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THE UN AND WESTERN SAHARA – REVIVING THE UN CHARTER

Hans Morten HAUGEN

SUMMARY:

I. UN CHARTER OBLIGATIONS REGARDING NON-SELF GOVERNING TERRITORIES, APPLIED TO WESTERN SAHARA. II. WILL SPAIN ACKNOWLEDGE THAT IT IS ADMINISTRATIVE AUTHORITY FOR WESTERN SAHARA, AND WHICH IMPLICATIONS WOULD THIS HAVE? III. UN ADMINISTRATION FOR WESTERN SAHARA? IV. THE PROCEDURE FOR DECIDING ON A TRUSTEESHIP AGREEMENT. VI. FACTUAL, STRATEGIC AND INSTITUTIONAL CONSIDERATIONS. VII. RECENT UN ADMINISTRATION OF TERRITORIES UNDER CHAPTER VII OF THE UN CHARTER: ARE THEY RELEVANT FOR WESTERN SAHARA? VIII. CONCLUSIONS.

Self determination for Western Sahara has been addressed in 43 resolutions from the UN General Assembly since 1965¹, and in 64 resolutions from the UN Security Council since 1975². Moreover, the International Court of Justice, in its 1975 Advisory Opinion on Western Sahara concludes that "...the materials and information presented to it do not establish ties of territorial sovereignty [...] as might affect the application of General Assembly Resolution 1514 (XV) in the decolonization of Western Sahara, and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory..."³. Self-determination is recognized both as a principle and as a human rights of peoples⁴.

1. In the most recent resolution, *A/RES/63/105* (2008), paragraph 2 reads (extracts): "...achieving a just, lasting and mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara..."

2. The most recent resolution, *S/RES/1871* (2009) has in paragraph 4 an identical formulation as found in *ibid*, paragraph 2.

3. Western Sahara Advisory Opinion (1975), paragraph 162, ICJ Report p. 68. General Assembly resolution *A/RES/1514(XV)* (1960) "Declaration on the Granting of Independence to Colonial Countries and Peoples" reads in paragraph 2: "*All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*".

4. In addition to resolution *A/RES/1514*, common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), recognize the right of peoples to self-determination, in the context of "political status" and "economic, social and cultural development" (Article 1.1); "natural wealth

Self-determination is also recognized by the First Additional Protocol to the Geneva Conventions⁵. In this context it must also be observed that Western Sahara by the UN General Assembly has also been recognized as being a question of occupation⁶ and decolonization⁷. The most frequent references regarding the status of Western Sahara, however, is to recognize it as a non-self-governing territory, which is regulated by Chapter XI of the Charter of the United Nations.

Despite these rich sources confirming the applicability of self-determination specifically regarding Western Sahara, there are no clear signs indicating that a solution is going to be reached soon. The United Nation's MINURSO (United Nations Mission for the Referendum in Western Sahara), established precisely with the mandate of overseeing a referendum on the status of the territory, is about to enter its 18th year, involving huge costs, but is far from achieving its objective.

In the report to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the talks between the two parties, Front Polisario and Morocco, based on resolutions S/RES/1754 are summarized as follows: "... although the parties dynamically interacted with each other, there had hardly been any exchange that could be characterized as negotiations"⁸. In an Annex to the last Secretary-General's report to the Security Council, the former Personal Envoy, Peter van Walsum, noted: "the parties continued to express strong differences on the fundamental questions at stake"⁹.

In his reflections after the mandate ended, van Walsum noted that "...the two main ingredients of the impasse were Morocco's decision of April 2004

and resources" (Article 1.2) and "administration of Non-Self-Governing and Trust Territories" (Article 1.3).

5. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), reads in paragraph 1.4: *"The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."*

6. *A/Res/34/37* (1979), paragraphs 5 and 6.

7. *A/RES/45/21* (1990), paragraph 2. Note also that Western Sahara is regularly reviewed by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples ("Committee of 24").

8. *S/2008/45* (2008), Report of the Secretary-General on the status and progress of the negotiations on Western Sahara', paragraph 4.

9. *S/2008/45*, Annex, Communiqué of the Personal Envoy of the Secretary-General for Western Sahara (in agreement with the parties), Greentree Estate, 9 January 2008. P. van Walsum's mandate was not renewed after his fifth semiannual term was out on 21 August 2008.

not to accept any referendum with independence as an option, and the Security Council's unwavering view that there must be a consensual solution to the question of Western Sahara. I focused on the latter..."¹⁰. The problem for Morocco is the term "independence"¹¹, as Morocco will only consider status quo or autonomy for Western Sahara as the options.

Moreover, van Walsum states that the Security Council "...has to take into account political reality" which includes "... fear of the destabilising effect of coercive action, awareness that redress of an injustice 33 years after the fact may entail new injustices, or reluctance to contribute to the possible creation of another failed state"¹². These observations by the person who was given a mandate to assist in identifying a solution for Western Sahara based on self-determination, indicate that the negotiations are not likely to proceed towards the holding of a referendum on the status of the territory of Western Sahara, implying that Saharawis will still be living as refugees in harsh conditions in Algeria and under Moroccan oppression in Western Sahara¹³.

Hence, there is a need for a totally new approach in order to proceed towards a solution where international law is not undermined by "political reality". The article will first analyze the obligations arising under Chapter XI of the Charter of the United Nations, and to which extent these obligations still apply to Spain. Second, the different scenarios regarding Spain's international

10. *El Pais* 28 August 2008: "Sahara's long and troubled conflict" by P. van Walsum; available at <www.elpais.com/articulo/internacional/Sahara/s/long/and/troubled/conflict/elpepuint/20080828elpepuint_5/1es>. The new US Administration has reportedly "disassociated itself from a Moroccan plan for autonomy for the disputed Western Sahara"; *World Tribune* 9 July 2009: "Obama reverses Bush-backed Morocco plan in favor of Polisario state"; available at: <www.worldtribune.com/worldtribune/WTARC/2009/af_morocco0547_07_09.asp>. While details on the new US policy are still not made public, the letter sent by Obama to the King Mohammed VI on 3 July 2009 refers directly to "UN-led negotiations", which we saw in note 1 and 2 must build on the principle of self-determination. The new Special Envoy of the UN's Secretary-General is Christopher W. S. Ross, former US ambassador to Algeria (1988-91) seemingly has another approach than Walsum, and hence could "make a difference"; *Reuters* 9 August 2009: "Talks to resume on breaking Western Sahara deadlock"; available at: <www.alertnet.org/thenews/newsdesk/L9539474.htm>.

11. Independence is referred to as an option in the 1990 *Report by the Secretary-General to the Security Council, S/21360*, paragraphs 6 and 31, and in *A/RES/45/21*, paragraph 2. In the 2003 "Peace plan for self-determination of the people of Western Sahara" (Baker II plan), *S/2003/565, Annex*, paragraph 2 does not specify the questions, but refers to previous agreement between the parties: "The options or ballot questions to be included in the referendum will include: (a) those previously agreed to in the settlement plan; and (b) any additional options or ballot questions agreed to by the Kingdom of Morocco and the Western Sahara Authority..."

12. See note 10.

13. See note 29.

responsibilities regarding Western Sahara, will be analyzed. Third, an analysis of whether it is realistic that the UN will be able to serve as the administrative authority for Western Sahara, will be undertaken, based on a trusteeship agreement in accordance with Chapter XII of the UN Charter. Fourth, based on the phrase “states directly concerned” of Article 79 of the UN Charter, there will be an analysis of which States that are to take part in the drafting of the trusteeship agreement. Fifth, there will be an analysis of which powers the administering authority can exercise under the trusteeship system. Sixth, the various factual, strategic and institutional factors will be analyzed, based on the findings of the previous sections. Finally, the alternative options for establishing a UN administration in a territory, based on Chapter VII and not on Chapter XI or XII of the UN Charter, will be analyzed, based on the experiences from Kosovo and East Timor.

While there are other authors analyzing direct administration by the UN¹⁴, this chapter provides a comprehensive analysis of the UN Charter as applied to Western Sahara situation.

I. UN CHARTER OBLIGATIONS REGARDING NON-SELF GOVERNING TERRITORIES, APPLIED TO WESTERN SAHARA

Chapter XI of the UN Charter consists of only two Articles. Article 73 reads (extracts):

“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...”

Five specific areas are then identified in *litra* (a)-(e), relating to culture; political aspirations; international peace and security; development; and statistical and other information. The phrases “the interests of the inhabitants”

14. See WET, E. de, “The Direct Administration of Territories by the United Nations and its Member States in the Post-Cold War Era: Legal Implications and Consequences for National Law”, *Max Planck UNYB* 8 (2004), 291; STAHN, C., “The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis”, *Max Planck UNYB* 5 (2001), 105; WOLFRUM, R., “International Administration in Post-Conflict Situations by the United Nations and Other International Actors”, *Max Planck UNYB* 9 (2005), 649.

and “the well-being of the inhabitants” are applied without defining the term “inhabitants”. While the term “inhabitants” is used in the UN Charter, subsequent UN conventions, declaration and resolutions use the term “peoples”¹⁵. The term “peoples” refers to a defined community based on both objective and subjective criteria, and encompassed both “nations” and “indigenous peoples”. The terms “paramount” and “sacred trust” of Article 73 cannot be interpreted differently than to provide a strong obligation on States having responsibility for the administration of non-self-governing territories. The reference of Article 76 on “trust territories” to Article 1 of the UN Charter is not included in Article 73 on “non-self-governing territories”. This implies that Article 76 must be understood to provide for a stronger human protection compared with Article 73.

Article 74 of the UN Charter is on general obligations applying to all States, not only those which have responsibility for the administration of non-self-governing territories. The Article reads (extracts):

“Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies [...] must be based on the general principle of good-neighbourliness...”

Hence, Morocco, shall, as all other States, conduct their policies towards Western Sahara based on mutual cooperation, and in such a way that Western Sahara shall not be forced into economic dependency with any States. This principle is specified by the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations¹⁶.

The most specific international obligation for those States having the responsibility for the administration of non-self-governing territories, also termed “administering power”, are found in Article 73(e), which says that the states shall (extracts):

“transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require,

15. ICCPR and ICESCR, see note 4, article 1; A/RES/1514(XV); see note 3; A/RES/1541(XV) Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter, principle 1.

16. A/RES/2625 (XXV) (1970), being a codification of the following principles: (i) refrain from the threat or use of force against any state; (ii) settle disputes by peaceful means; (iii) duty not to intervene in matters within a state’s domestic jurisdiction; (iv) duty to cooperate; (v) the principle of equal rights and self determination of peoples; (vi) the principle of sovereign equality of states; (vii) the principle that states shall fulfill their charter obligations in good faith.

statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible...".

The areas which shall be reported on must be said to be relevant both for the purpose of preserving the inhabitants "interests" and "well-being", in accordance with the introductory part of Article 73 of the UN Charter, and the peoples' rights to self-determination, as recognized in common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

Since Western Sahara is recognized as being a non-self-governing territory, there must be a State which has the responsibility for the administration of Western Sahara, in order to further its inhabitants' interests and well-being, and promote the realization of the right to self-determination for peoples living in non-self-governing and trust territories, in accordance with Article 1.3 of the ICCPR and the ICESCR. There is, however, no State which currently complies with Article 73(e) regarding Western Sahara. How can this situation be explained?

The United Nations itself makes this general statement of how Spain relieved itself from its obligations under the UN Charter with regard to Western Sahara:

"On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory. In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonization which remained to be completed by the people of Western Sahara"¹⁷.

This letter did not cause any protest, neither from Morocco, Mauritania or any other State. The statement that Spain considered itself "exempt from any responsibilities in connection with the administration of the Territory" implies that Spain implicitly acknowledged that the Madrid Accords entered into more

17. United Nations: *Non-Self-Governing Territories listed by GA in 2002*, note 2; available at www.un.org/Depts/dpi/decolonization/trust3.htm. The same term is found in a 2005 UN brochure on decolonization; see www.un.org/Depts/dpi/decolonization/Decolonization_brochure.pdf.



than three months earlier did not relieve it from its responsibilities with regard to Western Sahara. If Spain thought that the Madrid Accords were adequate, Spain would have said so.

We will come back to the Madrid Accord below, but will note one additional paragraph of the 26 February 1976 letter to the United Nations: “the decolonization of the Western Sahara will be reached when the opinion of the Saharawi population was validly expressed”¹⁸. This is another evidence that Spain in 1976 did not believe that any action taken in 1975-76 was sufficient for the expression of self-determination for the whole Saharawi population

We see that Spain by a unilateral declaration “considered itself exempt from any responsibility” regarding the administration of the territory of Western Sahara. It is reasonable to state that the 26 February 1976 unilateral declaration of Spain has no status within international law. The former UN Under-Secretary-General for Legal Affairs, Hans Corell, wrote in his letter to the Security Council that the status of an administering Power is “...a status which Spain alone could not have unilaterally transferred”¹⁹.

The basis upon which Spain claimed to have exempted itself from its obligation as administering power is a unilateral declaration. Such a declaration is in contradiction to the two resolutions on self-determination. First, resolution 1514(XV)²⁰, saying that self-determination is exercised when formerly colonial peoples freely determine their political status. Second, resolution 1541(XV)²¹, giving three options for when a non-Self-Governing Territory can be said to have reached a full measure of self-government: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.

Both of the latter options are only to be made after a “...free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes”²², and “...peoples acting with full knowledge of the

18. MIGUEL, C.R., *Spain's legal obligations as administering power of Western Sahara*, 2008, 12. Available at <http://www.gees.org/articulo/6096/>.

19. United Nations 2002: Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, S/2002/161, paragraph 6. Explicit recognition of Spain as a *de jure* administering authority of Western Sahara is provided both in CRAWFORD, J., *The Creation of States in International Law*, 2006, 117, and in SIMMA, B. (ed), *The Charter of the United Nations, A Commentary*, vol. II (Second Edition), 1994, 1095.

20. See note 4.

21. See note 15, principle VI.

22. *Ibid.*, principle VII(a) (extracts).

change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage”²³, respectively. These principles have not been observed when Spain unilaterally exempted itself from “any responsibility” regarding the administration of the territory of Western Sahara. Hence, it must be understood that the unilateral declaration of 26 February 1976 is both in contradiction with international law on the self determination of peoples, and is without any legal effect.

There has been no formal endorsement to this unilateral declaration, neither in the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, nor in the Trusteeship Council or in the Fourth Committee of the General Assembly. This lack of formal endorsement –or challenge– gives an even stronger indication that the 26 February 1976 unilateral declaration of Spain has no status within international law.

We briefly referred to the Madrid Accords of 14 November 1975, between Mauretania, Morocco and Spain above. According to it, a “...temporary administration [...] in collaboration with the Djemaa”²⁴ was to be set up. This agreement is contradiction with the relevant UN resolutions on decolonization²⁵, and has never been approved or endorsed by the UN²⁶. As the Madrid Accords does not comply with the UN resolutions on the right to self-determination, this agreement cannot be said to have any legal effect under international law, even if it is obvious that the Madrid Accords had political effect, as it provided for the Spanish withdrawal, and the Moroccan and Mauretanian occupation. Even

23. *Ibid.*, principle IX(b) (extracts).

24. Madrid Accords (included in *Security Council Official Records, Thirtieth Year, Supplement for October, November and December 1975*, document S/11880, Annex III), paragraph 2.

25. A/RES/1514(XV) (note 3) and A/RES/1541(XV) (note 15).

26. General Assembly Resolution A/RES/3458 (B) of 10 December 1975, which says in paragraph 1: “Takes note of the tripartite agreement concluded at Madrid on 14 November 1975 by the Governments of Mauretania, Morocco and Spain, the text of which was transmitted to the Secretary-General of the United Nations on 18 November 1975” cannot be understood as a recognition of the Madrid Agreement, but only noting the existence of the Madrid Agreement. Paragraphs 2, 3 and 4 of A/RES/3458 (B) reads: “Reaffirms the inalienable right to self-determination”; “Requests the parties [...] to ensure respect of the freely expressed aspirations of the Saharan populations”; and “Requests the interim administration to take all necessary steps to ensure that all the Saharan populations originating in the Territory will be able to exercise their inalienable right to self-determination...”, respectively. These three paragraphs state clearly that self-determination shall exercised by the Saharawis by their free expression; and the reference in the preamble to several UN resolutions, including A/RES/1514 (XV) and A/RES/1541 (XV), as well as the advisory opinion of 16 October 1975 by the International Court of Justice is an explicit confirmation of this.

if the Madrid Accord could have been proven to have a legal effect, this effect could last only as long as the “temporary administration” had the actual participation and presence from all the three parties to the Madrid Accords, which is not the case for Spain (since 1976) and Mauretania (since 1979).

In addition, the following observation by James Crawford must be acknowledged: “Chapter XI of the Charter appears to apply to defined territories irrespective of the consent of the States administering them...”²⁷. This must be understood to imply that Spain cannot take any measures to change neither the status of Western Sahara as a non-self-governing territory, nor the obligations that has with regard to Western Sahara.

Therefore, as Spain could not unilaterally exempt itself from its obligation relating to the administration of the territory of Western Sahara²⁸, Spain must be understood to still be the administering power in Western Sahara. Morocco has never been the administering power of Western Sahara in accordance with the UN Charter, even if governmental structures are established by Morocco in Western Sahara. Rather, the Moroccan administration of Western Sahara must be said to be conducted in a way which is contrary to the interests and well-being of most of the Saharawi people traditionally inhabiting Western Sahara, both regarding the extraction of natural resources²⁹, and regarding the presence of military, police and gendarmerie, being involved in human rights violations, including torture and prohibitions on freedom of assembly³⁰. There are, however, individual Saharawis who benefit materially from the Moroccan economic activities, and who will be strong defenders of maintaining the Moroccan presence in Western Sahara.

27. CRAWFORD, J., note 19, 117.

28. MIGUEL, C.R., *Los Acuerdos de Madrid, inmorales, ilegales y políticamente suicidas*, 2006, concluding: “España no puede transferir unilateralmente sus responsabilidades de potencia administradora.” Available at www.gees.org/articulo/2344; see also MIGUEL, C.R., note 18.

29. For more information Western Sahara and natural resources, see CHAPAUX, V., “The Question of the European Community-Morocco Fisheries Agreement”, in ARTS, K. and PINTO LEITE, P. (eds), *International Law and the Question of Western Sahara* (2007), 217 et seq. (232); see also in the same book BRUS, M., “The Legality of Exploring and Exploiting Mineral Resources in Western Sahara”, 201 et seq.; and also in the same book, HAGEN, E., “International participation in the Phosphates Industry in Occupied Western Sahara: The Local Content and Global Participation”, 267 et seq. See also HAUGEN, H.M., “The Right to Self Determination and Natural Resources: The Case of Western Sahara”, *Law, Environment and Development Journal* 3(2007) 70 et seq.

30. See US Department of State, *Country Reports on Human Rights Practices 2007: Western Sahara*, 2008, available at www.state.gov/g/drl/rls/hrrpt/2007/102555.htm; and Amnesty International, *Amnesty International Report 2008: State of the world's human rights*, 2008, section on “Morocco and Western Sahara”, available at <http://thereport.amnesty.org/eng/regions/middle-east-and-north-africa/morocco-and-western-sahara>.

II. WILL SPAIN ACKNOWLEDGE THAT IT IS ADMINISTRATIVE AUTHORITY FOR WESTERN SAHARA, AND WHICH IMPLICATIONS WOULD THIS HAVE?

The above conclusion that Spain is still the administering authority of Western Sahara is most probably surprising to many. Spain has not related to Western Sahara in any particular way since 1976³¹. As Morocco as the occupying State is most involved with Western Sahara, while Spain as the *de jure* administering authority does not fulfill its mandate, the peoples of Western Sahara are faced with a particular vulnerability among the international community of States.

This Section will analyze the different scenarios regarding Spain's international responsibilities regarding Western Sahara.

There are three scenarios regarding a Spanish response to this acknowledgement that Spain is still administering power in Western Sahara. First, Spain can totally deny this fact. Second, Spain can recognize that it is administering power over Western Sahara, and seek to comply with its obligations, in particular regarding Article 73(e) of the UN Charter. Third, Spain can recognize that it is administering power, but without any capacity to fulfill its obligations.

Strong predictions are impossible to make, but some reflections will be made. Regarding the first scenario, continued relative passivity from Spain with regard to Western Sahara is likely³², as any Spanish move to regain a position as administering power over Western Sahara will create tensions with Morocco, including over the Spanish enclaves Ceuta and Melilla in Northern Morocco.

Regarding the second scenario, an obligation that has been ignored for more than 30 years is not likely to be revived, and this scenario does not seem likely. It cannot be expected that Spain by complying with Article 73(e) of the UN Charter will admit that it has ignored this specific international responsibility for more than 30 years.

Regarding the third scenario, this scenario is less likely than the first but more likely than the second, as Spain only needs to recognize that the unilateral declaration made 26 February 1976 was incompatible with international law requirements regulating self-determination. The consequences of presenting

31. Spain has now sold its 35 per cent of its share in the Bou Craa phosphates mine that Spain controlled in accordance with the 14 November 1975 Madrid Agreement, which was also entered into in contradiction with international law as outlined above.

32. MIGUEL, C.R., "The Self-Determination Referendum and the Role of Spain", in Arts and Pinto Leite, note 29, 305 et seq..

such recognition do not have to be considered by the Spanish government. The Spanish authorities would then have to refer the situation to the United Nations, whose action will be analyzed below.

Hence, scenario one is most likely, scenario two is least likely, while scenario three is somewhere between the other two.

It is found that any action to maintain the current *status quo*, in other words scenario one, is actually incompatible with international law as recognized by the UN Charter and subsequent conventions and resolutions. Therefore, scenario three –to acknowledge Spain's status as a *de jure* administering authority and refer the situation to the UN– is in accordance with the UN Charter.

A request by the UN General Assembly to the International Court of Justice (ICJ) asking for an Advisory Opinion on which State is the *de jure* administering authority over Western Sahara is an appropriate starting point.

The basis for placing a non-self-governing territory under the trusteeship system is Article 77.1(c) of the UN Charter, which reads:

"The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: [...] territories voluntarily placed under the system by states responsible for their administration".

Crawford finds that no territories have been placed under the trusteeship system in accordance with Article 77.1(c)³³. The term "placed" is the most relevant in this context. Can this term as used in the latter part of the Article be understood to imply that it is the privilege of the administering power to decide whether or not the territory over which it is responsible should be a trust territory? This status implies that a territory comes under the supervision or administration of an administering authority, acting in accordance with a trusteeship agreement approved by the UN.

Article 77.1(c) must be understood only to allow the State which is the administering authority over a non-self-governing territory in accordance with Chapter XI of the UN Charter can only refer the situation to the UN, not to dictate the terms of a trusteeship agreement under Chapter XII of the UN Charter. Section IV below will analyze which role the administering authority for a non-self-governing territory will have in the drafting of the trusteeship agreement. With regard to mandates, regulated by Article 77.1(a) of the UN Charter, the

33. See note 19, 117, n 73.

pattern is that the State which held the mandate over a territory also was asked to continue as the administering authority under the trusteeship system. There is no precedence which implies that this also applies to non-self-governing territories.

In summary, as the Spanish government's unilateral declaration of 26 February 1976 cannot be said to have any effect under international law, a confirmation can be made by Spain saying that the procedures for the Saharawis to exercise their right to self-determination and Western Sahara to achieve self-government have not been complied with by this unilateral declaration, and then chose to refer the situation to the UN. This act by Spain cannot be said to result in the deterioration of the relationship between Spain and Morocco.

The interesting question is then what the UN Charter instructs the UN to do.

III. UN ADMINISTRATION FOR WESTERN SAHARA?

We have seen that the UN Charter provides for the placing of a non-self-governing territory under the trusteeship system. We will now proceed to analyze the general procedures for placing a territory under the trusteeship system, including how the administering authority is identified under the UN Charter.

Chapter XII of the UN Charter establishes an "international trusteeship system". According to Article 75 of the UN Charter this system shall provide for:

"...the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements".

The basis for a territory to be placed under the trusteeship system is a specific agreement, which has to be approved by the United Nations. In those situations where the territory is "strategic", the Security Council is given the authority to approve a trusteeship agreement, in accordance with Article 83.1:

"All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the Security Council".

Only one territory has been classified as a "strategic area", namely the Pacific Islands³⁴. It is impossible to predict if this will remain the only "strategic

34. S/RES/21 of 2 April 1947. The Pacific Islands are currently known as Micronesia, Marshall Islands, Palau and Northern Mariana Islands. The three former are independent and have entered into a Compact of Free Association with the US, while the latter is a commonwealth in political union with the US.

area” under the Trusteeship system. As observed in the Commentary on the UN Charter: “A trust territory becomes a strategic territory if the trusteeship agreement says so”³⁵. The existence of US nuclear test station, and the situation resulting from the Japanese occupation of these islands are the reasons why the Pacific Islands was defined as “strategic”. Western Sahara has no military bases or stations, but might be strategic due to its coast line, resources and transit territory for African immigrants seeking to enter EU. If a trusteeship agreement should be approved for Western Sahara, which is –as explained above– only a scenario, it is impossible to predict if this trusteeship agreement will define Western Sahara as a strategic area or not. Moreover, it is impossible to predict if one or more of the veto powers of the Security Council would actually apply this power in the process of approving the trusteeship agreement, provided that the agreement defines Western Sahara as “strategic”.

The Trusteeship Council, which is the organ that most persons would think of in connection with the trusteeship system, is only mentioned twice in Chapter XII of the UN Charter. First, Article 83.3 reads:

“The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.”.

Second, Article 85 regulates areas not designated as strategic, saying that in these areas, the functions shall not be exercised by the General Assembly. Article 85.2 reads:

“The Trusteeship Council, operating under the authority of the General Assembly shall assist the General Assembly in carrying out these functions”.

Hence, the crucial UN body under the trusteeship in any trusteeship agreement is not the Trusteeship Council, but the General Assembly. The Trusteeship Council shall only *assist* the General Assembly and the Security Council, in the case of “strategic areas”. The inactivity of the Trusteeship Council is therefore no argument against the potential approval of trusteeship agreements in the future by the UN³⁶.

35. SIMMA, B. (ed), see note 19, 1124.

36. A presentation on the Trusteeship Council says: “all Trust Territories have attained self-government or independence, either as separate States or by joining neighbouring independent

Article 75 also says that the tasks of “administration and supervision” shall be exercised by an administering authority, and can be exercised by a particular State (or as in the case of Nauru; three States), or by the United Nations itself. This is clear from the last sentence of Article 81 of the UN Charter:

“Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself”.

While the UN Charter provides for the UN itself to serve as the administering authority, the UN has not itself exercised such authority based on Chapter XII of the UN Charter. There are, however, recent examples from UN temporal administration of territories, based on chapter VII of the UN Charter³⁷. In the case of Western Sahara, it can be argued that no individual State stands out as an obvious choice. Spain has proven not to live up to its international responsibility. France has always been siding with its former colony Morocco. In addition to France, USA and the United Kingdom initially were positive to the never-approved “Baker I” plan of 2001³⁸. While the term “referendum” appears in this never-approved plan, the plan did not adequately provide for the exercise of self-determination in accordance with the most relevant UN resolutions³⁹.

Provided that the objective of an administering authority is to comply with Article 76 of the UN Charter, an administering authority must actually promote the trust territories “self-government or independence”⁴⁰. As UN is one of the possible administering authorities of a trust territory, it cannot be excluded that

countries. [...] The Trusteeship Council, by amending its rules of procedure, will now meet as and where occasion may require”. See: UN: “Trusteeship Council”; available at <<http://www.un.org/Depts/dpi/decolonization/council.htm>>.

37. Kosovo and East Timor; see notes 14 and 70 for relevant literature analyzing these forms of administration, and note 64-75 and accompanying text for more details on these two UN administrations over the respective territories.

38. The “Framework Agreement on the Status of Western Sahara”, UN Doc. S/2001/613, Annex 1, was in the end only approved by Morocco, never by the Security Council, unlike the Peace plan for self-determination of the people of Western Sahara, UN Doc. S/2003/565, Annex 1, which was approved by S/RES/1495, but never approved by Morocco.

39. A/RES/1514(XV) (see note 3) and A/RES/1541(XV) (see note 15).

40. Article 76(b) of the UN Charter says that “the basic objectives of the trusteeship system” is (extracts) “to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence...” While the paragraph continues with the formulation “...as may be appropriate to the particular circumstances of each territory...” this cannot be interpreted to ignore the general principle of self-determination, but only that the process towards self-determination must take into account the particular circumstances that may warrant a slower process, but never a reversal of a process towards self-determination.



the UN will be asked to undertake this task, in order to provide for a process of self-determination by the means of a free and fair referendum for the peoples of Western Sahara.

An argument against the involvement of the United Nations as administering authority is the costs that this would imply. This argument is relevant. In this context, however, one must also take into account the costs of the UN observer mission to Western Sahara, MINURSO, which has now been ongoing for 18 years, and which could potentially go on for another decade or so. In this context of the alternative involvement of the UN, which has not produced substantial political results regarding the process towards self-determination, the costs of a likely term of one year prior to a referendum and one to three year after the conduct of a referendum to establish the appropriate institutions to maintain law and order and a social infrastructure, cannot as such be said to be an argument against the possibility of a UN acting as a temporary administering authority under a trusteeship agreement.

An agreement regarding a non-self-governing territory can only be a trusteeship agreement by being approved either by the Security Council with regard to “strategic areas” or by the General Assembly with regard to “areas not designated as strategic”, in accordance with Article 83.1 and 85.1 of the UN Charter, respectively. If the trusteeship agreement is not approved, the agreement will not enter into force.

In summary, we see that the UN Charter provides for both the General Assembly and the Security Council to exercise the functions of the United Nations, but the latter has only once been involved in the approval of a trusteeship agreement and the subsequent supervision of the agreement. Whether Western Sahara does qualify for being considered a “strategic area” is not possible to determine. If the General Assembly is asked to approve a trusteeship agreement, the needed majority would most likely be obtained. If the Security Council, on the other hand, were acting on behalf of the UN when asked to approve a trusteeship agreement due to the wording of the agreement, the veto power of the permanent five members must be taken into account.

IV. THE PROCEDURE FOR DECIDING ON A TRUSTEESHIP AGREEMENT

The procedure for adopting the trusteeship agreement will be analyzed. Article 79 of the UN Charter defines how the trusteeship agreements shall be agreed upon. It reads:

"The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85".

Article 83 is on the Security Council's approval and Article 85 is on the General Assembly's approval of the trusteeship agreement.

The term "states directly concerned" is an open phrase, which must be clarified.⁴¹ There is no jurisprudence from the ICJ to determine what "states directly concerned" means. The phrase "states immediately concerned" is applied in the Statute of the ICJ, Article 67, which reads:

"The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned".

It seems reasonable that the two phrases "immediately concerned" and "directly concerned" refer to a situation where a State will be affected by an agreement taken. The phrase "states directly concerned" has also been applied in one General Assembly resolutions⁴², in the context of serious disputes or conflicts. The application of the phrase "states directly concerned" in this context does not alter the general understanding that a State must be affected.

41. The analysis will not address the issue of obligations *erga omnes*, which are obligations which are "owed to the international community as a whole, with the consequence that all States in the world have a legal interest in the compliance with the obligation" (UN Doc. A/CN.4/507: Report by ILC Special Rapporteur James Crawford, 2000, paragraph 106 (a)). See also I.D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, 2001, 125: "Obligations *erga omnes* [...] are not themselves primary or substantive rules of international law, but are rather obligations that give rise to certain legal consequences, or secondary rules of international law." There is general agreement that obligations *erga omnes* include prohibition against aggression and the right to self-determination.

42. A/RES/43/51 (1988) ("Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field") contains several paragraphs on "states concerned", but only two reference to "states directly concerned". This is paragraph 20 which reads: "The Secretary-General, if approached by a State or States directly concerned with a dispute or situation, should respond swiftly by urging the States to seek a solution or adjustment by peaceful means of their own choice under the Charter and by offering his good offices or other means at his disposal, as he deems appropriate" and paragraph 21 which reads: "The Secretary-General should consider approaching the States directly concerned with a dispute or situation in an effort to prevent it from becoming a threat to the maintenance of international peace and security".

To be “affected by a an agreement taken” will most likely apply to States which share borders with, or States which have some particular legal relationship with, the territory to which an agreement applies. In the case of mandate territory, the wording of Article 79 (“including the mandatory power in the case of territories held under mandate”) implies that the mandatory power belongs to the category “states directly concerned”.

We will now analyze whether also States which has legal relationships to the other territories defined in Article 77.1 of the UN Charter, can be considered as “states directly concerned”. We saw above that Article 77.1(b) applies to a territory of “enemy states,” while Article 77.1(c) applies to a non-self-governing territory. The terms of Article 77.1(c), which involves a positive action by the “states responsible for their administration”, outlines a different procedure than the terms of Article 77.1(b), which involves acts of compulsion against the enemy States, in order to weaken these States” strengths and capacities.

Hence, as the cooperative element that is implied in Article 77.1(c) is substantively different from article 77.1(b), the administering authority under Article 77.1(c) must be expected to have stronger influence on the terms of a trusteeship agreement, while an “enemy state” cannot be expected to have similar influence. As the wording of Article 79 of the UN Charter explicitly says the mandatory power is recognized as a “state directly concerned”, such States can exert greater influence over the terms of the trusteeship agreement compared to the States which are administering authorities over non-self-governing territories. The administering authorities over non-self-governing territories must, however, be said also to have an interest in how the territory is to be governed. This author finds that as Article 79 applies the term “including”, the Article cannot be read as to categorically exclude administering authorities over non-self-governing territories from being considered as “states directly concerned” if this territory’s status is to be amended by a trusteeship agreement⁴³.

Therefore, in the context of Western Sahara, European States, with the exception of Spain, as the administering authority in accordance with Chapter XI of the UN Charter, cannot be said to be directly concerned. On the other hand, all neighboring States must be considered to be directly concerned. This is also reflected in the proposed Peace plan for self-determination of the people of Western Sahara approved by the Security Council in 2003⁴⁴, where both Mo-

43. For a position that this issue has not been controversial, see Simma, note 19, 1120, finding that the issue of which are the “states directly concerned”, “...has in practice not been of any further interest”.

44. See note 38.

rocco, Algeria and Mauretania, in addition to Front Polisario, where included as signatories. Spain was not included among the signatories.

The procedures for determining the terms of the trusteeship agreement implies that also the UN bodies that are asked to approve the agreement can influence its wording. This is particularly relevant in the context of the Security Council, where the veto power implies that any agreement to which any of the permanent five disagrees, simply will not be approved.

V. WHICH POWERS SHALL BE EXERCISED UNDER THE TRUSTEESHIP SYSTEM?

After this clarification of which States that are likely to be “states directly concerned”, we will now turn to an analysis of the content of these agreements, including the possible tasks that might be served by the United Nations. Four areas will be covered: Security; expression of political rights, including political representation; social and educational matters; and economics and natural resources.

Regarding security matters, Article 84 of the UN Charter is on international peace and security in the context of trust territories. This Article reads (extracts):

“To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory”.

This must be understood to imply that the administering authority shall also have a mandate relating to security issues, and that the recruitment of personnel from the territory for such security efforts are fully appropriate.

On expression of political rights, including political representation, it is crucial to observe that Article 76(c) of the UN Charter states that:

“the basic objectives of the trusteeship system [...] shall be [...] to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

This implies that as political rights, such as the right to vote and the right to hold public positions are undoubtedly human rights, the trusteeship agreement must provide for these basic human rights, and ensure that these rights are exercised without discrimination.



On social and educational matters, the human rights paragraph quoted above is relevant, in addition to 76(b) of the UN Charter, which defines as an objective of the trusteeship system.

“to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories”.

A similar formulation is found in Article 83(3) on “strategic territories”, specifying the obligations of the Security Council. The formulation of Article 76(b) is general, but if read together with Article 76(c) on human rights, the obligations become clearer.

With regard to economics and natural resources, it must be observed that the management of natural resources is not explicitly addressed in the UN Charter in the context of the trusteeship system. On the issue of “economic activities” there are, however, annual resolutions passed by the General Assembly.⁴⁵ Interestingly enough, these resolutions only address non-self-governing territories, including Western Sahara. Hence, the protection against economic exploitation is stronger regarding non-self-governing territories than trust territories.

Since the trusteeship system is currently not operative as there are formally no trust territories, the relevant UN bodies, more specifically the Fourth Committee of the General Assembly and the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, do currently only relate to Chapter XI of the UN Charter. As these two bodies have a mandate which covers both Chapter XI and XII of the UN Charter, a potential situation in which a territory would be considered a trust territory, and not a non-self-governing territory, will not imply that its peoples would lose the “...rights of their peoples over their natural resources...”⁴⁶ The obligations on the administrative authority are specified:

“Urges the administering Powers concerned to take effective measures to safeguard and guarantee the inalienable right of the peoples of the Non-Self-Governing Territories to their natural resources and to establish and maintain control over the future development of those resources, and requests the admin-

45. See UN Doc. A/RES/63/102: *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories*. The resolution was adopted with 179 votes to 2 (USA and Israel), with two abstentions (United Kingdom and France). Similar patterns can be found regarding previous resolutions.

46. *Ibid.*, paragraph 3.

istering Powers to take all necessary steps to protect the property rights of the peoples of those Territories in accordance with the relevant resolutions of the United Nations on decolonization”⁴⁷.

We see that the obligations are embedded in the context of decolonization. Hence, the rights of peoples over their natural resources must be understood to apply irrespective of whether the territory is regulated by Chapter XI of the UN Charter (non-self-governing territories) or Chapter XII of the UN Charter (trust territories). Peoples’ or States’ sovereignty over natural resources are recognized within international law.⁴⁸ Territories which have not achieved independence and the peoples belonging to these territories are, however, in a particular vulnerable situation. The annual resolutions of the General Assembly must be understood to seek to ensure the rights of the peoples belonging to these territories. Different status of a territory, being a non-self-governing territory or a trust territory, cannot be a basis for treating peoples belonging to different territorial categories differently with respect to their rights over natural resources, provided that both territories are non-independent territories.

In summary, there are certain differences between the administration of trust territories and non-self-governing territories. Human rights protection is defined more explicitly within the context of trust territories than non-self-governing territories. On the other hand, the natural resource dimension of the right to self-determination seems to be more explicitly recognized for non-self-governing territories, at least in the General Assembly resolutions. With regard to peoples in both territories, however, the purpose of the administration is to serve their interests and advancement.

VI. FACTUAL, STRATEGIC AND INSTITUTIONAL CONSIDERATIONS

At the end of this analysis of the possibility of a trusteeship agreement over Western Sahara, there is a need to make some factual, strategic and legal considerations.

On the factual side, the functions that were originally entrusted with MINURSO, as outlined in a document specified to be a *proposal* by the UN Secretary-General and the OAU Chairman “...aimed at a settlement of the question of Western Sahara accepted in principle by the parties on 28 August

47. *Ibid.*, paragraph 9.

48. See note 4; see also the Convention on Biological Diversity, fourth preambular paragraph. In general, see N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, 1997.



1988”⁴⁹. The original mandate of MINURSO was relatively wide. In the Secretary-General’s 1990 report to the Security Council, which was approved by the Security Council⁵⁰, says, under the title “Main elements of the Implementation Plan”:

“The United Nations will monitor other aspects of the administration of the Territory, especially the maintenance of law and order, to ensure that the necessary conditions exist for the holding of a free and fair referendum”⁵¹.

The formulation “monitor the administration” is the most interesting. It is clear from the latter part of the paragraph that this monitoring is relating to ensuring the holding of a referendum. Also monitoring of the demobilization is part of the 1990 Implementation Plan,⁵² as further specified in the 1991 report from the Secretary-General.⁵³ The implementation plan of the 1991 Report contains provisions which allows for the Special Representative of the UN Secretary-General to alter the time-table of the operation⁵⁴.

The experiences of the MINURSO operation within the territory of Western Sahara in the absence of a process leading towards a referendum are that it has limited powers to act in order to ensure general law and order. There are instances where Saharawi demonstrators have been taken from inside the MINURSO head quarter in El Aaiún, and then severely tortured, without MINURSO seeking to prevent this⁵⁵.

In the 2003 “Peace plan for self-determination of the people of Western Sahara”, a proposed transitional authority, termed “Western Sahara Authority”, shall be responsible for the internal security, while Morocco shall be responsible for the national security⁵⁶.

49. S/21360, see note 11, 5.

50. S/RES/658, reads in paragraph 2: “Approves the report of the Secretary-General, transmitted to the Council in accordance with resolution 621 (1988) with a view to settling the question of Western Sahara, which contains the full text of the settlement proposals as accepted by the parties on 30 August 1988 as well as an outline of the plan provided by the Secretary-General in order to implement those proposals” (note referring to S/21360 omitted).

51. S/21360, see note 11, paragraph 47(g)

52. *Ibid.*, paragraph 50.

53. *The Situation Concerning Western Sahara, S/22464* (1991), saying in paragraph 10 that MINURSO will consist of civilian, security (police) and military units.

54. *Ibid.*, paragraph 12 reads (extract): “In either case, the Special Representative may, after consultation with me, determine whether circumstance require any alteration in the timetable, in accordance with the authority given to him.”

55. Interviews made with Norwegian journalists R. Steinsland and A. T. Nilsen, in El Ayoun, April 2005; tape of interviews available.

56. See note 11, paragraph 8.

Neither the 1991 nor the 2003 Peace Plans are explicitly disregarded, even if they do not serve as active references for the current negotiations. In this context, it is relevant to observe that the latest Security Council resolution on Western Sahara reads: "Recalling all its previous resolutions on Western Sahara"⁵⁷.

Hence, it can be derived from these plans and resolutions that the idea of an active UN presence in Western Sahara in the context of the realization of the right to self-determination has always been clearly envisaged.

On the strategic side, some concerns can be expressed regarding the placing of a territory under the trusteeship system. On the one hand, it can be held that to place a territory under the trusteeship system, rather than to provide for a referendum, in accordance with A/RES/1514(XV)⁵⁸, as specified by the International Court of Justice 1975 advisory opinion on Western Sahara⁵⁹, is to take one step back. To place a territory under the trusteeship system when the people of this territory clearly have the right to be consulted through a referendum, does not initially seem as a step in the right direction.

On the other hand, the impasse of any realistic plan for the exercise of self determination for the people of Western Sahara, and the resulting *status quo* which must be seen to favor Morocco as a consequence of its incomes from natural resources extraction, in contradiction to recent UN resolutions⁶⁰, calls for a new approach. By establishing Western Sahara as a trust territory, it becomes even more evident that Morocco does not exercise any rights over Western Sahara⁶¹. Rather, as a power which used aggression and still holds large parts of Western Sahara territory by force, acting as an occupying power⁶².

Therefore, for Western Sahara, a temporary trusteeship agreement is preferable to the current situation with the *de jure* administering authority (Spain) not complying with its obligations and a state exercising *de facto* control as an

57. See note 2, preambular paragraph 1.

58. See note 4.

59. See note 3.

60. See note 45.

61. For analyses saying that Morocco cannot exercise any rights with regard to Western Sahara or its resources, see notes 19 and 27. This reasoning follows from the fact that Morocco is an occupying power over most of Western Sahara, not the administering power.

62. This allows for the application of those provisions of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), where Article 6.3 specifies which Articles the occupying power shall be bound to comply with, "...for the duration of the occupation...". Those Articles which apply during an occupation are Article 33.2, which says: "Pillage is prohibited" and Article 49.6, which says: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." IV Geneva Convention is, however, rarely referred to in the context of Western Sahara.



occupying power (Morocco) conducts its policies without regard to the interests and rights of the peoples belonging to the territory (the Saharawis).

With regard to institutional issues, meaning how a changed status for Western Sahara best can be addressed by the different bodies of the UN, we must build on the analysis of the UN Charter in Section III above. If a trusteeship agreement, due to its wording, needs to be approved by the Security Council, the process of approving a trusteeship agreement over a strategic territory can come to a halt due to the veto power of the five permanent members.

A situation which is not properly addressed by the Security Council cannot, in principle, be impossible to present before the General Assembly. There are two bases for this "forum shift". First, the terms of the trusteeship agreement can simply be changed so that the agreement must be approved by Article 85 and not Article 83 of the UN Charter. Then we are still within Chapter XII of the UN Charter.

Second, Chapter VII of the UN Charter, which specifies tasks for the Security Council, can also be a basis for General Assembly actions, under specific circumstances. The United Nations has a mechanism for referring cases to the General Assembly if the Security Council cannot agree on how to address a situation presented before it. This possibility only applies to Chapter VII-decisions, which will be more thoroughly analyzed in the next section. The "Uniting for peace"-resolution says that "...the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures..."⁶³. This resolution shall be applied "...in any case where there appears to be a threat to the peace, breach of the peace or acts of aggression..."⁶⁴.

Under the current circumstances, the situation in Western Sahara is not of such a kind that it is realistic that there will be any action taken under Chapter VII of the UN Charter. It seems that only by a escalation of the conflict, resulting in an even graver humanitarian and human right situation, will there be a possibility for a UN action under Chapter VII, as will be analyzed in Section VII below. To avoid a situation of increased violence and a deteriorating humanitarian and human rights situation, appropriate action by United Nations, based on the UN Charter, might provide the basis for the exercise of the right of self-determination for the peoples of Western Sahara.

To sum up the possible process leading up to a trusteeship agreement for Western Sahara, the following procedure stands the highest chance of success:

63. A/RES/377 (V), 1950, paragraph 1.

64. *Ibid.*

First, as explained in Section II above, there is a resolution in the General Assembly calling for an ICJ Advisory Opinion clarifying which State is the administering authority of Western Sahara. Second, there is an appropriate UN response to this Advisory Opinion. Third, there is a Spanish recognition that its unilateral declaration of 26 February 1976 did not comply with the UN Charter and relevant conventions and resolutions on self determination. Fourth, this recognition is either immediately followed by a Spanish request to the Security Council to take appropriate actions in order to maintain international peace and security, based on Article 77.1(c) of the UN Charter, or the Security Council itself claims that the Spanish recognition implies that Article 77.1(c) of the UN Charter is applicable, without any direct request from Spain to place Western Sahara under the trusteeship system by a trusteeship agreement. Fifth, *if* the Security Council is blocked, a decision can be taken by the General Assembly. Sixth, provided that the UN has established its authority over Western Sahara, by a trusteeship agreement, the preparations for a free and fair referendum can take place.

VII. RECENT UN ADMINISTRATION OF TERRITORIES UNDER CHAPTER VII OF THE UN CHARTER: ARE THEY RELEVANT FOR WESTERN SAHARA?

This article is based on the assumption that a trusteeship agreement is the best and most realistic option with regard to Western Sahara. However, as the most recent UN administrations over whole territories have been based on Chapter VII, an analysis of potential UN involvement in Western Sahara cannot be complete without an assessment of the likely application of Chapter VII, in particular a precise understanding of the threshold for acting under Chapter VII.

The analysis will draw upon the experiences from two UN administrations of a territory, namely Kosovo and East Timor. Both these administrations, set up in 1999, gave the UN transitional administrative authority.

First, regarding Kosovo, Security Council Resolution 1244 authorizes the UN Secretary-General to:

“...provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic selfgoverning institutions...”⁶⁵.

65. Security Council Resolution S/RES/1244 (1999), paragraph 10 (extracts).

Kosovo does, unlike Western Sahara and East Timor, not have a colonial past. Hence, the specific resolutions 1514 and 1541 do not apply to Kosovo. Therefore, the self-determination that applies to the peoples of Kosovo did not extend to determining all aspects of the political status, but primarily the one relating to “self-administration”⁶⁶, in the first phase through the UN developing “provisional democratic selfgoverning institutions”⁶⁷.

Self-government as applicable to the international civil presence in Kosovo applies to: “Facilitating a political process designed to determine Kosovo’s future Status”⁶⁸. This is a relatively open phrase, particularly when remembering that the peoples of Kosovo at this time did not have any rights under international law to exercise their right to self-determination through a referendum where independence was one of the options. However, the term “substantial autonomy” as applied in the resolution also indicates that the autonomy that was granted to Kosovo in accordance with resolution 1244, was of a particular kind.

Finally, it is interesting to observe that the explicit acceptance of the overall principles enshrined in resolution 1244 had been given by the Federal Republic of Yugoslavia⁶⁹. This acceptance by the Belgrade authorities was an important requirement for the subsequent process towards independence of Kosovo, even if independence was not the only possible outcome⁷⁰.

66. *Ibid.*, preambular paragraph 11.

67. *Ibid.*, paragraph 10.

68. *Ibid.*, paragraph 11(e) (extracts).

69. *Ibid.*, paragraph 2.

70. A critical analysis of the Kosovo independence is given in A. Orakhelashvili, “Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo”, *Max Planck UNYB* 12 (2008), 1. For an analysis of both Kosovo and East Timor, see C. Stahn, note 14. The strongest basis for the Kosovo independence is the recognition in paragraph 2(3) of the Vienna Declaration and Programme of Action of the Second UN Human Rights Conference 1993 (A/CONF.157/23), which reads: “*In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States [see note 16] in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.*” In other words, if the principle of equal rights is respected for all, and there is a government which is actually representing the whole people, the territorial integrity cannot be impaired. If equal rights and representation is not ensured, which some argue was the case with Kosovo during most of the 1990s, there can – under given circumstances – be a deviation from the principle of territorial integrity. This basis is controversial.

Turning to East Timor, the basis for the UN administration of East Timor was the Peace Agreement of 5 May 1999⁷¹. It is, however, interesting to be aware of the basis for authorizing the establishment of a multinational force, with an initial mandate to support the United Nations as the temporary authority, was the current humanitarian and human rights situation which was said to "...constitute a threat to peace and security"⁷².

This resolution, on transfer of authority in East Timor to the United Nations, in accordance with the Agreement between Portugal and Indonesia of 5 May 1999, will be introduced in greater detail in the section below. In the current context, it will be noted that the basis for acting under Chapter VII of the UN Charter was the formulation "peace and security", not the formulation "international peace and security" which is the phrase applied in Chapter VII of the UN Charter⁷³. The preamble of Security Council resolution 1264 links the "threat to peace and security" directly to the humanitarian and human rights situation.

Hence, Security Council resolution 1264 can be said to allow for a wider understanding of potential situations where the Security Council can act under Chapter VII. This does not imply that the experiences of the UN involvement in East Timor can easily be replicated elsewhere. The long involvement of the United Nations from 1999 onwards came through five subsequent UN Missions⁷⁴, even if it was only under the second of these Missions, UNTAET, that the UN acted as the transitional authority.

The Peace agreement between the Portuguese and Indonesian foreign ministers, and the UN Secretary-General, on 5 May 1999 was crucial for the subsequent process with regard to East Timor, similar to the agreement with the (then) Federal Republic of Yugoslavia, which was crucial for the process with regard to Kosovo.

71. S/RES/1236, Annex I, Article 6, reading (extracts): "...the Governments of Indonesia and Portugal and the Secretary-General shall agree on arrangements for a peaceful and orderly transfer of authority in East Timor to the United Nations. The Secretary-General shall, subject to the appropriate legislative mandate, initiate the procedure enabling East Timor to begin a process of transition towards independence."

72. See S/RES/1264 (), preambular paragraph 14.

73. See Article 39, 43.1, 48.1 and 51 of the UN Charter.

74. United Nations Mission in East Timor (UNAMET – established by S/RES/1246, 11 June 1999); United Nations Transitional Administration in East Timor (UNTAET – established by S/RES/1272, 21 October 1999); United Nations Mission of Support in East Timor (UNMISSET – established by S/RES/1410, 17 May 2002); United Nations Office in Timor-Leste (UNOTIL – established by S/RES/1599, 28 April 2005); and finally, United Nations Integrated Mission in Timor-Leste (UNMIT – established by S/RES/1704, 25 August 2006).

After the referendum on East Timor independence or autonomy within Indonesia was held 30 August, 1999, only four months after the Peace Agreement, resulting in a clear vote for independence, and the violence had been ravaging, the UNTAET was established as the authority in East Timor.⁷⁵ The subsequent missions, established in 2005 and 2006, have been primarily concerned with assisting the East Timorese authorities in maintaining law and order.

We therefore see that the UN was given the transitional authority task only after the referendum was held, and before this, the Indonesian government was given the responsibility for maintaining peace and security. This task was not fulfilled appropriately⁷⁶. However, despite the insecurity and material hardship, the self determination process for East Timor happened within a very short time period, which shows that such swift processes are possible also elsewhere.

There are a number of strong similarities between the cases of Western Sahara and East Timor when it comes to the international law framework, both being for several years non-completed examples of decolonization. But there are two major differences. First, in East Timor, Portugal never ceded from its responsibility as an administering authority, despite the Indonesian occupation. Second, the Indonesian authorities were voluntarily signing up to an agreement to prepare for a referendum where independence was an explicit option. Morocco has in the last rounds of negotiations, rejected this as an option.

A Moroccan consent to a process with regard to East Timor similar to the one set in motion with regard to East Timor by the 5 May 1999 Agreement, in which independence was one option in the referendum, does not seem likely. The strong involvement of the UN in East Timor as a result of this Agreement implied that the UN could not be passive when the violence broke out immediately after the result of the referendum was announced. The lowering of the threshold to act under Chapter VII must be understood on the background of the role of the UN as envisaged in the 5 May 1999 Agreement.

Therefore, an agreement made in accordance with Chapter XII of the UN Charter on the trusteeship system, which places Western Sahara as a trust territory under UN administration for the purpose of conducting a referendum, seems to be the most realistic option for ensuring the right to self determination for the people of Western Sahara. The modalities for the referendum can be

75. See note 60, paragraph 1, where UNTAET was established, "...endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice." The UNTAET mandate was further specified in paragraphs 2 and 3.

76. See note 62, paragraph 9 (extracts): "...the need for credible accountability for the serious human rights violations committed in East Timor in 1999..."

agreed upon when the trusteeship agreement has been established, and the UN mandated personnel is actually present.

VIII. CONCLUSIONS

The fact is that Morocco is governing most of the territory of Western Sahara as a result of an invasion in 1975, without any rights over this territory. Moreover, Morocco is under an obligation to fulfill all its obligations under the UN Charter, including Article 74 on the general principle of good-neighbourliness with non-self-governing territories. The obligations under the UN Charter are specified by conventions and resolutions, including common Article 1 of the ICCPR and the ICESCR⁷⁷, which are not observed by Morocco.

The article has shown that the current situation, with Spain not fulfilling its responsibilities as the administering power, and with Morocco not willing to allow for a referendum where independence is an option, is not going to allow for the exercise of self-determination for the peoples of Western Sahara. While the negotiations are said to be conducted "...to provide for the self-determination of the people of Western Sahara in the context of arrangements consistent with the principles and purposes of the Charter of the United Nations"⁷⁸, the requirements of General Assembly resolutions 1514 and 1541 must be met. The first says that all peoples have a right to "...freely determine their political status..."⁷⁹ and the latter says that "Emergence as a sovereign independent State"⁸⁰ shall be one of the ways through which a non-self-governing territory can have self-government.

The relevant provisions of the UN Charter are found to be specifically clear and concise to enable to United Nations to establish a process within which the peoples of Western Sahara can be able to exercise the human right of self-determination, resulting either in independence or integration with Morocco. The time they have been waiting to exercise this right should be an argument for choosing a new approach, making more directly use of the UN Charter.

77. The respective committees supervising the implementation of the Covenants, have stated: "The Committee notes with regret [...] [t]he fact that no clear solution has yet been found to the question of self-determination for the people of Western Sahara" (*E/C.12/MAR/CO/3: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco* (2006), paragraph 13) and "The State party should make every effort to permit the population groups concerned to enjoy fully the rights recognized by the Covenant" (*CCPR/CO/82/MAR: Concluding observations of the Human Rights Committee: Morocco* (2004), paragraph 8).

78. See notes 1 and 2.

79. See note 4.

80. See note 15; see also note 19.