 October 2015. There are four sources (or categories) of revenue to assess, namely: (i) the Spanish fishery until 1988; (ii) payments by the EEC/EU from 1988 until the present; (iii) the Russian fishery, notably the payments under 2010 and 2013 agreements; and (iv) a local commercial fishery based in Dakhla using Moroccan and flag of convenience vessels which increased after the temporary end of EU fisheries in late 2011. Periodic fisheries by other states, such as a 2014 tuna fishery by Japanese

25 Even less about natural resources has been the organized international community's response to Morocco introducing its nationals as settlers into Western Sahara. 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' Article 49, *Fourth Geneva Convention*: *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, 75 UNTS 287 (entered into force October 21, 1950).

26 In October 2014 four or possibly five Japanese flag longliners operated southwest of Dakhla in a seasonal tuna fishery, landing their catch in Las Palmas. It is estimated that the four-week activity resulted in a total catch of 1600 tonnes at a market value of $12 million. The vessels were detected by Saharawi authorities and a protest at their presence was made by the Western Sahara Resource Watch NGO to the government of Japan. (Personal conversations of the author with SADR officials and Western Sahara Resource Watch (WSRW) managers, October 2014). The calculation of the value of the catch is the author's from a variety of stated market prices for yellowfin tuna in October 2014 following an estimate of the capacity and likely catch taken by the four vessels. For fisheries market prices, see the UN Food & Agriculture Organization (UNFAO) seafood pricing website: http://www.globefish.org (accessed April 15, 2015).

flag vessels, together with permit fee revenue realized by Morocco for local (artisanal) fishing, are discounted.[27] Fishing revenues from the period after 1999 until resumption of EU fishing in early 2007, from all states, are also discounted because of the lack of credible figures. A base date of 1 October 2015 for the valuation was chosen to allow for a full 40-year analysis.

To begin with, data for Spain's payments to Morocco from 1975 until 1988 is difficult to obtain. Accurate figures in what few records are publicly available are obscure and not always directly connected to the Saharan fishery. For this analysis the present value of Spain's payment during that period is dismissed. The present value of EEC/EU-era payments from 1988 through 1999 is straightforward; taking the 1.1 billion ECU paid until 1999 and calculating its value on 1 October 2015 results in a Figures of $1.072 billion.[28] Figures for Russia's actual payments from January 2010 through mid-2015 are not publicly available, although from the presence of Russian vessels on the Saharan coast, their patterns of activity, transshipment of catches to freezer ships, and prices stated for various species such as mackerel and sardines an annual catch-of 50,000 tonnes is indicated. Under its 2010 treaty with Morocco, Russia was to pay 17.5% of a stated value of all species caught of $255 per tonne, to an annual maximum of 120,000 tonnes. In the 2013 successor treaty that operated through 2015, Russia was required to pay 17.5% of a stated value of $497 per tonne for up to 100,000 tonnes and a lump sum payment of $5 million annually.[29] A realistic (i.e. one supported by observation) annual catch of 50,000 tonnes, as noted, is applied here. From 2010 through 1 October 2015, therefore, a present value of $27 million results.[30]

Payments by the European Commission under the 2006–07 FPA can next be calculated. Such payments were nominally €36.1 million annually for the first four years of the treaty starting in 2007 with an additional €30 million during the extension of its protocol until December 2011 and then, under a second four-year protocol agreed in 2013, €30 million annually.[31] (European flag vessels returned to Saharan waters in September 2014.) Morocco did not actually seek

27 Such occasional and local fisheries are discounted because of the entire lack of credible data about catches and market earnings from them. A crude estimate is that they may be worth $10 million annually.The author's personal observation (and from discussions with expatriate Saharawi fishers from Dakhla) is that there is little third state or otherwise IUU (illegal, unregulated, unreported) fishing in Saharan coastal waters (i.e. a presumptive exclusive economic zone). In July 2015 the SADR government protested to the government of the Faroe Islands about the presence of a vessel suspected of IUU fishing west of Cape Blanc. (Unpublished letter dated July 7, 2015, copy on file with the author.)

28 A conservative approach to calculating the present value of the 1.1 billion ECU is used: an exchange rate figure of $800 million; a benchmark date of December 31, 1999 for the 2015 present value; and inflation compounded at 2.00% per annum. If accurately known, historic inflation in Morocco could be the better determinant of present value, but it is not used in the present analysis.

29 The best figure for comparative purposes is present value; the current value of annual revenues remaining after capital, operation and maintenance costs. Under its 2010 three-year agreement with Morocco, Russia was obligated to pay 17.5% of $255/tonne for most species, with an allowable catch of up to 120,000 tonnes in the first year (and a further 80,000 tonnes shared jointly with Morocco). Russia is now required to annually pay $5 million and 17.5% of the caught value of fish (at $497 per tonne for frozen fish) for up to 10 vessels and a maximum of 100,000 tonnes under its 2013 treaty. Payments under the first three-year 2006 agreement are disregarded in the present analysis because of a lack of accurate catch data. A copy of the 2013 agreement can be found at WSRW's website, http://www.wsrw.org (accessed January 15, 2015).

30 The size (capacity) and fishing patterns of Russian flag vessels in Saharan waters suggests a higher value catch. The trawler *Oleg Naydenov* was one such vessel observed by Saharawi authorities after 2010, which had a capacity of 3372 tonnes. In April 2015 the vessel caught fire in Las Palmas and, after being towed out to sea, sank south of Gran Canaria where it began to release fuel oil. Saharawi authorities monitor fishing using several methods, including at-sea observation, vessel port visit reconciliations, satellite tracking and publicly available records such as catch landing by EU member state fishing vessels. (Personal conversations with SADR officials 2014–15.)

31 The second protocol, 'Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco', OJ L328/2 (July 12, 2013), was concluded in 2013 and entered into force in 2014. The second protocol and the Fisheries Partnership Agreement are stated to form an integral part of the 1996 EU–Morocco Association Agreement; Article 1 of the second protocol. Article 2 provides that €16 million is payment for the annual catch by EU permitted vessels and €14 million is 'support for the fisheries sector in Morocco'.

payment of a sector resource development component of the €36.1 million first protocol overall annual rent in at least one of its five years. Therefore, the present value (as at 1 October 2015) of annual FPA payments is €190 million, or $240 million. Finally, no value is assigned to the catch payments made by commercial vessels operating locally from Dakhla. This reduces the present value of the overall catch, of course, as such vessels work in relatively rich waters and are capable of week-long voyages to obtain 400 tonnes of fish. Accordingly, a *conservative* present value of the Saharan fishery under 40 years of occupation is $1.34 billion.

The *indirect* economic result of the Saharan fishery during this period has been considerable, although in the absence of accurate data, no attempt is made here to calculate it. But some discussion is useful. The commercial fishery is largely based at Dakhla. The port experiences continual activity associated with vessel provisioning and repair, and catch processing. Employment in primary fisheries and secondary support services in Dakhla may account for more than 10,000 persons. Assigning a *present* annual value of $60 million for direct rent of the Saharan fishery under treaties with other states and the EU, as well as local vessel fees, and a further $60 million from resulting economic activity yields a current total annual return of $120 million.

Calculating the value of extracted phosphate is straightforward, although there is little credible information about the cost of operating the Bu Craa enterprise.[32] Even during the long period from 1975 through 2006 when the market price of phosphate remained stable at $30 per tonne and production averaged 1.1 million tonnes, Phosboucraa may conceivably have been profitable, although that seems unlikely if the capital cost of the infrastructure (including the long conveyor belt and loading dock facilities) is accounted for. In recent years, the relative values of the fishery and phosphate have become reversed, starting with an unexpected price spike for phosphate in 2008. During 2011 the market price for phosphate again increased before stabilizing at $200/tonne, a figure it would hold through 2012 before declining through 2013 and leveling at about $110 per tonne through 2015.[33] The value of phosphate exports in recent years has been as much as six times that of the fishery and much greater than agricultural production, and sand and salt exports.

From an annual 1.1 million tonnes average in each of 31 complete years from 1976 through 2006 at $30 per tonne, there results a net present value of $1.81 billion as at 1 October 2015.[34] figures from 2007 through to 1 October 2015 can be adjusted for value of the latter date, $2.46 billion, and added to the to-2006 present value total, for an overall total of $4.27 billion.[35]

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32 See *OCP-Bou Craa Production 1975–2006* (unpublished, copy on file with the author). In 1975 production was 2.7 million tonnes. In 1980, 1981 and 1982, there was no production. Annual production did not exceed 1 million tonnes until 1989. It would not return to the 1975 level until 2006. Less than 1 million tonnes per year was produced at Bu Craa during much of the 1980s, exceeding 2 million tonnes only after 1998. In 2011, exports reached a high of 2.78 million tonnes: OCP 2014 *Prospectus*, 95. In 2012, 2013 and 2014, production and exported annually averaged 2.1–2.2 million tonnes. In late 2014 and early 2015 exports were delayed because of reported structural problems at the el Aauin phosphate loading dock.

33 See 'OCP SA Note d'Information: Emission d'un Emprunt Obligatoire', http://www.ocpgroup.ma (accessed January 5, 2015), which details two bond offerings of 2 billion Dirhams each, opened for subscription September 22, 2011, with interest at 4.46\% on a seven-year term. Bo Craa is discussed at pages 104, 126 and 149–50. No data is given in the 2011 prospectus about the volume of reserves or production at the site.

34 Present value is calculated here on the basis of annual production of 1.1. million tonnes (1976–2006, inclusive), $30/tonne (idem), and average annual inflation rate of 2.50% from 1976 until 1986, and 2.00% thereafter, compounded annually, not in advance, and known production, export and market value figures for the years 2007–15 (until October 1, 2015), inclusive. Again, the better rate of inflation may be local figures, that in Morocco perhaps averaging 5% in these years. See also figures available from the US Geological Survey at its website, http://minerals.usgs.gov/minerals (accessed December 1, 2014).

35 This figure does not include phosphate rock exports in 2015, the known value of which, until July 15, 2015, was $80 million from 700,000 tonnes shipped. It is expected that 1.4 to 1.8 million tonnes will be exported in the year, with a total value of $160 to $200 million. (Conversations of the author with SADR officials and WSRW managers, July 2015.)

Table 1. Value of natural resources exported from Western Sahara, 1976–2015

Resource	Present value at 1 October 2015
Fishery	$1.34 billion
Phosphate rock	$4.27 billion
Petroleum	$0 (single well production December 2014–March 2015)
Other	$40 million(estimated: sand and salt, excluding agricultural products)
Total	$5.65 billion

2250 persons are reported employed in the Bu Craa enterprise, 10% of OCP SA's overall workforce.[36]

These figures can be compared to the sums Morocco claims to have spent in developing the territory. In 2011 and 2015 the figures were made public. The former was a total of $900 million (€600 million) said to have been spent from 2004 through 2009, and 20 billion Dirhams ($2.5 billion at 2011 exchange rates) since 1975.[37] These amounts, ostensibly spent until 2015, were made available by the Kingdom of Morocco through its embassy in Australia in March 2015. They also appear to include the 2011 figures, above. The document notes that:

> Concretely, an important budget has been developed, since 1976, to the development of the region. *This effort that surpasses, by far, the income generated by the exploitation of natural resources*, comes as follows:
>
> -For the period 2001/2005, an average annual amount of 9.5 billion Dirhams was devoted to the Southern Provinces (Western Sahara) (1 AUD = 8 MAD)
> -Since the creation of the Agency for the Development of the Southern Provinces, the state spent more than 7.7 billion Dirhams for the period of 2006–2009.[38]

The declared investment (i.e. its present value for comparative purposes), whether as stated in 2011 or in 2015, is about 90% of the present value of the two principal resources taken from Western Sahara during the years of occupation. (It should be recalled that, until 2009, less than half the $4.27 billion present value of phosphate rock had by then been realized.) Generally after 2000 and until 2009, therefore, Morocco's stated civil expenditures exceeded the gross market value of the territory's principal resources. Making good an annexation project, however, is a continuing task. What counts is the revenue from resources from year to year, and an overall calculation or estimate of all that has gone before is useful only to illustrate the relative cost of the occupation, something discussed below, and to assess an idealized eventual

36 OCP 2014 *Prospectus*, 110. Some 400 Saharawi persons are said to be employed in this workforce, a figure the author arrived at after interviews with persons living in the occupied part of Western Sahara and SADR government officials from October 2012 until February 2015. In an undated document titled 'Allegations regarding exploitation of natural resources' made available in March 2015 by Morocco's embassy in Australia, Morocco notes 'the basis of [OCP's] exploitation is motivated, above all, by social considerations imposed by the necessity to preserve the jobs of the Western Sahara workers who support more than 700 families' (unpublished, copy on file with the author).

37 See e.g. submissions made in October 2011 to the UN General Assembly Special Political and Decolonization Committee at New York, http://www.un.org/en/ga/fourth (accessed February 1, 2015). Morocco did not provide data to support its figures. It is not clear if the figures include costs to construct and maintain public infrastructure in the territory.

38 'Allegations regarding exploitation of natural resources', a document issued by the Embassy of the Kingdom of Morocco in March 2015 (undated) (unpublished, copy on file with the author). (Emphasis in original.) The document notes the expenditures were directed to 'urbanisation', 'basic infrastructure' (964 km of roads, three airports, three sea ports) and 'drinking water supply'.

reparations claim.[39] It is the entire result of exploiting Western Sahara's natural resources that must be considered. How international law applies, to which we turn next, is vital to understanding how Western Sahara's natural resources are allowed to be taken.

III. Western Sahara's resources and the law

The international law which applies to the development and export of Western Sahara's natural resources is now mature. It has evolved in the modern era, including by cases in the International Court of Justice, the International Criminal Court and international criminal tribunals.[40] What makes the law remarkable when it comes to Western Sahara is how widely and continually it has been disregarded. The problem is enforceability. The measures available in law are for states to act on, and not the Saharawi people or an incompletely recognized Saharawi Republic. Two bodies of international law prohibit the taking of Saharawi resources. The first is the permanent sovereignty of non-self-governing peoples over their natural resources.[41] The second is international humanitarian law, and it is the more restrictive, prohibiting commercial exploitation of Western Sahara's resources except to meet the immediate needs of the original Saharawi population.[42]

During the 40 years of Western Sahara's occupation, there has been little declared interest in applying international humanitarian law in the territory, and less so in protecting the civil population by safeguarding public and private property including natural resources. The UN and the organized international community have been unwilling to declare that this body of law, IHL, applies. To insist on its application would be to acknowledge that the territory is occupied as defined in the Geneva and Hague Conventions and related customary international law, thereby raising the question of whether international criminal law applies. A declaration confirm-

39 The SADR government has presented a reparations claim to a phosphate purchasing company, Potash Corporation, stating: ' Our purpose in writing is to deliver to Potash Corporation notice of a pending or eventual claim for compensation resulting from your company's purchase of phosphate mineral rock from occupied Western Sahara … The historical record and precedent bear out a claim for reparations, recalling the examples of the United Nations (Iraq–Kuwait) Compensation Commission and the mechanisms in the 1998 *Rome Statute* of the International Criminal Court … We calculate the claim conservatively to be at least $400 million (in 2014 dollars).' SADR Petroleum and Mines Authority letter of January 10, 2014 (unpublished, copy on file with the author).

40 The leading ICJ decision on the right of non-self-governing peoples to self-determination is the *Kosovo Advisory Opinion* (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion), ICJ Reports 2010, 403. 'During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.' Ibid., at para. 79 (citations omitted). The ICJ has not pronounced on the legality of resource development in non-self-governing territories or those considered occupied within international humanitarian law.
It is the right of permanent sovereignty to resources, coupled with the right to self-determination, that requires Morocco as an administering state in Western Sahara to ensure the consent of the original inhabitants of the territory is obtained to resource development, and that the benefits of such development accrue to them. This was the basis for the governance of Namibia's resources under occupation, by decree of the UN Council for Namibia, created in the 1960s and discussed below.
The leading international criminal law decisions for the taking of public resources under occupation remain those of the International Military Tribunal after the Second World War, for which see the discussion in James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York: Open Society Initiative, 2010).

41 This body of law traces back to the UN's decolonization mission with the UN General Assembly issuing its 1962 declaration, *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII) (December 14, 1962), discussed below. Arguably, because Spain could not assign or transfer responsibility for self-determination of the Saharawi people to other states, Spain remains responsible for resource development in Western Sahara, that is, ensuring the consent of and benefit to the Saharawi people from such activity.

42 International humanitarian law and international criminal law is discussed below. As noted above, Spain's courts have accepted the application of international criminal law in recent months. Pillage may result in the setting of an international or a non-international armed conflict, from the taking of public and private resources. The Fourth Geneva Convention, 1949 and the Rome Statute 1998 of the International Criminal Court, discussed below, govern. Because of the stricter obligation to protect an occupied population, Morocco is arguably first bound to comply with international humanitarian and criminal law in its administration of Western Sahara.

ing the occupation was made early on by the General Assembly, but it has not been acted on.[43] Recognizing the annexation of Western Sahara as a continuing occupation would make inescapable the obligation on states to deny support to Morocco in its project. That is something the organized international community has not been prepared to accept. As with East Timor (Timor-Leste) until 1999, the occupation of Western Sahara remains disregarded under this branch of international law. Even as IHL rapidly developed in the first decade of the new millennium, including a creation of the International Criminal Court with a war crimes jurisdiction that includes pillage, there has been no interest in applying its criminal law adjunct to Western Sahara. That changed in the second half of 2014, and there are now two criminal appeals decisions in Spain which have directed investigations to proceed against alleged serious crimes in the occupation of Western Sahara on the basis of international criminal law.[44]

The reluctance of the organized international community to contemplate the application of international law in general to Western Sahara and within that its resources is the result of several factors. To begin with, few states have any interest in the legal protection of the territory's natural resources. This position is understandable when it is recalled that they defer to the United Nations in its oversight role for self-determination. The problem in having states recognize and apply international legal obligations is something that comes from treating the 'question' of Western Sahara exclusively as an incomplete self-determination project. In any event, and apart from Palestine's particular status, the case of Western Sahara is one now largely singular, almost unique. The treatment of Western Sahara therefore remains one of self-determination (that is, of completing decolonization) and not the reality of territorial acquisition through *re-colonization*. Considered this way, and consistent with the history of colonizing nations having particular and apparently non-transferable obligations to complete self-determination for peoples who were once a part of their imperiums, the UN's decolonization project arguably no longer has much useful application. Portugal, it seems, was the last colonizing state to realize its obligations, acting in 1999 to assure for the Timorese people their right to self-determination. (France in New Caledonia must be noted as a contemporary example.) When it is recalled that the Saharawi people have been consistent in expressing their desire for independence should self-determination eventuate (as well as their relatively uncontroversial declaration of independence in 1976), the UN decolonization project is revealed as fading in importance. A better approach might now be to categorize cases as either secessionary (including those of state dissolution) or the occupation of non-self-governing territories by (usually) neighboring states.

Another factor that has restricted the application of international law to Western Sahara (across several subjects, notably that of human rights) is found in the locus of international responsibility for the Saharawi people and their territory. Spain renounced its continuing colonial ('administering power') role despite half-hearted later statements that it did not intend to abandon the territory under the Madrid Accords.[45] Without Spain the Saharawi people have no colonial interlocutor to pursue diplomatic or legal redress for self-determination. But that does not

43 Resolution 34/37 'deeply [deplored] the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently occupied [until August 1979] by Mauritania'. *Question of Western Sahara,* GA Res 34/37 (November 21, 1979).

44 The first was a decision of the *Audencia Nacional* directing an investigating magistrate to proceed on a criminal complaint about the death of a dual Saharawi/Spanish citizen at Gdeim Izek in November 2010. The court concluded that international criminal law applied in the territory as a result of Spain's adoption of such law into its national legal system. The same court concluded the following April that an investigation for genocide could proceed against 11 Moroccan citizens in the early years of Western Sahara's occupation. See the Decisions of the *Audiencia Nacional*, Auto no. 40/2014 (July 4, 2014), and Sumario 1/2015 (April 9, 2015). The latter decision effectively set aside Spain's November 1975 statute that purported to abrogate the country's colonial responsibility for Western Sahara, Ley 40/1975. See Fernando J. Pérez, 'Ruz procesa 11 mandos militares marroquies por genocidio en el Sáhara', *El País*, April 9, 2015.

45 Spain formally legislated an end to its responsibility. See *Ley* [Law] *40/1975, de 19 de noviembre, sobre descolonización del Sahara*. 'The Government is authorized to perform such acts and adopt measures as may be necessary for

mean the responsibility has become Morocco's. The obligation to ensure decolonization after 1991 has remained with the United Nations. By resolution and precedent, this responsibility in the UN system should fall first to the General Assembly, something that had its apogee in the case of Namibia.[46] The discussion of Western Sahara in the General Assembly and in a Security Council content to annually renew the mandate of the UN self-determination mission in the territory, MINURSO, has not been one in which annexation of territory or an occupation has featured.[47]

The two areas of law concerning natural resources, permanent sovereignty and IHL, are usefully returned to. The first prohibits states and individuals from taking the territory's natural resources without the consent of the Saharawi people and a benefit to them. The obligation to respect a people's sovereignty to resources originates from the United Nations Charter. Articles 73 and 74 of the Charter were intended to ensure the well-being of peoples of non-self-governing territories until they are no longer colonized. The duty for colonizing, administering and occupying states has several aspects. There must be consultation with the people of the colonized territory. They must give free consent, arrived at on an informed basis, to the exploitation of their natural resources. It is they who are to have the benefit of the exploitation. Settlers introduced by a colonizing state or an occupying power do not qualify.

> 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.[48]

The obligation for consent has resulted from the two General Assembly Resolutions on which the UN self-determination process is founded, Resolutions 1514 (XV) and 1541 (XV) of 14 December 1960.[49] Resolution 1514 declares that 'peoples may, for their own ends, freely dispose of their natural wealth and resources … based on the principle of mutual benefit and international law' in order to realize the right to 'freely pursue their economic, social and cultural development'. In the five decades since, the two have uncontroversially entered into international law and are the core of Saharawi sovereignty over the resources of occupied Western Sahara.

In 1962 the General Assembly addressed permanent sovereignty over natural resources, declaring in Resolution 1803 that 'economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination'.[50] That sovereignty to natural resources is vested in the

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the decolonization of the non-autonomous territory of the Sahara, safeguarding Spanish interests.' (Translation by the author.)

46 The UN General Assembly-created Council for Namibia had legislative and executive jurisdiction for the territory after the termination of South Africa's mandate, exercising it including by legal action in the protection of natural resources. See *The Question of Namibia*, GA Res 2248 (S-V) (May 19, 1967). In November 2011, the Frente Polisario first called for UN oversight and possibly a form of trusteeship of natural resources in Western Sahara.

47 UN Security Council Resolution S/2218 (April 28, 2015) is the most recent annual extension of MINURSO's mandate. The UN assumed the obligation to ensure Saharawi self-determination in its referendum agreement with Morocco and the Frente Polisario which took effect in September 1991. The agreement is detailed in two reports of the UN Secretary-General, S/21360 (June 18, 1990) and S/22464 (April 19, 1991). 'The two parties, namely the Kingdom of Morocco and the Frente POLISARIO, recognize in the settlement proposals that the sole and exclusive responsibility for the organization and conduct of the referendum is vested in the United Nations.' S/22464, para. 9.

48 Article 73, *Charter of the United Nations* (June 26, 1945) 1 UNTS 16 (in force October 24, 1945). The UN Secretary-General noted the application of Article 73 in his annual report to the UN Security Council of April 10, 2015, above.

49 *Declaration of the Granting of Independence to Colonial countries and Peoples*, GA Res 1514 (XV) (December 14, 1960) and *Principles which should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information called for under Article 73e of the Charter*, GA Res 1541 (XV) (December 14, 1960). See also *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII) (December 14, 1962).

50 Ibid., *Sovereignty over Natural Resources* resolution.

people of a non-self-governing territory – and not an occupying or administering state – is clear by the resolution: 'The right of peoples and nations to permanent sovereignty over their wealth and natural resources must be exercised in the interest of their natural development and of the well-being of the people of the State concerned.' The General Assembly has observed that a '[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations'.[51]

The Saharawi people's sovereignty over natural resources could theoretically be enforced by any state. That is because there exists a universal (*erga omnes*) requirement on all states to uphold the law in this respect.[52] The organized international community accepts the protection of non-self-governing peoples' sovereignty to natural resources, as the work of the UN Council for Namibia, and the Nauru and Palestine Wall decisions of the International Court of Justice have shown.[53] Although by 1990 there were only a few remaining self-determination cases, the obligation of administering-occupying states to safeguard the resources of such territories had become a peremptory norm of international law. The most recent UN General Assembly Resolution on the subject emphasizes

> the right of the peoples of the Non-Self-Governing Territories to self-determination in conformity with the Charter of the United Nations and with General Assembly resolution 1514(XV) … as well as their right to the enjoyment of their natural resources and their right to dispose of those resources in their best interest.[54]

The development of this area of the law was discussed by Judge Christopher Weeramantry in his dissent to the ICJ's 1995 *East Timor (Portugal/Australia)* decision. He concluded that the 1989 Timor Gap Treaty was illegal, noting the obligation *erga omnes* on states to oppose the operation of the treaty:

> At such time as the East Timorese people exercise their right to self-determination, they would become entitled as a component of their sovereign right, to determine how their wealth and natural resources should be disposed of. Any action prior to that date which may in effect deprive them of this right must thus fall clearly within the category of acts which infringe on their right to self-determination, and their future sovereignty, if indeed full and independent sovereignty be their choice. This right is described by the General Assembly, in its resolution [1803] …
>
> The exploration, development and disposition of the resources of the Timor Gap, for which the Timor Gap Treaty provides a detailed specification, has most certainly not been worked out in accordance with the principle that the people of East Timor should 'freely consider' these matters, in regard to their 'authorization, restriction or prohibition'.

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51 Ibid., Articles 1 and 7, respectively.

52 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 2004 ICJ Reports 136 [*Palestine Wall,* Advisory Opinion]. Paragraph 159 of the Opinion is worth recalling: 'Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by lsrael with international humanitarian law as embodied in that Convention.' The Court noted that the taking of resources for construction of the wall was to be remedied, including payment of compensation. Ibid., para. 153.

53 Respectively, *Case concerning Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objection, 1992 ICJ Reports 240, *East Timor (Portugal v Australia),* 1995 ICJ Reports 139 [*East Timor*], and *Palestine Wall*, Advisory Opinion, ibid.

54 *Economic and Other Activities which Affect the Interests of the Peoples of Non-Self-Governing Territories*, GA Res 69/98 (December 16, 2014), paragraph 1.

> The Timor Gap Treaty, to the extent that it deals with East Timorese resources prior to the achievement of self-determination by the East Timorese people, is thus in clear violation of this principle.[55]

In 2002, the law of non-self-governing peoples' sovereignty to natural resources was considered by Hans Corell, then the UN Under-Secretary-General for Legal Affairs. The Security Council had requested his opinion on the legality of seabed petroleum exploration on the coast of Western Sahara. Corell was not asked to consider the territory's fishery and phosphate resources.

> The conclusion is, therefore, that, while the specific [petroleum exploration] contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the international law principles applicable to mineral resource activities in Non-Self-Governing Territories.[56]

There is an additional source of international law to be recalled when it comes to the Saharan fishery. All EU states, the EU itself and Russia are signatories to the UN Convention on the Law of the Sea; Morocco acceded in 2007.[57] UNCLOS states have an obligation to comply with Resolution III of the Final Act of the Law of the Sea Conference to ensure that for a 'people [who] have not attained full independence … or a territory under colonial domination, provisions concerning rights and interests under the Convention [are] implemented for the benefit of the people of the territory with a view to promoting their well-being and development'.[58] The phrasing is consistent with General Assembly Resolution 1803. Resolution III has been overlooked in the case of Western Sahara.

The UN and the organized international community could be motivated to apply international law to Western Sahara if the principles of territorial integrity were recalled.[59] It is, after all, in the interest of the international community to promote the norm, as the response to Iraq's attempt to annex Kuwait in 1990 and by Western states to the incorporation of Crimea into Russia in 2014 have demonstrated. Dealing with the territorial integrity of Western Sahara would mean having to accept that international humanitarian law applies. Even if the facts on the ground are compelling – and they include the international nature of the conflict, the parties' 1991 ceasefire referendum arrangement, the presence of a substantial occupying force, the building of the berm and, not least, Morocco's admission that Western Sahara remains 'technically, a war zone' – what has been a deference to the UN to ensure self-determination displaces the suggestion that international humanitarian law can apply, even given the stark circumstances of a separated and refugee Saharawi people.[60]

When it comes to IHL, although 1991 brought an end to active hostilities between the Frente Polisario and Morocco, the occupation of Western Sahara continues. As such, there continues the

55 Dissenting Opinion in *East Timor*, 198.

56 'Report of the UN Office of Legal Affairs on the Legality of the Oil-Contracts Signed by Morocco over the Natural Resources of the Western Sahara' (letter dated January 29, 2002), UN doc. S/2002/161 (February 12, 2002), http://www.arso.org/UNlegaladv.htm (accessed December 1, 2014).

57 United Nations *Convention on the Law of the Sea*, 1982, December 10, 1982, 21 ILM 1261 (in force November 16, 1994) [UNCLOS].

58 UNCLOS Resolution III, para. 1. There has been virtually no mention of Resolution III in the context of the 'question' of Western Sahara by any state, the UN, or any commentator.

59 Territorial integrity finds its starting place in the UN Charter, at Article 2. The basis to assert the territorial integrity of Western Sahara has several dimensions, including the necessity of such a circumstances in order to ensure the exercise of the Saharawi people's right to self-determination, the commitments of the parties in the 1990–91 ceasefire and referendum arrangements, the principle of *uti posseditis* in the maintenance of the inviolability of Western Sahara's territory and, notably, the conclusion of the ICJ that Morocco has not basis in law for a territorial claim to the Sahara. The UN General Assembly's declaration of Western Sahara to be occupied and the African Union's position on the nature of Morocco's presence in the territory, discussed above, are a part of this imperative.

60 US diplomatic cable, 'Seven Saharawi activists charged with intelligence cooperation with a foreigner' (US embassy Rabat) (October 16, 2009), http://www.wikileaks.ch (accessed December 1, 2014).

obligation to protect the territory's original population. The Fourth Geneva Convention prohibits pillage after cessation of hostilities for the entire period a state or territory is occupied:

> In the case of occupied territory … the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of [the articles against pillage and introducing settlers into occupied lands, among other provisions] of the present Convention.[61]

No state recognizes Morocco's claim to Western Sahara. As with Namibia, East Timor and Palestine, Morocco's annexation of the territory continues to be universally rejected.[62] That is a useful start to making out the norm of territorial integrity as it applies to Western Sahara and accepting the legal circumstances of the existence of an occupation. The discussion recalls the ICJ's task 'to assist the General Assembly to determine its future decolonization policy and in particular to pronounce on the claims of Morocco and Mauritania to have had legal ties with Western Sahara involving the territorial integrity of their respective countries' by its 1975 *Western Sahara* advisory opinion.[63] The court concluded:

> [T]he 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 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.[64]

If the rules of international law are clear enough in the case of Western Sahara's natural resources, we are left with the question of why they have not been applied. The answer should not be complicated, but it has become so. It includes the lack of any single state interested in upholding international law coupled with a leaving of the matter to a United Nations unwilling to act outside of a self-determination referendum approach. The consequence for international law is just as much the inability of any state or the Saharawi people being able to apply it to their circumstances as it is the creation of another precedent for the violation of territorial integrity, denial of self-determination and pillage of occupied lands. The taking of Saharawi resources damages the law in more ways than one. The organized international community has been slow to appreciate that.

IV. Pillage made good

If the value of Western Sahara's natural resources can be approximated, the consequences of their taking have not been wholly understood. The exploitation of resources is only a part of Morocco's efforts to annex the territory. The historical record strongly suggests that Western Sahara would have been invaded by Mauritania and Morocco whatever resource potential the territory had.[65] However, as we have seen, the two states were quick to divide resources between them, although Mauritania does not seem to have benefited from the fishery. And several years were needed for Morocco to reestablish production at Bu Craa. Resource exploitation certainly acquired greater

61 *Fourth Geneva Convention*, Article 6.

62 Consider the statements of United States, Norway and Switzerland that their free trade agreements with Morocco do not apply to Western Sahara.

63 *Western Sahara*, Advisory Opinion, para. 161

64 Ibid., para. 162.A useful fact in applying international humanitarian law is Mauritania's admission of its wrongful occupation of Western Sahara, made in its 1979 treaty with the Frente Polisario. If a court has yet to pronounce definitively on the legal situation resulting from Morocco's occupation, the statement of an occupier asserting a similar historic claim as Morocco (and which agreed with Morocco to partition the territory in 1976) is compelling.

65 The best historical record is that presented in voluminous records to the ICJ by Spain, Mauritania and Morocco in the 1975 advisory opinion proceedings. Mauritania could never hope to share in the phosphate reserves at Bu Craa. The most in-depth discussion of the 'siren call' of resources and the idea sometimes suggested that Morocco hoped to acquire a monopoly of global phosphate production by its annexation is that of Tony Hodges, *Western Sahara: The Roots of a Desert War* (Westport, CT: Lawrence Hill, 1983).

importance because an economy was needed for settlers after 1975 (who entered in increased numbers after the 1991 ceasefire). While revenue from the trade in resources is important, the real benefit to Morocco has been to create the appearance of a viable annexation. Work available for settlers in the resource sector serves as the basis for a labor market, with employment for Moroccan nationals justifying the success of settlement. The purported return of resource revenues back into the local economy as something that benefits the 'local' population – now a majority of Moroccan citizens – helps satisfy international concerns that resource revenues are being properly applied in the territory.

The consequences of taking natural resources from occupied Western Sahara can be categorized as: (i) Morocco's unrealized financial enrichment; (ii) a present and perhaps future denial of natural resources to the Saharawi people; (iii) the consolidation of Morocco's occupation including the settlement of its nationals in the territory (together with the related problem of the delay of a self-determination referendum); and (iv) the promotion of the appearance of legitimacy for the occupation through the 'credibility mechanism' of trade in resources. An additional problem beyond these four, and noted above, is the diminished application and availability to the Saharawi people of international law along with a further incident of state practice which erodes the two basic norms of international law: territorial sovereignty and the protection of peoples under occupation. These consequences are not isolated from each other, being connected in their causes and having a common point of a delayed self-determination.

The consequences are now considered in turn. Over four decades the annexation of Western Sahara has resulted in a financial loss to Morocco. Its hold on the territory is one secured by large expenditures. Just as it is difficult to determine the extent to which the benefits of Western Sahara's resources have been applied in the territory, so it is equally difficult to gauge the cost of an occupation that allows for the taking of resources. It may be reasonable to conclude that recent revenues from resources – annually averaging $300 to $400 million from 2010 through 2014 – if directed back into the occupied territory, would substantially provide for the civil economy, meeting at least the basic cost of sustaining settler and Saharawi populations within existing Moroccan state expenditures (including taxation benefits and commodities subsidies) but not the cost of the military presence in the territory.[66]

The ongoing result for the Saharawi people from the taking of their resources is not something that is easily quantified. The Saharawi have a subordinate (or marginalized) role in the economy of Western Sahara. However, it is not accurate to say that the Saharawi population inside the occupied territory is deprived of all benefits from development of natural resources. Small numbers of Saharawi are employed by Phosboucraa, in the fishery and in related services. Labor figures are not reliable; however, the number of Saharawi employed in the formal sector appears to be between 25,000 and 40,000, less than a majority of the adult population in the occupied territory.[67] But few of these are involved directly or secondarily in resource industries, no more than several thousand. What is known is that preferred employment, housing and amenities overwhelmingly favor Moroccan settlers.[68]

66 There are few available figures about the cost of Morocco's military presence in Western Sahara. The CIA's 2014 *World Factbook* notes that the Kingdom's annual military spending in 2012 was 3.55% of a $105 billion GDP (2013 estimated), https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html (accessed March 1, 2015). Morocco's reported state (government) budget for 2013 was estimated at $34.5 billion. (Transparency International states GDP in 2010 at $90.8 billion.) On the basis that one-third of Morocco's armed forces and military support infrastructure, including as many as 100,000 FAR members, is located in Western Sahara, the annual *military cost* of the occupation is approximately $1.2 billion.

67 Personal interviews, Saharawi government officials at the Boujdour and Rabouni refugee camps, October 2010 and December 2012.

68 In late 2010 the Saharawi protest camp at Gdeim Izek near el Aauin and others in the occupied territory were expressions of Saharawi discontent over marginalized economic circumstances. See Association Sahraouie des Victimes des Violations Graves des Droits de l'Homme Commises par l'Etat du Maroc, *Rapport de l'ASVDH sur le campement de Gdeim Izik et les événements qui ont suivi son démantèlement* (Tindouf, Algeria: January 2011).

That half the Saharawi population – those who live in the camps at Tindouf – is denied any benefit of their natural resources is a significant problem, a matter also overlooked during the early conflict. In recent years, the annual direct and indirect donor support including food aid and essential commodities to this population of perhaps 140,000 has been between €40 and 60 million.[69] The amount is small in comparison to the revenue in the same period from phosphate and the fishery. As far as the occupied territory is concerned, there is no reason why resource revenues could not be allocated to both Saharawi and Moroccans, including indirectly through employment schemes. However, Morocco has not been prepared to acknowledge any right of the Saharawi people to their resources and, in any event, the large settler population in the occupied territory, outnumbering the Saharawi population by at least two to one, depends on continued financial support from Rabat.[70]

The long-term value of Western Sahara's natural resources and so their potential loss to the Saharawi people in the future turns on three factors. The first is the uncertainty of the remaining time until the Saharawi people achieve self-determination. Changes in market prices for the two leading resources is another. (East Timor's experience with increases and the late 2014/15 decline in petroleum prices after independence is recalled.) A third factor is petroleum development in a time of unstable world prices for the commodity, which has now tentatively started in the territory.

An optimistic prediction might be made that fish stocks will continue undiminished. A 2011–12 fisheries research program, the Northwest Africa Ecosystem Survey (a joint undertaking of the UN Food and Agriculture Organization and Norway's Institute of Marine Research), will provide data about long-term sustainability in the area including the Saharan fishery.[71] The history of fishing in Saharan waters since 1975 should be recalled, for there have frequently been too many vessels involved. The allowance for more than 100 European vessels under the Fisheries Partnership Agreement has continued the tradition. Concerns persist that some stocks are overexploited.[72]

The extent of phosphate reserves at Bu Craa is uncertain, with present estimates ranging from a low of 100 million tonnes to 1.3 billion tonnes.[73] The latter figure seems too high and may come from outdated survey data. In its 2014 debt financing prospectus issued through the Irish Stock Exchange, OCP claims present reserves at Bu Craa (known also as Oued Eddahab) to be 500 million tonnes.[74] Phosphate extraction will continue to be limited by the capacities of the conveyor belt to el Aauin and facilities at the coast.

Overall, an annual revenue of about $300 million can be forecast to come from Western Sahara's resources over the next few years, until petroleum and mineral resources come to be

69 See UN Office for the Coordination of Humanitarian Affairs (Financial Tracking Services), 'Aid to Saharawi Refugee Camps in 2013′ (December 12, 2014), http://fts.unocha.org (accessed April 1, 2015). In 2013, a total of $24 million was given by various governments (e.g. Spain) and agencies (WFP, UNHCR, UNICEF) as aid into the Tindouf camps. The SADR government has few sources of revenue, but obtains modest operating funds of perhaps $10 million annually from AU member states. Algeria offers considerable in-kind and material support to the Tindouf camps, including electricity and, through the Algerian Red Crescent, cooking gas. In the author's visits to the camps, discussion with aid agency managers, and interviews of SADR officials, the figure of €40–60 million for 2014 is arrived at.

70 Petrol is taxed less in occupied Western Sahara than in Morocco and is supplied by chartered vessels to El Aauin and Dakhla. See Western Sahara Resource Watch, 'Fuelling the Occupation: The Swedish Transport of Oil to Occupied Western Sahara' (WSRW: Brussels, July 2014).

71 The work is part of the UN Food & Agriculture Organization's Canary Current Large Marine Ecosystem (CCLME) Project. See the UNFAO project website: http://www.canarycurrent.org (visited April 1, 2015).

72 See the 2010 report prepared by the consultancy Oceanic Développement, 'Framework Contract Fish/2006/20 Convention Specifique N°26: Evaluation ex-post du protocole actuel d'accord de partenariat dans la domaine de peche entre l'union europeenne et le royaume du maroc, etude d'impact d'un possible future protocole d'accord – Rapport – Décembre 2010', http://www.fishelsewhere.eu/files/dated/2012-03-05/evaluation-app-maroc-2010.pdf (accessed December 1, 2014).

73 WSRW, *P for Plunder*, 9. Toby Shelley put the 'known exploitable reserves' in 2004 at 132 million tonnes, Shelley, *Endgame in the Western Sahara*, 70.

74 OCP 2014 *Prospectus,* 79. The figure is stated as 1% of 50 billion tonnes under control by OCP SA, i.e. Morocco, from the January 2013 United States Geological Survey published 'Mineral Commodities Summaries'.

exploited in commercial quantities.[75] Of course, the future value of resources should account for how much will remain for the Saharawi people at independence. As with East Timor, the international community has an interest in preserving such resources, the better to make a viable economy for an independent Saharawi Republic after self-determination is resolved. Along the way, the question of Western Sahara's two primary resources should not detract from the preservation of other resources including groundwater, the territory's limited arable land, and environmental protection generally.[76]

Another consequence of the development and export of resources from Western Sahara has been what seems to be a useful domestic political and international gaining of support (or at least a tacit acceptance) of the annexation. In general, development and trade in the resources has created a useful internal legitimacy for the Moroccan monarchy, its armed forces and civil society. The 'national project' to acquire Western Sahara, in other words assuring the success of returning to the Kingdom its lost southern provinces, is made more acceptable by apparent financial gain and economic activity in the territory. Moreover, the presence of a standing army in Western Sahara has been partly justified by the necessity to protect resources. (That there was no phosphate production at Bu Craa for several years before the berm was built bears this out.) The taking of resources also offers a greater stake for Moroccan government agencies, state corporations and individuals in the continued occupation of the territory. Perhaps most importantly, resource development serves as a pretext for economic activity to support Morocco's settlers. This is especially true given the absence of industry and manufacturing in Western Sahara. In other words, the acceptance by Moroccan society of repossessing the Sahara has been more readily perpetuated because of apparent productive activity and financial return.

On the international stage, states have for the most part avoided commenting about the trade in Western Sahara's phosphate. Norway is a rare exception; in late 2011 its government directed the state pension fund to sell off interests in the FMC Corporation and Canada's Potash Corporation.[77] To their credit, Norway, Switzerland and the United States declared that their post-2000 free trade agreements with Morocco do not extend to products from Western Sahara. (However, Saharawi phosphate enters the United States free of import taxes.)

It is the fishery which most secures for Morocco international support for its exploitation of the territory's resources. The European Commission has been satisfied to have the benefit of the FPA be realized by the entire population of Western Sahara, side-stepping the question of Saharawi resource rights.[78] Although not as well known, the same has been true for the recent Russia–Morocco fisheries treaties. The absence of measures to ensure compliance with the law of sovereignty to natural resources has reinforced the willingness of states to tolerate Morocco's presence in Western Sahara. An example is the statement in an internal document from the

75 Metalex Resources Ltd. of Canada has conducted aerial surveys in a joint venture with Morocco's state oil and mineral development agency, ONHYM. See the company website at: http://www.metalexventures.com (accessed April 1, 2015) and the 2013 ONHYM annual report at page 32: http://www.onhym.com (accessed April 4, 2015). Exploration for petroleum on land continues, for which see again the ONHYM 2013 annual report. Hanno Resources of Australia has extensively surveyed the liberated zone and found extensive deposits of iron ore and other minerals, under technical cooperation agreements with the SADR government.

76 Groundwater resources and water use in urban areas of occupied Western Sahara is not well understood.

77 See the website of Norway's state pension fund, http://www.regjeringen.no/en/dep/fin/pressesenter/pressemeldinger/2011/statens-pensjonsfond-utland-nye-beslutni/statens-pensjonsfond-utland-to-selskaper.html?id=665637 (accessed December 15, 2014). The Swedish state pension fund has also more recently divested itself of share ownership in Western Sahara resource-receiving companies.

78 See Smith, 'Fishing for Self-determination' and the observations of the EU Parliament Fisheries Rapporteur Carl Haglund, 'Report to the EU Parliament Fisheries Committee, 2011', http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0394&language=EN (accessed December 1, 2014).

Moroccan government published by a whistle-blower on 21 November 2014.[79] Titled 'La Fédération de Russie et la Question du Sahara Marocain', it explains that:

> To this objective, Morocco has to … implicate Russia in activities in the Sahara, as is already the case in the field of fisheries. Oil exploration, phosphates, energy and touristic development are, among others, the sectors that could be involved in this respect … In return, Russia could guarantee a freeze on the Sahara file within the UN, the time for the Kingdom to take strong action with irreversible facts with regard to the *marocanité* of the Sahara.[80]

For its part, the United Nations would do well to consider how the two areas of law described above can be used to help achieve Saharawi self-determination. Eliminate a substantial reason for the annexation of Western Sahara – the taking of its resources – and Morocco's capacity and justification to maintain its annexation should be diminished. The reasoning of the International Court of Justice in its *Palestine Wall* advisory opinion is relevant:

> The Court would observe that the obligations violated by Israel include certain obligations erga omnes. As the Court indicated in the Barcelona Traction case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection' … The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law. […]
>
> In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[81]

It is unfortunate that the well-established rules of international law have been made marginal in the case of Western Sahara. If the law is considered properly, Morocco's annexation of Western Sahara will be again revealed as illegal. For the present, there continues a tacit acceptance of the occupation and so the approval of the taking of resources from the Saharawi people's territory.

V. Will the taking of the Sahara continue?

The organized international community meets the 'question' of Western Sahara most directly through trade in the territory's natural resources. The other aspects of Morocco's occupation and the stalled right of self-determination for the Saharawi people are not so much the concern of states, deferring as they have to the United Nations to ensure decolonization. None of the concern for a large Saharawi refugee population at Tindouf, the problem of human rights abuses inside occupied Western Sahara or the partition of the territory by the berm have sufficed to overcome a status quo that has prevailed since 1991. If international law in its various forms can be applied to the question of Western Sahara, it will be over natural resources, as the EU Parliament's rejection in 2011 of the Fisheries Partnership Agreement – if only partly out of concern for the Saharawi people – demonstrated.

A few predictions can be ventured. It is unlikely that the United Nations, whether the General Assembly or the Security Council, will act to apply international law to the taking of Western Sahara's natural resources. Enforcing obligations to ensure for the Saharawi people their right of sover-

79 Government of Morocco, 'La Fédération de Russie et la Question du Sahara Marocain' (undated), http://www.arso.org/Coleman/Note_Russie_Saharacorrige.pdf (accessed January 5, 2015). The Moroccan government has not contested the validity of much of the leaked documents. See e.g. TelQuel, 'Chris Coleman: le government dénonce finalement une campagne <enragée>' (December 12, 2014); *Le Monde*, 'L'étrange marocain' (January 4, 2015); *Le Monde*, 'Un hacker ne peut déstabiliser à lui tout seul la monarchie marocaine' (January 6, 2015).

80 The document was made available through a Twitter account: @chris_coleman24 on November 21, 2014. It is undated, but contains information suggesting it was created after 2010. The Twitter account has sometimes been taken offline. See e.g. TelQuel, 'Twitter a supprimé le compte de Chris Colement, sans s'expliquer' (December 17, 2014).

81 *Palestine Wall* Advisory Opinion, paras. 155 and 159 [citation omitted]. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136*

eignty over natural resources, even where the UN has an interest in the future availability of those resources to an independent Saharawi Republic restored to its territory, would mean confronting Morocco. The UN's declared aim of resolving the question of Western Sahara on a 'just, lasting and mutually acceptable basis' suggests that it will not prefer the application of the law to the detriment of one of the parties, no matter how serious the violation. That proved to be the case in the aftermath of self-determination in Timor, and is arguably what prevails in Palestine.[82] And so it appears to be the same over the short term when it comes to the natural resources of Western Sahara. In the short term, the best that might be hoped for from the UN is that it supports initiatives of the Personal Envoy of the Secretary-General to have the Frente Polisario and Morocco engage over natural resources.[83]

Another prediction is that international law will inevitably, if slowly, come to be applied to the case of Western Sahara, including international humanitarian law. Morocco, of course, remains immune to legal action for the occupation and plunder of Western Sahara. The kingdom is not a member of the International Criminal Court; nor can it be expected to join while the occupation of Western Sahara continues. And it will not consent to proceedings against it in any international forum, not when its defeat in the *Western Sahara* advisory case is recalled. If there are to be legal remedies against the taking of Saharawi resources, noting there is no similar recourse to challenge the fact of the occupation or human rights violations in Western Sahara, they will necessarily be against third states trading with Morocco for the resources, and individuals and corporations involved with purchasing those resources. The current docket of the International Criminal Court, together with the precedent of the UN Council for Namibia seeking civil remedies to protect natural resources, suggest the law can be applied in the defence of Saharawi resources.[84]

Ultimately, international law can only work at the margins of the Western Sahara case. The problem of Western Sahara is one of a stalled right of self-determination, impeded by an occupation and displacement of the Saharawi people. No body of law yet exists that is sufficient to force the resolution of such matters. We are left with an ordering norm of clear but unenforceable rules for those involved in the taking of Western Sahara's resources. Recent successes reveal the promise of reminding those involved about such norms, noting the successes in Norway and Sweden to withdraw government pension funds from phosphate trading companies and the EU Parliament in 2011 rejecting the FPA's extended first protocol.

There are good reasons for the organized international community to reject Morocco's annexation of Western Sahara. Self-interest in the preservation of the principle of territorial integrity is one. The general acceptance of the desirability of self-determination of non-self-governing peoples is another. The tragic circumstances of the Saharawi people in occupied Western Sahara and at the Tindouf camps is a third. A fourth is to ensure for a future Saharawi Republic sufficient resources for a functioning national economy. Where the international community concerns itself with Western Sahara's natural resources it will be to end the international trade in them, or least ensure Saharawi consent and benefit to their use, thereby reducing a pretext for an illegal occupation that has been allowed to continue too long.

Disclosure statement

No potential conflict of interest was reported by the author.

82 The United Nations Secretariat had called on the government of an independent Timor-Leste after 2002 to consider pursuing criminal investigations into serious human rights violations during Indonesia's occupation from 1975 until 1999 and notably arising in the months prior to the August 1999 self-determination referendum, without result. See Mohamed C. Othman, *Accountability for International Humanitarian Law Violations: The Case of Rwanda and East Timor* (New York: Springer, 2005).

83 See the 2014 'Report of the Secretary-General on the situation concerning Western Sahara' which noted continuing protests over resources (April 10, 2014), UN doc. S/2014/258.

84 As noted above, Spanish criminal law and therefore Spain's complementary jurisdiction under the Rome Statute of the International Criminal Court now appear to apply in Western Sahara.

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