

**The plundering of the Sahara:  
Corporate criminal and civil liability for  
the taking of natural resources from Western Sahara**

*By J.J.P. Smith\**

**Abstract**

*Western Sahara, the last European colony in Africa that is to undergo self-determination, has abundant natural resources. Among them is a rich Atlantic Ocean fishery, substantial phosphate deposits and promising petroleum reserves. They continue to be developed by Morocco more than 35 years after that country's armed annexation of the territory. The insistence of the Saharawi people that they do not consent to or benefit from resource extraction in the occupied part of their territory underscores state liability under international humanitarian and reparations law, while engaging the civil and criminal liability of individual Moroccans responsible. The parallel liabilities of corporate actors involved in the taking of natural resources from Western Sahara are considered. The nature and value of the taking by foreign corporations is surveyed, together with the forms of liability particular to individual corporate actors. A detailed consideration is made of the triggering and application of international criminal law to corporate actors directly and indirectly engaged in taking of resources from the territory. The availability of international and domestic fora, remedies and the standing of representatives of the Saharawi people are assessed.*

“Free enterprise does not depend upon slave labour,  
and honest business does not expand by plunder.” \*\*

“The central principle around which this case revolves is the principle of self-determination,  
and its ancillary, the principle of permanent sovereignty over natural resources.” \*\*\*

**Western Sahara: Land of plunder**

**W**estern Sahara, Africa's last colony, encompasses an area of 266,000 square kilometers within colonially drawn frontiers that established the territory adjacent to Algeria, Mauritania and Morocco. Western Sahara lies at the extreme reach of its eponymous desert and has a long coastline on the Atlantic Ocean. The territory is rich in natural resources including high quality phosphate deposits in substantial quantities at Bou Craa and an abundant ocean fishery. The territory's prospectivity for minerals and petroleum is well assured given the successful development of those resources nearby in Mauritania and Morocco. Notwithstanding the legal status of the territory and the right of the Saharawi people to self-determination, the exploitation of the territory's resources continues.<sup>1</sup> That Morocco as an occupying power is primarily responsible for this taking as a matter of

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\*\* Closing statement of the prosecution in the Flick Trial, as cited by the US Military Tribunal in the *Krupp* case, 10 Trials of War Criminals 69 at 172. The Tribunal noted in the trial of Herman Roehling after World

international law has been obvious. The norms protecting the rights of non-self-governing peoples to their resources are similarly well established.

Less apparent is the liability of corporate actors engaged in the extraction and export trade of natural resources from Western Sahara. What is the case for their civil liability and the criminal liability of individuals responsible for developing, exporting and trading in the territory's resources? The matter has scarcely been considered, despite developments in international law which substantiate the right of non-self-governing peoples to their natural resources. Parallel advances in international humanitarian and criminal law to protect the property of peoples under occupation, applied routinely by the International Criminal Court, and the United Nations (UN) tribunals for Rwanda and the former Yugoslavia, demonstrate the progress of the law. The cases of East Timor (Timor-Leste) and Namibia further illustrate the concern of the UN regarding this issue and the universally accepted norm of protecting sovereign rights of colonized peoples to their natural resources. There are few areas of international law which enjoy such clarity.

A starting point to consider the civil and criminal liability of corporate actors engaged in Western Sahara's natural resources is what might be termed the primary liability of Morocco for taking Saharan resources. Here, three things are evident, namely, the uncertain basis for those persons and states capable of pursuing legal action to preserve the Saharawi people's resources sovereignty, the limited available judicial *fora* and, critically, the deference of the organized international community to the UN as the central actor responsible for resolving the "question" of Western Sahara as an organization unable or unwilling to respond to the predation of the territory's resources. For the time being there is seemingly no means to legally challenge the underlying fact of Western Sahara's occupation. However, those who can be held to account for the pillage of natural resources from the territory are the corporate actors involved.

### **A valuable prize: Western Sahara's natural resources**

The value of resources taken from the occupied area of Western Sahara has been little considered in the conflict over the Saharawi people's right of self-determination. The effect of resource development and the result of it to prolong Morocco's hold on the territory have received no serious attention. That is unfortunate, because the value of the resources continues to exacerbate the Western Sahara conflict. To begin with, Morocco's costly occupation is better funded. In the future, the availability and benefit of the resources will have been diminished for an independent Saharawi people.<sup>2</sup> Further, Morocco's occupation is given the veneer of legitimacy through foreign trade and the purported development of its so-called southern provinces.

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War I: "[T]he industrialist who used these means, reaped a personal benefit from them and took advantage, with the purpose of realizing a benefit, of the force put at his disposal ..."

\*\*\* Judge Christopher Weeramantry, Dissenting Opinion, *Case Concerning East Timor (Portugal v Australia)*, [1995] ICJ Rep 90 at 193.

<sup>1</sup> The people of Western Sahara as determined by a 1974 Spanish colonial census with their descendants in the Moroccan occupied part of the territory, in refugee camps near Tindouf, Algeria and throughout their diaspora are referred to here as the Saharawi. "Saharan" and "Western Sahara" are used as geographic descriptors of the territory, its ocean area and natural features.

<sup>2</sup> Such concerns were at the fore of the work of the UN Council for Namibia, discussed below.

The current market value of the two principal resources reveals the scale of taking.<sup>3</sup> The European Union, primarily fishing in Saharan waters under a 2007 treaty, pays €36.1M/year to Morocco.<sup>4</sup> A steady annual production of 3M tonnes of phosphate mineral rock from Bou Craa, carried by conveyor belt to the coast at el-Aauin (Laayoune) for loading aboard bulk freighters, generates revenues exceeding \$600M. If such figures have been insufficient to prompt discussion about the taking of Saharawi resources, ongoing petroleum and mineral exploration in the territory and its Atlantic Ocean continental shelf may yet be the catalyst.<sup>5</sup>

The history of foreign involvement in the territory's resources reveals a continuing pattern of appropriation by outsiders. It can be accurately said that the Saharawi people have never enjoyed the benefit of the resources now in contention. Foreign involvement began in 1885 with Spain securing a colonial presence in the Sahara. Its interest in the territory proper was almost non-existent and limited for decades into the Twentieth Century to the coastal fishery, the Saharan Atlantic having been fished from the Canaries for hundreds of years. After 1895, the mechanization of commercial fishing resulted in small Spanish settlements at el-Aauin (Laayoune) and Dakhla (Villa Cisneros). Although Spain did not consolidate its presence in the interior of the territory until 1934, colonial frontiers were created by treaty in 1900, 1904 and 1912 giving the territory its modern dimensions.<sup>6</sup> Geological surveys in the 1940s revealed significant phosphate mineral rock deposits at Bou Craa in the north central part of the territory. Spain legislated development of the site in 1962. In later years construction included a 100-kilometre conveyor belt to transport the phosphate to a deepwater loading facility off el-Aauin.<sup>7</sup> By the

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<sup>3</sup> A third resource - sand - taken away to beaches in the Canary Islands is of negligible value even as it represents in a tangible form the *ground* of the Saharawi people.

<sup>4</sup> *Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco*, 28 July 2005, (entered into force 7 March 2007), online: <<http://eur-lex.europa.eu>> (accessed 27 July 2011) [*Fisheries Partnership Agreement*]. The *Fisheries Partnership Agreement* was extended in February 2011 on the expiry of its four-year term. The European Commission earlier declared it would not resume fishing by 11 participating member states nor extend the *Agreement* without Morocco's assurance that the fishery benefits the inhabitants of Western Sahara and was consented to by them. In late 2010 the EC Fisheries Commission apparently received evidence of benefit from Morocco but such information has not been made public. "Saharan waters" - the territorial sea and a 200 nautical mile exclusive economic zone (EEZ) claimed by the Saharawi Arab Democratic Republic (the "SADR") - extends into the Atlantic Ocean from the territory's land frontiers with Morocco and Mauritania. This area of 308,000 square kilometers extends is between Point Stafford (27° 40' N) in the north and in the south from a point 12 NM south of the Cape Blanc peninsula. See *Law No. 3 of 2009 Establishing the Maritime Zones of the Saharawi Arab Democratic Republic*.

<sup>5</sup> Seabed petroleum exploration in the Saharan offshore began in the 1970s. It was limited in scope and interrupted by the events of 1975. On current exploration see the website of Kosmos Energy Ltd. at: <[www.kosmosenergy.com](http://www.kosmosenergy.com)> and Western Sahara Resource Watch at: <[www.wsrw.org](http://www.wsrw.org)> (accessed 29 August 2011). Kosmos acknowledged certain risks in exploring the Saharan offshore in its January 2011 submission to the United States Securities & Exchange Commission for approval of an initial public share offering. In August 2011 it reduced its license area on the Saharan coast, now known as the "Cap Boujdour Block."

<sup>6</sup> *Convention pour la délimitation des possessions françaises et espagnoles dans l'Afrique occidentale, sur la côte du Sahara et sur la côte du Golfe du Guinée*, 27 June 1900, 92 BFSP 1014. (also known as the *Convention between France and Spain for the Delimitation of their Possessions in West Africa*); *Convention between France and Spain respecting Morocco*, 3 October 1904, 102 BFSP 432; *Treaty between France and Spain regarding Morocco*, 27 November 1912, (1913) AJIL 7 at Supplement 81. And see *Franco-Spanish Agreement delimiting the Mauritania-Spanish Sahara boundary*, 19 December 1956, IBS No. 149 at 2.

<sup>7</sup> See the website of Morocco's Office Chérifien des Phosphates (OCP), online: <<http://www.ocpgroup.ma>> (accessed 26 July 2011). The Bou Craa site has reserves estimated at 1.1 billion cubic metres.

time Spain left the colony in late 1975, the Fosboucraa site was in production. The Spanish government retained a 35% share in the enterprise.<sup>8</sup>

The November 1975 *Madrid Accords* gave the imprimatur of a formal arrangement for the taking of Saharan resources after the territory was occupied by Mauritania and Morocco. Corporate actors would necessarily be involved in the production, trade and export of the resources. The basic text of the *Accords* provided for administration of Spanish Sahara by the three states, obligating them to ensure the Saharawi people's exercise of the right to self-determination. Spain would wind up its presence in the territory on 28 February 1976.<sup>9</sup> The importance of the *Accords* as a basis for Spain to give up colonial responsibility for the Sahara should not be overlooked, for unlike Portugal in East Timor, Spain continues to deny it has any such responsibility, leaving the Saharawi people without what should be their accepted interlocutor among states.

Three undisclosed protocols came with the *Madrid Accords* allowing Spain to continue fishing and participate in the operation of Fosboucraa. The protocols were not made public until after 2009. The first provided for Spain to have exclusive third state access to Saharawi resources until it joined the European Economic Community in 1986 at which time responsibility for member state fisheries management and treaty-making became that of the Community, later the European Commission. Spain was assured it would enjoy 20 years of fishing in "Saharan waters" for up to 800 vessels.<sup>10</sup> The second protocol ratified Spain's ownership stake in Fosboucraa, as well as technical assistance to Morocco for geological exploration, the building of vessels to transport phosphate ("roca fosfatos"), tourism and agriculture. The third protocol confirmed an arrangement dating from 1964 for Spain to fish in Mauritanian waters.<sup>11</sup> In the event, Spain withdrew from its colony a little earlier than planned, on 26 February 1976. The next day, in response to these developments, Saharawi representatives proclaimed the independence of the Saharawi Arab Democratic Republic (the SADR). In April 1976 Mauritania and Morocco concluded a partition treaty establishing a frontier to divide the territory between them, signaling as occupying powers that they would not comply with the requirement of the *Madrid Accords* to allow Saharawi self-determination.<sup>12</sup>

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<sup>8</sup> The government of Spain divested its ownership in 2003. The entire corporate interest is held by the OCP. See *ibid.*

<sup>9</sup> *Declaration of Principles (Tripartite (Madrid) Accords (Mauritania/Spain/Morocco)*, 14 November 1975, 14 ILM 1512; (1976) RGDIP 80 at 380.

<sup>10</sup> *Acta de las Conversaciones Mantenedas, de una parte, entre las Delegaciones del Reino de Marruecos y la Republica Islamica de Mauritania, y de otra, de España, a Proposito de los Aspectos Economicos Derivados de la Transferencia de la Administracio del Sahara.* (On file with the author.) The protocol established a joint oversight commission with a review to be done five years into its 20-year term and compensation framework for Spanish government property connected to the fishing industry left in the territory.

<sup>11</sup> Respectively, the *Acta de las Conversaciones entre el Reino de Marruecos y España* and the *Acta de las Conversaciones entre Mauritania y España Relativas a los Aspectos Economicos Derivados de la Transferencia de la Administracion del Sahara*, *ibid.* (On file with the author.)

<sup>12</sup> *Convention concerning the State frontier line established between the Islamic Republic of Mauritania and the Kingdom of Morocco*, 14 April 1976, 1977 UNTS 117(entered into force 10 November 1976). The agreement included a continental shelf boundary extending west from Dakhla into the Atlantic Ocean at 24° North latitude. Mauritania implicitly denounced the treaty as a result of its August 1979 peace agreement with the Frente POLISARIO.

The division of the territory's ocean resources was commented on by Driss Dahak, a Moroccan law of the sea advisor and UNCLOS negotiator. Dahak notes that specific provisions (“une chapitre”) for Spanish-Moroccan fisheries cooperation were part of the *Accords*, with Morocco obliged to accept what Spain demanded because of the “particular political circumstances” of the time.<sup>13</sup> Subsequent fishery agreements between the two states were short-lived, with new treaties in June 1979, December 1979, April 1981, December 1982 and August 1983. The last provided for reciprocal commitments, Spain continuing to have its usual access and Morocco to receive “assistance in the technical domain and the financing of projects.”<sup>14</sup> After Spain's accession to the European Community, the first Brussels controlled treaty was concluded in 1988. It had a four-year term during which Morocco was to be paid 282 million European Currency Units (“ECU”). Later agreements were concluded in 1992 (310 million ECU) and 1995 (500 million ECU). The treaties ended in 1999 when no agreement for renewal could be reached because of concerns over the viability of certain fish stocks.<sup>15</sup>

Morocco and Spain also reportedly agreed to divide the continental shelf between the Canary Islands and the Saharan coast. The two states had not established or apparently discussed maritime boundaries in the area. The modern law of the sea was still developing with many states awaiting the result of the *Law of the Sea Convention*.

[T]he negotiations for the Madrid Accord [*sic*] of 14 November 1975 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.<sup>16</sup> [Translation. Footnotes omitted.]

The involvement of third states in the resources of Western Sahara is presently limited to the fishery. Mauritania expresses no interest in any of the territory's natural resources, except by its 2009 extended continental shelf claim mistakenly encroaching on the Saharan seabed.<sup>17</sup> As earlier noted, the

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<sup>13</sup> Driss Dahak, *Les Etats Arabes et le Droit de la Mer*, Tomes I et II (Rabat: Les Editions Maghrébines, 1986) at 409. Dahak also notes that a 1977 fishing agreement was not ratified by Morocco as a response to “Spain declaring after 1976 that it had only ceded administration of the territory, and not its sovereignty.” [Translation] (*Ibid.* at 410). I didn't think there was a different between *ibid* and *idem*. If not, I might stick to one or the other. If, however, there is some nuance between the two I'm not familiar with, please disregard.

<sup>14</sup> *Ibid* at 411 [Footnote omitted]. The 1983 agreement prescribed a first annual catch limit of 136,602 tonnes, to be reduced for conservation reasons in successive years by 5 %, 10 % and 14 %.

<sup>15</sup> Toby Shelley, *Endgame in the Western Sahara: What Future for Africa's Last Colony?* (New York: Zed Books, 2004) at 74. The failure to negotiate a new fisheries agreement after 1999 led to a 2002 agreement with Russia and, later, the EU-Morocco *Fisheries Partnership Agreement*, *supra* note 4.

<sup>16</sup> Dahak, *supra* note 13 at 239. Dahak notes that Morocco would apply equitable principles in the adjustment of such a median line boundary, “in keeping with the goal of a complete delimitation of the continental shelf and the jurisprudence of the ICJ.” [Translation] (*Ibid* at 240). Cf. Article 5 of the first protocol above, which provided only general terms for experts of the three states to examine and resolve “problems of air and maritime navigation and communications in general” and other matters arising in the “transfer of the Saharan territory.”

<sup>17</sup> République Islamique de Mauritanie, *Informations Indicatives des Limites Extérieures du Plateau Continental de la République Islamique de Mauritanie*, 7 May 2009, (deposited with the Commission for the Limits of the Continental Shelf at New York 11 May 2009).

government of Spain recently divested its interest in Fosboucraa, with Morocco and corporate actors continuing the export of Saharan phosphate. Many companies are involved with their activities monitored by the Brussels-based non-governmental organization Western Sahara Resource Watch.<sup>18</sup> Petroleum development in the territory and its continental shelf has been limited to exploration, including seismic surveys, with the American firm Kosmos Energy Ltd. (as it now is) exploring the “Boujdor Offshore” prospect.<sup>19</sup> Corporate involvement with the Saharan fishery is done under the cover of a 2010 three-year Morocco-Russia treaty and the now extended EU-Morocco *Fisheries Partnership Agreement*.<sup>20</sup> Completing this survey, it should be noted that foreign fishing vessels reportedly operate under the Moroccan flag in Saharan waters although the evidence is unclear.

The Frente POLISARIO, as the recognized national liberation movement of the Saharawi people and in its capacity as the government of the SADR, has continually protested the taking of the territory’s natural resources and the recent extension of the 2007 *Fisheries Partnership Agreement*. The Frente’s November 2010 letter from its EU delegate, Mohamed Sidati, to EC Fisheries Commissioner Maria Damanaki is unambiguous:

[I]t is incumbent upon the Frente POLISARIO, on behalf of the Saharawi people, to 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.** 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. This was an expression and exercise by the Saharawi people of their permanent sovereignty over the natural resources of Western Sahara, including their *exclusive* sovereign rights with respect to the resources offshore. 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.<sup>21</sup> [Emphasis in original.]

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<sup>18</sup> See: <[www.wsrw.org](http://www.wsrw.org)> (accessed 2 July 2011).

<sup>19</sup> *Supra* note 5. Kosmos Energy’s Sahara exploration is detailed in the company’s submission to the United States Securities and Exchange Commission for approval of an initial share purchase offering as follows: “Kosmos believes that the geology offshore Morocco [Western Sahara], like that of Ghana, constitutes an overlooked Cretaceous deepwater sandstone play ... Kosmos’ exploration opportunity presented in Morocco is substantial.” See pages 99 ff. online: <[www.sec.gov](http://www.sec.gov)> (accessed 27 July 2011).

<sup>20</sup> *Agreement between the Government of Russian Federation and the Government of The Kingdom of Morocco for a Marine Fisheries Partnership*, 15 January 2010, (On file with the author). For the Russian language text of the treaty see: <[www.wsrw.org](http://www.wsrw.org)> (accessed 21 July 2011).

<sup>21</sup> On file with the author and see online: <[www.wsrw.org](http://www.wsrw.org)> (accessed 16 August 2011). On the history of the Frente POLISARIO and the development of the Saharawi state, see recently Stephen Zunes and Jacob Mundy, *Western Sahara: War, Nationalism, and Conflict Irresolution* (Syracuse, NY: Syracuse University Press, 2010) and Pablo San Martín, *Western Sahara: The Refugee Nation* (Cardiff: University of Wales Press, 2010).

## Law, colonies and occupation: Permanent sovereignty to resources

The right of non-self-governing peoples to permanent sovereignty over their natural resources is a preemptory norm of international law. Two juridical streams nourish the development of this law, namely the treaty and customary aspects particular to self-determination together with the norms of international humanitarian law. Both contain the international criminal precedents and civil reparation principles offering a variety of remedies. And both have a ready application to state and corporate involvement in the continued taking of Saharawi resources.

This first stream of law, clearly prohibiting states and individuals from taking Saharawi natural resources as a matter of self-determination, has its origins in the United Nations *Charter*.<sup>22</sup> Although the requirements to give effect to Articles 73 and 74 of the *Charter* for non-self-governing territories were created only in 1960, the duty to assure the well-being of colonized peoples pending the achievement of their self-determination and, within that, the duty to consult and to ensure the direction of benefits from an extracted resource to the affected people has been accepted for decades:

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[.]<sup>23</sup>

The obligation to obtain the consent of a colonized, *i.e.* non-self-governing, people to the development of their sovereign natural resources comes from the two General Assembly Resolutions at the heart of the UN self-determination process: Resolutions 1514 (XV) and 1541 (XV) of 14 December 1960.<sup>24</sup> 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.” It is these norms that are the core of Saharawi sovereignty to the resources of occupied Western Sahara.

In 1962 the General Assembly looked again at permanent sovereignty to natural resources, asserting 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

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<sup>22</sup> *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, online: <[www.un.org](http://www.un.org)> (accessed 30 July 2011) [the UN *Charter*].

<sup>23</sup> *Ibid* at Article 73.

<sup>24</sup> *Declaration of the Granting of Independence to Colonial countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15<sup>th</sup> Sess, (1960), online: <[www.un.org](http://www.un.org)> (accessed 28 July 2011); *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), UNGAOR, 15<sup>th</sup> Sess, (1960), online: <[www.un.org](http://www.un.org)> (accessed 1 July 2011); See also *Transmission of information under Article 73e of the Charter*, GA Res 1542 (XV), UNGAOR, 15<sup>th</sup> Sess, (1960), online: <[www.un.org](http://www.un.org)>. *Permanent sovereignty over natural resources*, GA Res 1803 (XVII), UNGAOR, 17<sup>th</sup> Sess, (1962), online: <[www.un.org](http://www.un.org)> (accessed 27 July 2011) [*Sovereignty over natural resources*] declared the right to permanent sovereignty over natural resources "a basic constituent of the right to self-determination."

to self-determination.”<sup>25</sup> That sovereignty to natural resources is vested in the people of a non-self-governing territory and not its administering or occupying state is clear in 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 voiced a concern that “[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 ...”<sup>26</sup>

Two important principles of the law governing the natural resources of non-self-governing peoples have a basis in Resolution 1803: the universal or *erga omnes* requirement incumbent on states to prevent violations of the law, and the ability of the states and peoples concerned to have standing in courts of competent jurisdiction. The former principle is expressed at Article 5 of the Resolution: “[T]he exercise of sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.” Article 7 underscores the importance of the obligation: “Violations 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 and hinders the development of international cooperation and the maintenance of peace.” The issues of the right of standing (*jus standii*) and obligations on states in the case of Western Sahara resulting from these principles are considered below.

That the organized international community accepts the protection of non-self-governing peoples’ sovereignty over natural resources can be seen in the work of the UN Council for Namibia and the Nauru, East Timor and Palestine Wall decisions of the International Court of Justice (ICJ).<sup>27</sup> Although by 1990 there were only a handful of self-determination cases that remained - East Timor, Palestine and Western Sahara being the most contentious - the obligation upon administering and occupying states to safeguard the resources of the territories for their peoples was clear and had become a preemptory norm. One milestone in this development was the *Charter of Economic Rights and Duties of States*.<sup>28</sup> Four decades on, the most recent UN General Assembly Resolution on the subject declares “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

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<sup>25</sup> *Sovereignty over natural resources, ibid.* On its *travaux préparatoires* and earlier resolutions concerning natural resources see Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (New York, NY: Cambridge University Press, 1997) at 57 ff.

<sup>26</sup> Articles 1 and 7, respectively. See also *Sovereignty over natural resources, ibid.*

<sup>27</sup> Respectively, *Case concerning phosphate lands in Nauru (Nauru v Australia)*, Preliminary Objection, [1992] ICJ Rep 240; *East Timor (Portugal v Australia)*, [1995] ICJ Rep 139 [*East Timor*]; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, [2004] ICJ Rep 136 [*Palestine Wall*]. On the history and legal status of the UN Council for Namibia see *Sovereignty over natural resources, ibid* at 12.

<sup>28</sup> *Charter of Economic Duties and Rights of States*, GA Res 3281 (XXIX), UNGAOR, 29<sup>th</sup> Sess, (1974), online: <www.un-documents.net> (accessed 7 July 2011) [*Charter of Economic Duties*]. See notably Article 16: “(1) It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them. (2) No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.”



to the enjoyment of their natural resources and their right to dispose of those resources in their best interest[.]”<sup>29</sup>

The evolution of the law was considered by Judge Christopher Weeramantry when he dissented to the ICJ’s 1995 *East Timor (Portugal/Australia)* decision. He concluded that the 1989 *Timor Gap Treaty* was illegal as a matter of the law found in Resolution 1803. Judge Weeramantry concluded that there existed an obligation *erga omnes* on states to oppose the operation of the treaty. His reasoning addressed the merits of the case:

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] on Permanent Sovereignty over Natural Resources, as "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests ..."

The same resolution notes that strengthening permanent sovereignty over natural resources reinforces the economic independence of States [and] is even more explicit in that it stresses that: "The exploration, development and disposition of such resources ... should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities." (Emphasis added.)

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".

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.<sup>30</sup>

The Saharawi people’s sovereignty to their Atlantic fishery is also assured by the 1982 UN *Convention on the Law of the Sea* (UNCLOS). Resolution III of the *Convention*, part of the final act of the Law of the Sea Conference, is binding on signatories including Morocco and the European Union. The

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<sup>29</sup> *Economic and other activities which affect the interests of the peoples of Non-Self-Governing Territories*, GA Res 109, UNGAOR, 65<sup>th</sup> Sess, (2010), online:<<http://daccess-dds-ny.un.org>> (accessed 24 July 2011).

<sup>30</sup> Dissenting Opinion in *East Timor*, *supra* note 27, at 198. "In the result, I would reaffirm the importance of the right of the people of East Timor to self-determination and to permanent sovereignty over natural resources, and would stress that, in regard to rights so important to contemporary international law, the duty of respect for them extends beyond mere recognition, to a duty to abstain from any State action which is incompatible with those rights or which would impair or nullify them." (*ibid* at 204).

Resolution has been accepted without reservation by all but two States; Spain in respect of Gibraltar and Argentina for the Falkland Islands. Resolution III provides:

In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.<sup>31</sup>

In 2002 the law of non-self-governing peoples' sovereignty over natural resources was canvassed extensively by the then UN Under Secretary for Legal Affairs, Hans Corell. His opinion on the legality of seabed petroleum exploration off the Saharan coast had been sought by the Security Council. Corell was not asked to consider the fishery and phosphate resources of Western Sahara.

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.<sup>32</sup>

The UN generally and the Security Council in particular did not act on Corell's report. They had no need to because the petroleum exploration firms withdrew a short time later. Corell's opinion has been cited frequently in the continuing controversy over the 2007 *Fisheries Partnership Agreement* but sometimes incorrectly. It is often mistakenly asserted that the only legal requirement incumbent on Morocco as an occupier is to demonstrate that resource extraction benefits all the inhabitants of occupied Western Sahara. Two things are wrong about this. The application of benefits necessarily must extend to the Saharawi people who live east of Morocco's sand wall including in the refugee camps around Tindouf. Moreover, the benefits realized can properly only accrue to the original people of the territory and not settlers introduced over the past 35 years.

The requirements for a colonial administering power or occupying state to act lawfully, consistent with the UN *Charter*, General Assembly resolutions and state practice (all of which we might call the "Corell test") are uncontroversial. Those requirements are the consent of a non-self-governing people to development of their resources and that the activity be done for their well-being, that is, economic advancement.

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<sup>31</sup> Resolution III of the Final Act of the Third United Nations Conference on the Law of the Sea. For the text of the Resolution and related documents see Myron H. Nordquist, ed, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Boston: Martinus Nijhoff, 1989). See also *Oceans and the law of the sea*, GA Res 38, UNGAOR, 65<sup>th</sup> Sess, (2010), online: <[www.un.org](http://www.un.org)> (accessed 8 July 2011).

<sup>32</sup> The opinion, "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 29 January 2002), online: <[www.derechos.org](http://www.derechos.org)> (accessed 28 July 2011). Exploration of the Saharan offshore continues including seismic surveys done for Kosmos Energy after 2006 and drilling of prospect wells in the Boujdour Offshore Block after 2012.

The principle that the interests of the peoples of Non-Self-Governing Territories are paramount, and their well-being and development is the "sacred trust" of their respective administering Powers, was established in the Charter of the United Nations and further developed in the General Assembly by resolutions on the question of decolonization and economic activities in Non-Self-Governing Territories. In recognizing the inalienable rights of the peoples of Non-Self-Governing Territories to the natural resources in their territories, the General Assembly has consistently condemned the exploitation and plundering of natural resources and any economic activities which are detrimental to the interests of the peoples of these territories and deprive them of their legitimate rights over their natural resource. It recognized, however, the value of economic activities that are undertaken in accordance with the wishes of the peoples of those territories, and their contribution to the development of such territories [...]<sup>33</sup>

The Saharawi people, through the government of the SADR and their recognized national liberation movement the Frente POLISARIO, consistently declare that they do not consent to the taking of their natural resources and do not benefit from their exploitation. A March 2011 letter by the Saharawi minister responsible for offshore petroleum development to the American company Kosmos Energy Ltd. is the latest of these assertions: "[T]he Saharawi people have neither consented to nor realize any benefit from the exploration and use of the natural resources of their territory."<sup>34</sup> With the law as clear as it is, taking steps to restrain the taking of Saharawi natural resources is less a question of standing before an international tribunal, with the Frente POLISARIO barred for most practical purposes and the other actors concerned - Spain as the lapsed administrative power, the UN Security Council, the UN General Assembly through its central coordinating role for decolonization (recalling its role in Namibia) and all states by an obligation *erga omnes* - being unwilling to act, than it is a matter of political-diplomatic will. There is no question a basis for action exists because of this first stream of the law. What is the challenge is the matter of which state or international organization can effectively espouse a claim to the protection of Saharawi sovereignty over natural resources and how they may do so against corporate actors.

The application of international humanitarian law to restrain the taking of natural resources from that part of Western Sahara occupied by Morocco has been little addressed.<sup>35</sup> This is not surprising

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<sup>33</sup> *Ibid* Cf. Resolution 1803, *supra* note 24.

<sup>34</sup> Letter of Emhamed Khadad (SADR Petroleum Authority) to Kosmos Energy Ltd. (22 March 2011), online: <[www.wsrw.org](http://www.wsrw.org)> (accessed 28 July 2011). On fisheries see the 1 March 2010 letter of minister delegate Mohamed Sidati to the EC, reiterated 16 November 2010, online: <[www.fishelsewhere.eu](http://www.fishelsewhere.eu)> (accessed 28 July 2011).

<sup>35</sup> Consider Hans Corell's recent published remarks, made in a personal capacity: "The question became whether mineral resource activities in a Non-Self-Governing Territory by an administering power are illegal as such, or only if conduct in disregard to the needs and interests of the people of that territory. An examination of the relevant provisions of the Charter of the UN, General Assembly resolutions, the case law of the International Court of Justice and the practice of States led me to the conclusion that such activities would only be illegal in the latter situation." "Western Sahara – status and resources" (2010)15 *New Routes* 10 at 12. Corell summarizes a test to satisfy the law of sovereignty over natural resources that is arguably diminished from his 2002 conclusion for the Security Council. The proper test is that of consent and benefit to a non-self-governing people. In other words, the threshold for legality in this stream of the law is higher than that of mere beneficial application of the

when the organized international community's characterization of the "question" of Western Sahara is recalled, namely, as a case of decolonization to be resolved by a "just, lasting and mutually acceptable" settlement and not one of occupation.<sup>36</sup> The Security Council has not used the term occupation. But the General Assembly has, as it did with Namibia and East Timor, Resolution 34/37 of 1979 "deeply [deploring] 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."<sup>37</sup>

When viewed through the perspectives of territorial integrity, the precedents of other occupations found to have violated the UN *Charter* and customary international law, the occupation of Western Sahara triggers the application of international humanitarian law. The facts on the ground are compelling, including the parties' 1991 ceasefire arrangement, the presence of a large occupying military force and the construction of Morocco's sand wall, together with its admission that the territory remains "technically, a war zone".<sup>38</sup> Should there be any doubt the occupation of Western Sahara violates international law, Article 2(4) of the United Nations *Charter* prohibiting the use of force (and for states to respect territorial integrity) and the Security Council and General Assembly resolutions on the territory's and Saharawi people's status should be recalled. The preamble to a recent General Assembly resolution, "The Question of Western Sahara", 64/101 (10 December 2009), is typical:

*Reaffirming* the inalienable right of all peoples to self-determination and independence, in accordance with the principles set forth in the Charter of the United Nations and General Assembly resolution 1514(XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples[.]<sup>39</sup>

Insofar as the legal character of Western Sahara's occupation is established, what follows is to consider how the law might be applied to prevent further pillage of the territory's natural resources and perhaps the compensation to result from what has been taken. An important distinction must be made here. The protection of Saharawi natural resources within international humanitarian law is more absolute than that under permanent sovereignty to natural resources. International humanitarian law - with its corollary international criminal law - has little if any scope to accept a claim that the removal of natural resources benefits an occupied people. The law requires outright prohibition of exploitation and removal of natural resources during a continuing occupation. This is an inflexible requirement, contrasting starkly with the "Corell test" of ensuring the consent and benefit of an affected people as an exercise of their sovereignty to natural resources. Peoples under military occupation are not able to

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*usufruct* of a natural resource. These recent remarks characterize Morocco's presence as only that of an administering, not an occupying power.

<sup>36</sup> See *e.g. Situation Concerning Western Sahara*, SC Res 658, UNSCOR, (1990), about the holding of a self-determination referendum.

<sup>37</sup> *Question of Western Sahara*, GA Res 37, UNGAOR, 34<sup>th</sup> Sess, (1979), online: <<http://daccess-dds-ny.un.org>> (accessed 8 July 2011).

<sup>38</sup> US diplomatic cable, "Seven Saharawi activists charged with intelligence cooperation with a foreigner," (US embassy Rabat), 16 October 2009, online: <[www.wikileaks.ch](http://www.wikileaks.ch)> (accessed 9 September 2011).

<sup>39</sup> *Question of Western Sahara*, GA Res 101, UNGAOR, 64<sup>th</sup> Sess, (2010). The General Assembly has referred to Morocco as the occupier of Western Sahara including after Mauritania's 1979 departure under its treaty with the Frente POLISARIO. See UN GA Resolutions 34/37 and 35/19 of 21 November 1979 and 11 November 1980, respectively.

credibly consent to the taking of their resources.<sup>40</sup> If an example is needed, the notion of such consent did not even enter into the work of the UN Council for Namibia.

The fact of occupation, moreover, is inimical to extracted natural resources being applied to the benefit of the people affected. It is the 1907 *Hague Regulations*, now a part of customary international law, that define occupation in the sense relevant to Western Sahara. Article 42 provides that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>41</sup> The International Court of Justice considered the applicability of international humanitarian law and the nature of an occupation in its *Palestine Wall* advisory opinion, reasoning that:

Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories ...<sup>42</sup>

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<sup>40</sup> Consider that “protected persons” under international humanitarian law are not competent to renounce their rights for example under Article 8 of the *Fourth Geneva Convention: Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, (entered into force 21 October 1950), online: <[www.icrc.org/ihl](http://www.icrc.org/ihl)> (accessed 27 July 2011) [*Fourth Geneva Convention*]. “This is to prevent the occupying authorities, acting from a position of strength, from exploiting the weak position of the inhabitants of the territories and thus to abrogate, apparently legally, the protection guaranteed by international law.” Dieter Fleck, ed, *The Handbook of International Humanitarian Law*, 2d ed (Oxford: Oxford University Press, 2008) at 284. Morocco is a state signatory to the *Fourth Geneva Convention*, acceding on 26 July 1956, but not Additional Protocols I and II. Morocco is not a signatory to the *Hague Regulations 1907*, *infra*.

<sup>41</sup> *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907, online: <[www.icrc.org](http://www.icrc.org)> (accessed 28 July 2011). “The law of occupation applies only to those parts of a foreign territory actually controlled by the occupying power and not to parts not occupied ... The reasons given for the occupation of foreign territory are irrelevant. Even if the stated strategic goal is not to gain control of foreign territory or of its inhabitants, but e.g. ‘merely’ to secure its own territory close to the border against foreign attacks, the invading power bears responsibility for the parts of the territory actually under its control.” Fleck, *ibid* at 274. See also Article 2 of the *Fourth Geneva Convention*, *ibid*.

<sup>42</sup> *Palestine Wall*, *supra* note 27 at para 95. See notably Article 47 of the *Fourth Geneva Convention*, *supra* note 40: “Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.” The International Committee of the Red Cross (ICRC) continues to be concerned about inconsistent definitions of occupation. “Defining the legal nature of a situation is a legal matter. Unfortunately, this often becomes a political exercise. Thus, the essential problem regarding that definition is to be found neither in the legal nor the humanitarian realm but rather in the political arena. It would therefore be unfair to make a humanitarian organization bear the burden of full responsibility for the legal definition of a situation. That task belongs above all to States. States have repeatedly denied their involvement in conflict, refusing to recognize that the situation has become internationalized and thus that the Fourth Convention is applicable. The unclear legal status of certain territories, claims to rights over such territories, the annexation of an adversary's territory or the reclaiming of territory viewed as having been wrongly appropriated by another State - all have on various occasions served as further excuses for refusing to acknowledge the Fourth Convention's applicability, as have the reasons advanced for actually denying the existence of a conflict, such as the struggle against terrorism, the need to carry out a police operation in order to resolve a political crisis, and intervention in response to an appeal from an allied country.” Report by the ICRC, “General problems in

Although active hostilities between Morocco and the Frente POLISARIO ended in 1991 the occupation of Western Sahara continues and with that the obligation under international humanitarian law to protect the territory's original civilian population. The *Fourth Geneva Convention* protects against pillage after cessation of hostilities for the entire period a state or territory remains under occupation:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, 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 following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.<sup>43</sup>

No other state formally or publicly recognizes Morocco's annexation or purported claim to Western Sahara. As with the precedent cases of Namibia, East Timor, and Palestine, Morocco's status in the territory is universally rejected *de jure*.<sup>44</sup> That is an important declaratory precept underscoring Morocco's control over the occupied part of Western Sahara to be that of an occupation. The ICJ's reasoning in its 1975 *Western Sahara* advisory opinion obviates any credibility of Morocco's claim:

[T]he Court cannot be unmindful of the purpose for which its opinion is sought. Its answer is requested in order 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 ...

**[T]he Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity.**

Thus the Court has not found legal ties of such a nature as might affect the application of 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.<sup>45</sup> [Emphasis added.]

An additional historical fact that triggers international humanitarian law is Mauritania's acknowledgement of the wrongfulness of its occupying the territory's southern half. Mauritania made the admission in its 1979 peace treaty with the Frente POLISARIO, waiving claims to the territory and later extending recognition to the Saharawi Republic.<sup>46</sup> If no court or authority with competent

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implementing the Fourth Geneva Convention," Meeting of Experts (27-29 October 1998), online: <[www.icrc.org](http://www.icrc.org)> (accessed 10 July 2011).

<sup>43</sup> *Fourth Geneva Convention*, *supra* note 40 at Article 6.

<sup>44</sup> Consider, for example, the statement of the United States government that its 2004 *Free Trade Agreement* with Morocco does not apply to the territory of Western Sahara.

<sup>45</sup> *Western Sahara, Advisory Opinion*, [1975] ICJ Rep 12 at paras 161-62.

<sup>46</sup> *Mauritano-Sahraoui agreement*, signed at Algiers (10 August 1979), as annexed to "Letter from the Permanent Representative of Mauritania to the United Nations addressed to the Secretary-General" (18 August 1979), UN Doc. A/34/427. Mauritania committed to "withdraw definitively from the unjust Western Sahara

jurisdiction has yet to pronounce definitively on the legal situation resulting from Morocco's occupation, the renunciation by an occupier asserting the same historic claim as Morocco is a compelling collateral fact.

Lest the norms of international law not have been sufficiently emphasized, two points can be offered in summary of the principles of law applicable to Western Sahara's natural resources. The first is that the crime of pillage, outlawed for more than a century, continues in Western Sahara. Morocco is the party primarily responsible, but it does so with extensive support from foreign corporations. The second is that, in all the modern cases of self-determination including Namibia, East Timor and Palestine, the right of a non-self-governing people to permanent sovereignty over their natural resources has been acknowledged. So has the obligation *erga omnes* on all states to support realization of the right.<sup>47</sup> The taking of Saharawi resources offends the law in more ways than one and more than the organized international community has been prepared to acknowledge.

### Defining theft: Pillage

The taking of natural resources from Western Sahara has several consequences. The first is that it denies the Saharawi people - the legitimate original inhabitants of the territory - the present benefit of the resources.<sup>48</sup> The effect of this has become evident in recent years, culminating in the large-scale Saharawi *décampment* at Gdeim Izek in October 2010.<sup>49</sup> The basis for the protest was the collective sense of grievance felt by Saharawi in el-Aauin about their marginal employment and economic circumstances. None of the revenues earned by Morocco from fishery and phosphate production accrues to the majority of the Saharawi people living in the occupied part of the territory, to say nothing of those in the "free zone" of Western Sahara and at Tindouf. Morocco's appropriation also legitimizes and finances the continuing occupation of the territory. The cost of the occupation is significant, with more than 125,000 Moroccan soldiers garrisoned in the territory, one for every four people in the civil population, the majority of them settlers introduced after 1975. The trade in Saharan resources has resulted in foreign governments and corporations dealing with Morocco without regard for the legality of its occupation.<sup>50</sup> Moreover, the removal of the territory's natural resources diminishes their availability to the Saharawi people after self-determination. As we have seen, identical concerns resulted in the UN

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war" while renouncing all claim to the territory, a *volte face* to its position during the ICJ advisory case five years earlier.

<sup>47</sup> See Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005). The basis for states concerned to act in the case of Western Sahara is clear, although no positive duty exists to enforce the law.

<sup>48</sup> The European Commission was reportedly provided with evidence of "benefit" of the EU-Morocco *Fisheries Partnership Agreement* in December 2010. The information and supporting evidence has not been made public. It is not known how the information defined the people of the territory or if consent of the Saharawi people was obtained.

<sup>49</sup> See *Report of the Secretary-General on the situation concerning in Western Sahara*, UNSGOR, UN Doc. S/2011/249 (1 April 2011). See also the media release of Human Rights Watch "Western Sahara: Beatings, Abuse by Moroccan Security Forces" (26 November 2010), online: <[www.hrw.org](http://www.hrw.org)> (accessed 22 July 2011).

<sup>50</sup> There are exceptions. One was the withdrawal of Kerr-McGee and Totalfina Elf from offshore petroleum exploration after 2002. On the EU's engagement of Morocco (including advanced status progress) see the European Commission's "European Neighbourhood Policy" online: <<http://ec.europa.eu>> (accessed 4 July 2011).

Council for Namibia taking action against the export of uranium and Portugal's challenge to the *Timor Gap Treaty*.

The taking of natural resources from Western Sahara given a continuing forcible occupation and the circumstances of a stalled process for self-determination can only be described as theft. The facts support that allegation. The exploitation of the territory's two primary resources enriches the Moroccan state, the corporations trading with it, and the European Union as a result of the extended 2007 *Fisheries Partnership Agreement* (and Russia under its 2010 fisheries agreement). It is widely accepted that the benefits do not reach the Saharawi people, most especially those in the refugee camps at Tindouf. The substantial weight of *opinio juris*, the uniform refusal of states to recognize Morocco's sovereignty over Western Sahara, and the earlier cases of non-self-governing peoples' natural resources make out the failure to satisfy both parts of the "Corell test". This first stream of international law has been clearly violated.

The case to criminalize the corporate taking of Western Sahara's natural resources is similarly straightforward. The prohibition within international humanitarian law, in which the criminal law operates, for pillaging the resources of Western Sahara is evident. The treaties, customary law and judicial decisions which define the act with relevance to corporate actors are well established.

Pillage, sometimes called plunder, has a long history in armed conflict, coming to be restricted and then banned under the law of war (and subsequently international criminal law) in the Twentieth Century. One definition of the crime is the "unlawful appropriation of private and public property during armed conflict."<sup>51</sup> Article 9 of *Rome Statute* of the International Criminal Court (ICC) prohibits pillage, with criteria defining the crime found at Article 8(2)(b)(xvi) of the ICC's "Elements of Crimes". These reflect the accepted understanding of the crime and it should be noted, as a current restatement of the law, the Elements provide for no distinction between private and public property (the latter including natural resources) or the perpetrator involved (an official of an occupying power, or a corporate actor benefitting from the act):

#### War crime of pillaging

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>52</sup>

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<sup>51</sup> See James G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources* (New York, NY: Open Society Institute, 2010) at 15-17 [*Corporate War Crimes*].

<sup>52</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF. 183/9, (entered into force 1 July 2002), online: <[www.iccpi.int](http://www.iccpi.int)> (accessed 10 July 2011) [*Rome Statute*]. All EU states are members of the Assembly of States Party to the ICC. A footnote to the Elements states that "appropriation" of property is allowable in cases of military necessity. Similar elements prescribed by the ICTY Statute were applied by the Trial Chamber in April 2011 in *Prosecutor v Ante Gotovina*, IT-06-90-T (15 April 2011) at para 1777 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) discussed *infra*.



Pillage is equally a treaty-based crime as it is part of customary international law.<sup>53</sup> That is because pillage was sufficiently recognized over the past century to have become *jus cogens*.<sup>54</sup> The treaty prohibition of pillage is three-fold: (i) the Regulations of the *Fourth Hague Convention of 18 October 1907 respecting the Laws and Customs of Wars on Land* (the “Hague Regulations”); (ii) the *Fourth Geneva Convention* (and its 1977 Protocols); and (iii) the *Rome Statute*. Article 47 of the Hague Regulations declares pillage to be “formally forbidden.” Article 33(2) of the *Fourth Geneva Convention* states that “pillage is prohibited”, with Article 147 defining it as a “grave breach” of the *Convention*.<sup>55</sup> Many states have added to these definitions for domestic prosecution purposes by incorporating and adapting the *Rome Statute Elements of Crimes*, something that is a requirement for members of the ICC.<sup>56</sup> Within international law particularly regarded among Islamic states the 1990 *Cairo Declaration on Human Rights in Islam* is recalled. Articles 3 and 15 of the Declaration prohibit the unlawful taking of natural resources by an occupying power, a violation of *Shari’a* law.<sup>57</sup> The *Cairo Declaration* was cited to the UN Security Council as a basis for Arab States to oppose Iraq’s 1990 occupation and pillage of Kuwait.<sup>58</sup> There would be no material change in asserting its application to the case of Western Sahara.

The International Committee of the Red Cross has widely reviewed the prohibition of pillage under treaty, state practice and national legislation, defining the act as the “systematic spoliation of occupied or controlled territory ... the seizure or destruction of enemy private or public property or money [and the] violent acquisition of property for private purposes.”<sup>59</sup> Australia’s military guidelines are typical among states in reflecting a policy to criminalize pillage in the context of military action during an occupation: “The rule against pillage is directed against all private acts of lawlessness committed against enemy property.”<sup>60</sup> However, it is the criminal cases that offer a nuanced definition of pillage, necessary to understand criminal liability for the taking of Western Sahara’s natural resources.

The post-World War II criminal cases in the International Military Tribunal were the first to judicially define the pillage of public resources in occupied lands. Several decisions considered the crime in this particular context including its occurrence during armed conflict (*i.e.* with other war crimes) as well as the liability of individuals for their assistance to states and persons engaged in pillage. The *IG Farben*, *Krupp* and *Flick* prosecutions established that criminal liability for pillage could result for

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<sup>53</sup> “[T]he prohibition of plunder is ... firmly rooted in international customary law.” *Prosecutor v Zejnli Delalic (Celebici Camp Case)*, IT-96-21-T, (16 November 1998) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: <www.icty.org> (accessed 12 July 2011) [*Delalic*].

<sup>54</sup> The treaty development of the crime of pillage is reviewed comprehensively by Jean-Marie Henckaerts and Louise Doswald-Beck, eds, *Customary International Humanitarian Law, Vol. II* (Cambridge: Cambridge University Press, 2005) at 1077.

<sup>55</sup> *Fourth Geneva Convention*, *supra* note 40. See also Articles 54 and 14, respectively of Additional Protocols I and II “Protection of objects indispensable to the survival of the civilian population”, online: <www.icrc.org> and see Article 4 of Protocol II.

<sup>56</sup> See *e.g.* *Gesetzes zue Einführung des Völkerstrafgesetzbuches* of 30 June 2003, BGBl 2002, I, 2254, §9(1) (the German Code of Crimes against International Law).

<sup>57</sup> *Cairo Declaration on Human Rights in Islam*, UNGAOR, UN Doc. A/Conf.157/PC/62/Add.18 (1990), online: <www1.umn.edu> (accessed 23 July 2011).

<sup>58</sup> See UN Doc. S/PV.2960 (27 November 1990) and generally Elihu Lauterpacht et al, *The Kuwait Crisis: Basic Documents* (Cambridge: Grotius Publications Ltd., 1991) at 149 ff.

<sup>59</sup> *Customary International Humanitarian Law*, *supra* note 54 at 1077 ff. Morocco’s Disciplinary Regulations and Code of Military Justice, *ibid* at 1082 and 1902, respectively, prohibit pillage.

<sup>60</sup> *Australia Defence Force Manual*, *ibid* at 1079.

businesspersons who were citizens of an occupying state.<sup>61</sup> The tribunals were willing to convict both for public property directly taken, and well as its possession after the fact.<sup>62</sup> In addition, government officials were found responsible for their direction in the taking of natural resources from occupied territories. The conviction of Schwerin von Krosigk, Germany's Minister of Finance, for directing the removal of "oil, coal, ores, and other raw materials" from Poland to the benefit of the German economy was one. He was sentenced to 10 years imprisonment and released in a 1951 amnesty.<sup>63</sup> The liability of military officials conducting hostilities for pillage in armed conflict was affirmed by the International Criminal Tribunal for the former Yugoslavia (the ICTY). The case of *Prosecutor v Blaskic* is typical. Tihomir Blaskic was the commander of HVO units in central Bosnia at a time of widespread pillage by his forces. The ICTY convicted Blaskic for failing to control pillage - to take adequate measures to prevent it - when the crime would foreseeably have resulted from his orders.<sup>64</sup>

The ICTY's 1998 Trial Chamber decision in *Delalic* provides a comprehensive definition of pillage that is relevant to the corporate taking of natural resources from Western Sahara:

The prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory [...]

In this context, it must be observed that the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed "pillage", "plunder" and "spoliation" ... [embracing] all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillage".<sup>65</sup>

Other recent cases are notable for their underscoring of civil liability for pillage including those pursued by the UN Council for Namibia, the UN Compensation Commission for Kuwait, the ICJ's *Palestine Wall* advisory opinion, and the recent awards of the Eritrea-Ethiopia Claims Commission. Although it had the necessary jurisdiction, the UN Council for Namibia never pursued civil claims to completion. The Council was created to act as the legislative and governing entity for Namibia after the UN revoked South Africa's mandate over the territory in 1966. The UN General Assembly gave the Council authority "to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative assembly is established following elections", in other

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<sup>61</sup> See, respectively, 8 *Trials of War Criminals before the Nuernburg Military Tribunals under Control Council Law No. 10* 1081 [*Trials of War Criminals*]; 9 *Trials of War Criminals* 1461; 6 *Trials of War Criminals* 1191. See online: <www.loc.gov>. For a summary of the decisions see *Corporate War Crimes*, *supra* note 51 at 95-99. In *Flick* the IMT concluded "the economic subsistence of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort."

<sup>62</sup> See *e.g.* the IG Farben case, *ibid* at 1143-47.

<sup>63</sup> 14 *Trials of War Criminals* 784.

<sup>64</sup> *Prosecutor v Dario Kordic (Lasva Valley case)*, IT-95-14-T, Judgment (3 March 2000) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

<sup>65</sup> *Supra* note 53 at 590-91.

words, to legislate for Namibia after the UN ended South Africa's mandate over the territory.<sup>66</sup> It was not until 1974, concerned with mining activity in the territory and foreign fishing in Namibian waters that the Council enacted *Decree No. 1 for the Protection of Natural Resources of Namibia*.<sup>67</sup> Western Sahara enjoys no such status as a "direct responsibility" of the UN General Assembly.

In more recent cases where the UN has governed (and legislated) in respect of a territory - East Timor and Kosovo - the direction has been that of the Security Council in the circumstances of securing the end of occupation and a transition to statehood. By analogy to Western Sahara, however, the 1974 Namibia *Decree* is noteworthy for several things. First, it affirmed the right of the Namibian people to independence. Second, it adopted the requirement of Resolution 1803 for sovereignty over natural resources. Third, the *Decree* declared that South Africa had "usurped and interfered" with the Namibian people's right of permanent sovereignty over their natural wealth and resources. It also expressed the goal to "secure for the people of Namibia adequate protection of the natural wealth and resources of the Territory which is rightfully theirs." In addition to prohibiting the removal of natural resources from Namibia, the *Decree* established a basis for the Council to seize resources and a future right of action for an independent Namibia to hold "any person, entity or corporation ... liable in damages ..." In 1987 the Council started a civil lawsuit under the *Decree* against the Dutch company Urenco in a national court at The Hague. The claim included a request to enjoin any further trading in the territory's uranium and for the Dutch government to supervise the company's trading activities. The proceeding was withdrawn after Namibia's independence in 1990.<sup>68</sup>

The United Nations' work against pillage and its support for reparations arising from the crime has been demonstrated by the continuing work of the UN Claims Commission for Kuwait (the UNCC). Established in 1991 "not [as] a court or an arbitral tribunal" the UNCC is "a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims [where] a quasi-judicial function may be involved."<sup>69</sup> The Commission received claims until 2005 on the basis of Iraq's liability "for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."<sup>70</sup> Compensation has been funded by revenue from the sale of Iraq's petroleum. More than 2.6 million claims totaling \$352 billion (US) were presented in a compensation scheme for individuals, corporations, governments and international organizations. The overall amount awarded to date is \$52.38 billion. The government of Kuwait's claims included losses resulting from pillage. A small number of claims for the pillage of resources from the Kuwait Oil Company - principally stockpiled sulphur - have been allowed.<sup>71</sup> What is notable about the UNCC claims, the majority resulting from the

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<sup>66</sup> *The Question of Namibia*, GA Res 2248 (S-V), UNGAOR, (1967). See generally Karin Arts, "The Legal Status and Functioning of the UN Council for Namibia" (1989) *Leiden J Int'l L* 194.

<sup>67</sup> The decree is reprinted in *Sovereignty over natural resources*, *supra* note 24 at 162-63.

<sup>68</sup> See the discussion *ibid* at 149 ff.

<sup>69</sup> *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687(1991)*, UNSGOR, UN Doc. S/25599 (1991) at para 20, online: <[www.uncc.ch](http://www.uncc.ch)> (accessed 24 July 2011).

<sup>70</sup> *Iraq-Kuwait*, SC Res 687, UNSCOR, (1991) at para 16. See the UNCC's website at: <[www.uncc.ch/start.htm](http://www.uncc.ch/start.htm)> (accessed 14 July 2011).

<sup>71</sup> See *Report and Recommendations made by the panel of commissioners concerning the second installment of "E1" claims*, UNCCOR, UN Doc. S/A.22/1999/10 (1999), online: <[www.uncc.ch](http://www.uncc.ch)> (accessed 24 July 2011). A high value of the company's petroleum lost through spoliation, negligence and willful destruction during the

taking of government and private property by the occupying forces, was the uncontroversial manner in which they were provided for by the Security Council and their ready acceptance by the Commission.

Another example of the obligation for an occupying state to compensate the loss of natural resources - although not arising from an act of pillage as such - is the ICJ's *Palestine Wall* case. The Court found that compensation was owed to Palestinian landowners and others who had lost orchards and farmland ("agricultural holdings") from land expropriated for construction of Israel's security wall. The Court applied the principle of *restitutio in integrum* developed by the Permanent Court of International Justice in its 1928 *Chorzow Factory* case, reasoning that "the essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."<sup>72</sup>

Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.<sup>73</sup>

The work of the Eritrea Ethiopia Claims Commission, created by agreement of the two states in December 2000 after their 1998-2000 armed conflict to assess compensation for damages resulting "from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law", further establishes a right of compensation for pillage.<sup>74</sup> The Commission had a significant challenge valuing mass individual claims (espoused by each state) for property looted from impoverished villages.

As their claims demonstrate, both Parties recognized that the violations of international law identified by the Commission give rise to an obligation to pay compensation. Determining the amount of such compensation, particularly in large inter-State claims such as these, cannot be a mechanical process. In weighing its awards of compensation for damages, the Commission has had to take into account multiple factors, often not subject to precise quantification. It has weighed the nature, seriousness and extent of particular unlawful acts. It has examined whether such acts were intentional, and whether there may have been any relevant mitigating or extenuating circumstances. It

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occupation of Kuwait from 2 August 1990 until 2 March 1991 was compensated, although not characterized as pillage.

<sup>72</sup> *Factory at Chorzow (Indemnity) Case* (1928), PCIJ (Ser A) No 17 at 47.

<sup>73</sup> *Palestine Wall*, *supra* note 27 at para 153. When it received the opinion the General Assembly voted to accept that reparations were payable. See UN GA Res A/ES-10/15 (2004).

<sup>74</sup> Article 5(1) of the *Agreement signed in Algiers on December 12, 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia*, online: <[www.pca-cpa.org](http://www.pca-cpa.org)> (accessed 15 July 2011). See notably J. Romesh Weeramantry, "Eritrea's Damages Claims (Eritrea v. Ethiopia); Ethiopia's Damages Claims (Ethiopia v. Eritrea)" (2010) AJIL 104 at 480. "Both sides may not be fully satisfied with the (August 17, 2009) awards: Ethiopia was awarded approximately 1 percent, and Eritrea 3 percent, of the amounts claimed ... provisions in widely accepted international humanitarian law treaties expressly require the payment of compensation for *jus in bello* violations, but they provide no instruction as to how this compensation should be calculated." [Footnote omitted.] (*ibid* at 485).

has sought to determine, insofar as possible, the numbers of persons who were victims of particular violations, and the implications of these victims' injuries for their future lives.<sup>75</sup> [Footnote omitted.]

The policy of the organized international community, based as it is the obligation to respect the sovereignty to natural resources of peoples under occupation be it in the remaining cases of decolonization or those resulting from occupation governed by international humanitarian law, is to ensure that such resources are not unlawfully appropriated. Both streams of international law applicable to the taking of Saharawi natural resources, Corell and criminal, are reconciled on the point. It is increasingly a recognized part of this policy that, while protection of the proprietary right and *usufruct* of natural resources in occupied territories must inherently be supported - as the ICJ notes in its *Palestine Wall* opinion - by all states actively denying support for the taking of natural resources during an occupation - a uniform approach to sanctioning such conduct by states and individuals responsible is necessary to prevent international conflict and violations of territorial integrity. It is, after all, the assurance of territorial integrity and within that sovereignty to natural resources which is the guarantor of peace and security in the world order.<sup>76</sup> It is for these reasons that pillage carried out or supported by individuals is a crime. We turn next to consider how the law applies in the case of corporate actors involved in taking resources from Western Sahara.<sup>77</sup>

### **A who's who: The corporate actors involved**

The companies and individuals engaged in the export and trade of natural resources from Western Sahara can be grouped into three categories. First, there are the Moroccan state companies. Next, there are the corporate actors engaged in the direct extraction of resources. Those companies and persons receiving and trading in the exported resources are a third group. An example of each, respectively, is the Moroccan government company Phosboucraa (an entity wholly owned by Morocco's *Office Chérifien des Phosphates* that operates the Bou Craa mine and contracts for the sale of phosphate rock), the Spanish fisheries company Jealsa Rianxeira SA (which operates vessels in Saharan waters) and Potash Corporation of Saskatchewan Inc. (which purchases phosphate rock exported from el-Aauin).<sup>78</sup> There is also a fourth category of corporate actor; those companies exploring and prospecting for the development of Saharan resources. Kosmos Energy Ltd. of the United States is an example.<sup>79</sup> Another is Canada's Metalex

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<sup>75</sup> *Final Award: Eritrea's Damages (Eritrea/Ethiopia)*, Eritrea Ethiopia Claims Commission (17 August 2009) at para 40, online: <[www.pca-cpa.org](http://www.pca-cpa.org)> (accessed 24 July 2011).

<sup>76</sup> "The General Assembly ... invites all Governments and organizations of the United Nations system to take all possible measures to ensure that the permanent sovereignty of the peoples of the Non-Self-Governing Territories over their natural resources is fully respected and safeguarded in accordance with the relevant resolutions of the United Nations on decolonization." *Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories*, GA Res 427, 65<sup>th</sup> Sess, (2010) at para 8. This is consistent with Article 16(2) of the *Charter of Economic Rights and Duties*, *supra* note 28: "No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force."

<sup>77</sup> *Palestine Wall*, *supra* note 27 at para 159: "[T]he 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 ... 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."

<sup>78</sup> See their websites, respectively, at: (i) <[www.ocpgroup.ma](http://www.ocpgroup.ma)> (ii) <[www.rianxeira.com](http://www.rianxeira.com)> (iii) <[www.potashcorp.com](http://www.potashcorp.com)> (accessed 21 April 2011).

<sup>79</sup> *Supra* note 5.

Ventures Ltd. which is presently exploring for minerals in two license areas under a joint venture agreement with Morocco's ONHYM.<sup>80</sup>

Corporate actors trading indirectly in the territory's resources are not likely to attract civil and criminal liability, except in cases where they knowingly come into possession of the resources in a primary form, for example, fertilizer manufacturing companies such as Lifosa AB of Lithuania and Incitec Pivot Limited of Australia. Those corporate actors remote from liability include processing and marketing companies accepting fish from vessels operating in Saharan waters and geophysical consulting firms supporting the exploration work of mining and petroleum companies with concessions in the occupied part of the territory.<sup>81</sup> Individual persons qualify as a corporate actor if they have a directing role in the corporate taking of the resources or are knowingly involved with the export trade of the resources.<sup>82</sup> Others related to corporations such as shareholders, auditors and professional advisors are likely too remote in most cases to have any liability.

The civil and criminal liability of Moroccan companies engaged in taking Saharan resources turns on the nature of their corporate ownership by the government of the Kingdom. For practical purposes, such companies are an extension of the Moroccan state and therefore immune from legal action within that country. That is not the case outside Morocco, where those corporations are unlikely to have diplomatic protection from legal action in the courts of other states. In a discussion of corporate legal liability for the taking of Saharan resources it must be recalled the principal liability remains that of the Moroccan state. The remedies now available against Morocco as occupier - and for an independent Saharawi Republic with possible future standing before international tribunals (or a UN Security Council directing payment of reparations as with the UNCC for Kuwait) - demand separate consideration.<sup>83</sup> The potential remedies, to be clear about what the law provides, include state-to-state reparations, civil actions by the Saharawi state against Moroccan corporations and individuals, and criminal proceedings in national courts and the International Criminal Court.<sup>84</sup> In the short term, therefore, it is corporate actors outside Morocco who can be most readily pursued for the pillage of Saharan natural resources. Who is best situated to pursue the civil liability of companies and persons, and where criminal prosecutions can be undertaken are central questions. Each is considered in turn.

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<sup>80</sup> See press release "Metalex Commences Airborne Geophysical Survey in Morocco", online: <[www.metalexventures.com/2011-08-16.pdf](http://www.metalexventures.com/2011-08-16.pdf)> (accessed 16 August 2011).

<sup>81</sup> The Saharawi Republic has a right of action by way of civil proceedings before the courts of those states recognizing it, including interim (or interlocutory) relief to detain cargos of phosphate aboard vessels arriving or transiting through the territorial seas of such states (and to attach the proceeds of sale of landed phosphate). Consider, for example, the passage of phosphate aboard bulk carriers through Panama and South Africa *en route* to Australia and New Zealand.

<sup>82</sup> I discuss the liability of European Commission officials for the admitted taking of Saharan fisheries in "The pillaging of the Sahara: Criminal liability of European Commission officials resulting from proposed renewal of the 2007 EU-Morocco *Fisheries Partnership Agreement*," (2010) ASIL Accountability, online at: <[www.asil.org](http://www.asil.org)>.

<sup>83</sup> The prospect of a UN established criminal tribunal for a newly independent Western Sahara merits consideration.

<sup>84</sup> An estimate of the value of Saharawi resources taken since 1975 is \$12B; from more than 110M tonnes of phosphate rock with a net present value of \$100/tonne and 2.5M tonnes of fish products at \$200/tonne. Phosphate has traded above \$100/tonne since January 2010 and more than \$150/tonne during 2011.

## The civil liability of corporate actors

There has long existed a basis for civil compensation - restitution - for the taking of natural resources from Western Sahara. The basis in law is so universally accepted that it needed only summary treatment by the ICJ in its Palestine Wall advisory opinion. As we have seen, the post-conflict restitution mechanisms in Kuwait and its legislated provision for an independent Namibia to follow after UN administration made out the norm. But the case of Western Sahara is not yet at that stage. Or is it? There is seemingly the problem of forum - a court in which to seek civil remedies - and that of standing, the competency of the person or party to bring a case against a corporate actor. Along the way it should be recalled that the remedies to be had are more than restitutionary. Given a continuing problem they might usefully include the enjoining of trade in the resources or at least the seizing of them when exported through appropriate national jurisdictions. The apparent ease of obtaining civil remedies coupled with the urgency of arresting the trade in the territory's resources suggests that corporate actors be pursued civilly in preference to criminal action, at least in the short term. Again, however, civil remedies and compensation turn on the issues of a court to accept jurisdiction and a party having the requisite standing.

The basis for civil compensations flows out of the taking (conversion as it is referred to in common law systems) of the territory's resources, in deprivation to the Saharawi people who exclusively have permanent sovereignty over those resources. The obligation *erga omnes* on states to refrain from such taking (and the corollary of paying reparations in such circumstances) extends to corporate actors. The civil law analogs are helpful. For example, Article 816 of the German Civil Code provides that "[i]f an unauthorised person disposes of an object and the decision is effective against the authorised person, then he is obliged to make restitution to the authorised person of what he gains by the disposal ... If performance is rendered to an unauthorised person that is effective in relation to the authorised person, then the unauthorised person is under a duty to make restitution of the performance."<sup>85</sup> The French Civil Code, in quasi-contract, requires: "Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû s'oblige à le restituer à celui de qui il l'a indûment reçu."<sup>86</sup>

Two defences appear to be available to corporate actors in compensatory and injunctive proceedings over the export trade of Western Sahara's resources. Both are readily overcome. First, it might be said that the taking (or knowing receipt) of natural resources is a commercial activity taking place under colour of right by Morocco as an administering state, that is, a party competent to transfer rights to the resource in question. It is the fact of Morocco's adverse possession of the resource, together with a demonstration of the law of permanent sovereignty over the resource for the Saharawi as a non-self-governing people and, critically, their continuing protest of the taking which rebuts this. The status of the territory and its people is sufficiently clear – and well known – that there can be no credible

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<sup>85</sup> *Civil Code* (version promulgated 2 January 2002) (Federal Law Gazette [*Bundesgesetzblatt*] I p. 42, 2909; 2003 I p. 738), last amended by the statute of 28 September 2009 (Federal Law Gazette, p. 3161) online: <[www.gesetze-im-internet.de](http://www.gesetze-im-internet.de)> (accessed 21 July 2011). And see Article 818: "(1) The duty to make restitution extends to emoluments taken as well as to whatever the receiver acquires by reason of a right acquired or in compensation for destruction, damage or deprivation of the object obtained. (2) If restitution is not possible due to the quality of the benefit obtained, or if the receiver is for another reason unable to make restitution, then he must compensate for its value."

<sup>86</sup> Article 1376 *Code civil*, online: <[www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)> (accessed 21 July 2011). For a comparative survey see Ernst von Caemmerer and Peter Schlechtriem, eds, *International Encyclopedia of Comparative Law*, Vol. X (Hotei Publishing: Leiden, 2007) at 8-1.

assertion the permitted export of resource commodities by an occupier is in any way within the law. Again, the entirety of the elements to satisfy a legitimate or legal taking, within both branches of the Corell test and more stringently under international criminal law are impossible to satisfy. A second defence is to demonstrate that the Saharawi people have not suffered a loss from the taking of their natural resources. This is the second branch of the Corell test and it would be defeated in showing that, as in the present case of the *Fisheries Partnership Agreement*, the benefits from the trade do not accrue to the Saharawi people themselves. It would not be enough for a corporate actor to offer evidence, assuming it could be reliably adduced, that the present inhabitants of Western Sahara realize the benefit of corporate activity in the occupied territory. The law is clear that the introduced settlers or inhabitants of a territory under occupation (or to undergo self-determination) do not qualify as part of the people enjoying the right of sovereignty and so the *usufruct* of resources from that territory. (Indeed, to the extent that they do, the violation of the law is further established.) It must be the Saharawi people who are shown to have benefitted from a trade in natural resources. For the past 35 years and into the foreseeable future, that will prove impossible.

In the absence of action by the organized international community to ensure for the Saharawi people compensation from the loss of their natural resources, whether by the United Nations or states acting *obligatio erga omnes* to espouse a Saharawi claim before national courts - and it is doubtful that most national legal systems would accept the latter as a basis for *jus standi* - it falls to the government of the SADR to pursue civil claims for corporate compensation. In states that recognize the Saharawi Republic, the task should be straightforward, provided domestic law does not exclude a corporate actor as having insufficient connection to the particular jurisdiction. It might be useful if the SADR had legislation to ground the basis of civil claims to be made in other states where corporate actors are to be found or Saharawi resources come to be exported. Such legislation would have obvious utility after the Saharawi Republic completes its independence. For the present and in general terms the government of the Republic has the competence to pursue civil action in those states that recognize the SADR. Suitable states with accessible commercial courts include Panama and South Africa. The imperative to take action in the short term is entirely that of government of the Saharawi Republic, as no single Saharawi citizen nor any non-governmental actor seemingly has standing in a court of competent jurisdiction.<sup>87</sup> When the Saharawi state achieves its entire independence, including its acceptance by recognition and membership in the United Nations, such standing will be presumed in states where a right of action exists, namely where national jurisdiction applies as a matter of citizenship (or residence or territorial nexus) of corporate actors or where Saharan natural resources (or revenues realized from them) are found.<sup>88</sup>

Two recent Canadian cases demonstrate the difficulties in seeking civil remedies for the taking of Saharawi resources. In the first, *Bil'in (Village Council) v Green Park International Ltd.*, the Quebec Superior Court declined jurisdiction over a company headquartered in that province.<sup>89</sup> Palestinian

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<sup>87</sup> The case of *Horta and others v The Commonwealth of Australia*, [1994] HCA 32 is recalled. The High Court of Australia had no concern with three foreign citizens, including José Ramos-Horta, bringing an action to set aside domestic legislation enabling the 1989 Australia-Indonesia *Timor Gap Treaty*. The case was rejected on the basis of legislative discretion in the exercise of foreign affairs, non-justiciable under Australia's constitution.

<sup>88</sup> The present Constitution of the Saharawi Republic provides a basis for criminal and civil action in the taking of natural resources, at Articles 14 (state sovereignty) and 17 (public ownership of natural resources). No specific legislation enjoining the unauthorized removal of natural resources from the Republic's territory has been enacted. See *Constitution de la RASD* (1999, as amended 2003), online: <[www.arso.org/03-const.99.htm](http://www.arso.org/03-const.99.htm)>.

<sup>89</sup> 2009 QCCS 4151, [2009] RJQ 2579.



villagers had pursued an action against the Canadian company for constructing Israeli settlements in the West Bank. The basis for the action was unique and specific to civil code jurisdictions, especially Quebec. The villagers claimed that the construction had enabled or resulted in settlement of Israeli citizens onto their lands, contrary to Article 49(6) of the *Fourth Geneva Convention* which prohibits an occupying state from transferring its population into an occupied area. The villagers of Bil'in relied on section 1457 of the Civil Code of Quebec to assert a tort claim for corporate assistance in the taking of their land: "Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another."<sup>90</sup> The Court accepted such a basis for liability, declaring:

A war crime is an indictable offence. As such, it is an imperative rule of conduct that implicitly circumscribes an elementary norm of prudence, the violation of which constitutes a civil fault pursuant to art. 1457 C.C.Q.

In theory, a person would therefore commit a civil fault pursuant to art. 1457 C.C.Q. by knowingly participating in a foreign country in the unlawful transfer by an occupying power of a portion of its own civilian population into the territory it occupies, in violation of an international instrument which the occupying power has ratified. Such a person would thus be knowingly assisting the occupying power in the violation of the latter's obligations and would also become a party to a war crime, thereby violating an elementary norm of prudence.<sup>91</sup>

However, the action was denied on the basis of *forum conveniens*. The Court reasoned that, notwithstanding the lack of application of international humanitarian law in Israeli courts, the closer connection to the alleged wrong and so more appropriate jurisdiction was Israel.<sup>92</sup> In August 2010 the Quebec Court of Appeal upheld the decision: "[T]he fact remains that the dispute pits citizens of the West Bank against corporations carrying out work in the West Bank in compliance with the law applicable in the West Bank. It requires a great deal of imagination to claim that the action has a serious connection with Quebec."<sup>93</sup>

On 27 April 2011 the Quebec Superior Court allowed a class action in the case of *Canadian Association Against Impunity v Anvil Mining Ltd.*<sup>94</sup> Like that of *Bil'in v Green Park International*, the tort action was brought in the province as a commercial location (although not the corporate seat) of Anvil Mining. It is alleged the company assisted in the commission of war crimes in The Democratic Republic of the Congo in 2002 by providing vehicles for government forces to retake the town of Kilwa in eastern Congo where a mass killing of civilians subsequently took place. In applying the Quebec Civil Code and Canada's *forum conveniens* caselaw, the Court noted it was impossible to determine if The Congo or

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<sup>90</sup> RSQ, c C-25.

<sup>91</sup> *Supra* note 89 at paras 175-76.

<sup>92</sup> See James Yap, "*Bil'in and Yassin v Green Park International Ltd.*: Quebec Court Acknowledges War Crimes as Potential Basis for Civil Liability, Claim Ultimately Fails on Forum Non Conveniens," The Court (October 14, 2009), online: <[www.thecourt.ca](http://www.thecourt.ca)>.

<sup>93</sup> 2010 QCCA 1455 at para 86, 32 DLR (4th) 232. The Supreme Court of Canada denied leave to appeal on March 3, 2011.

<sup>94</sup> 2011 QCCS 1966.

Australia (the corporate seat of the company) would be clearly more appropriate for the litigation. “[A]ll indications are that if the court were to reject the action . . . there would exist no other possibility of the victims obtaining civil justice.”<sup>95</sup>

Any policy of the Saharawi Republic to pursue civil action should have the short term goal of enjoining the export trade in natural resources, for example by injunction in the few available common law jurisdictions where such relief is available. Most African and Latin American states where such proceedings might be pursued because of governmental recognition of the SADR have neither corporate interests involved with Western Sahara and are not places of residence for corporate actors. The exclusive European ownership, registration and operation of vessels permitted to fish in Saharan waters under the *Fisheries Partnership Agreement* exemplify the lack of *fora* in which to pursue civil remedies.<sup>96</sup> In this context, if an immediate goal is to prevent the taking of Saharawi natural resources, leaving the matter of compensation for the future, the preferred means of interrupting the export trade could be criminal law. Its deterrent effect is stronger and its availability in a larger number of states - including those where the responsible corporate actors are to be found - less difficult to achieve.<sup>97</sup>

### **The criminal liability of corporate actors**

The basis to criminalize corporate taking of Saharawi resources is straightforward. What is remarkable is that there has not previously been a discussion of the possibilities for criminal prosecution given the scale and continuity of the appropriation of the resources. This owes as much to the political nature of the “question” of Western Sahara as it does the gradual development of national and international *fora* in which to pursue responsible individual Moroccans and foreign corporate actors. The case for criminalizing the corporate pillage of Western Sahara also turns substantially on invoking international humanitarian law, as will be discussed below.

One procedural advantage of criminal prosecution over civil claims is the ability of any person or organization to bring a complaint in a national jurisdiction suitable for such action. Suitable, of course, means a state with courts willing to engage the crime of pillage, generally through a combination of prosecutorial willingness (including any direction the state may give in such circumstances) and a sufficient connection to the corporate actor involved. Individual persons, the Saharawi Republic or the Frente POLISARIO, national governments, and the United Nations Security Council could initiate

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<sup>95</sup> *Ibid* at para 39 [Translation].

<sup>96</sup> There is a possible civil remedy for individual Saharawi for the taking of natural resources from Western Sahara under the United States Alien Tort Claims Act, 28 U.S.C. § 1350 (known also as the Alien Torts Statute.) The enabling language of ACTA is broad enough to permit a claim in human rights for such taking: “[T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” See generally George P. Fletcher, *Tort Liability for Human Rights Abuses* (Portland, OR: Hart Publishing, 2008). On the acceptance of a claim in pillage, see *Sarei v Rio Tinto*, 499 F 3d 923 (9th Cir 2007). On the liability of corporations see *Khulumani v Barclay National Bank*, 504 F 3d 254 (2d Cir 2007).

<sup>97</sup> In general there is no limitation deadline for state-to-state reparations claims, although the period of time available for the SADR to claim against other states for civil compensation will not be unlimited after independence. Conversely, see the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, UN GA Res 2391 (XVIII), UNGAOR, (1968) (entered into force 11 November 1970). Article 29 of the ICC Statute prescribes that genocide, crimes against humanity and war crimes “shall not be subject to any statute of limitations.” Consider the extension of limitations prescribed by the statute for the hybrid tribunal the Extraordinary Chambers in the Courts of Cambodia (ECCC).

proceedings. They could do so in a state with courts exercising universal jurisdiction or as a matter of national legislation adopting the ICC *Rome Statute*. They might also do so by complaint to the ICC where it has jurisdiction over the citizens of member states of the Court, as the majority of individual corporate actors presently are. However, the case of East Timor (Timor-Leste) offers a cautionary lesson. The leaders of that country's government have been against the creation of a UN or hybrid tribunal for serious international crimes in Timor until 1999.<sup>98</sup> There has been almost no suggestion in Timorese civil society about pursuing civil claims against individuals or the government of the former occupying power, Indonesia. Without the SADR's clear support following a complete independence, internationally-based criminal proceedings should not be expected to result. Even when they do, a necessary priority will be the redress of the more serious, overt human rights violations.

Any policy of pursuing criminal action against corporate actors necessarily must account for the limited basis and precedent for civil compensation within such proceedings. The *Rome Statute* contains the most far-reaching provisions for compensation to be had from a convicted individual. Compensation for pillage in the few instances where it has been required had a goal of restoring individual victims their losses. Payment by a wrongdoer to the Saharawi people through the government of the SADR, except in cases where an identifiable offender has individually profited from acts of pillage, is unlikely.<sup>99</sup> Civil compensation for the large-scale taking of a public resource, therefore, should be pursued exclusively as such.

With these considerations in mind, the basis to establish the criminal liability of corporate actors can be assessed. Two forms of liability exist. There is the direct participation in the taking of a Saharawi natural resource. There is also the assistance, in other words, the aiding and abetting of others in the taking of Saharawi natural resources or a joint criminal enterprise to the same end. A third species of liability in national legal systems – the knowing receipt of stolen property – is available in most countries. The continuing presence of European flag commercial fishing vessels in Saharan waters is an example of direct participation in pillage, a physical taking by the corporate actor involved. The Boucraa phosphate export trade by numerous corporate actors illustrates the second form of liability.

The criteria to establish the crime of pillage for assisting, that is, being a corporate party in the export trade of Saharan phosphates fit squarely with the ICC Elements of the crime of pillage. The specific criteria to establish the crime are: (i) the continuing armed conflict and occupation of Western Sahara (including the ostensible fact of the sand wall to protect the Boucraa mine site from attack); (ii) the presence of a phosphate as a discrete within the territorial confines of Western Sahara; (iii) the sovereignty over the resource vested in the Saharawi people as the original inhabitants of Western Sahara; (iv) the taking of the resource, *i.e.* its export trade, and finally; (v) the continuing protest by the legitimate, recognized representative of the Saharawi people, the Frente POLISARIO (acting as the

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<sup>98</sup> Consider the remarks of José Ramos-Horta at the Massachusetts Institute of Technology, September 29, 2009: "Chasing the ghost of the past will lead us nowhere. I am happy to endure criticisms from the ultra-patriots of international justice who want to make East Timor a guinea pig of international justice. I will not be part of that."

<sup>99</sup> *Rome Statute*, *supra* note 52 at Article 75 "Reparations to Individuals." Restitution from a finding of pillage was considered in the *Krupp* war crimes case, *supra* note 61, under Article II(3) of Allied Control Council Law No. 10 ("restitution of property wrongfully acquired"). See Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Leiden: Martinus Nijhoff, 2010).

government of the Saharawi Arab Democratic Republic) over the fact of the taking. Each can be considered in turn.

That Morocco continues to occupy the greater part of Western Sahara is evident. International humanitarian law, within which the crime of pillage is defined, offers no distinction between armed conflict of an international character and that which only indirectly affects the international community (*i.e.* “armed conflict not of an international character”) demonstrated by Rwanda and the former Yugoslavia and most recently in Libya. More recent ICC cases from Kenya and the Democratic Republic of the Congo as well as the ICJ’s *Palestine Wall* opinion establish that, in the case of Western Sahara, this requirement is met. As noted earlier, the *Fourth Geneva Convention* provides for protection against pillage after cessation of actual hostilities during the period a state or territory remains under occupation.<sup>100</sup>

The phosphate resource is itself located in a relatively discrete area, within the territorial confines of Western Sahara. No other state pretends to claim it. Indeed, no state recognizes within law Morocco’s occupation and possession of the territory. The discrete nature of the resource and therefore the property rights of the Saharawi people to it is straightforward, an uncontroversial requirement, especially in light of a clear legal finding of the status of the territory in the ICJ’s 1975 advisory opinion.<sup>101</sup>

The Saharawi people’s permanent sovereignty over the Bou Craa mine and reserves of phosphate is also evident. The sovereignty is rooted in customary international law and notably as part of the unequivocal right to self-determination for non-self-governing peoples. Morocco’s development and trade in phosphate is an acknowledged fact. No further evidence is necessary to make out the circumstances of the taking. The continuing protest and assertion of rights to the resource by the Saharawi people’s representatives are important parts of such sovereignty. A recent statement is typical:

The Frente POLISARIO reserves the right to pursue, on behalf of the people of Western Sahara, all legal avenues to ensure the protection of their permanent sovereignty and sovereign rights with respect to the territorial and offshore resources of Western Sahara, and to seek redress for the illegal exploitation that has occurred thus far.<sup>102 103</sup>

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<sup>100</sup> *Fourth Geneva Convention*, *supra* note 40 at Article 6.

<sup>101</sup> See notably Karim A.A. Khan et al, eds, *Principles of Evidence in International Criminal Justice* (Oxford: Oxford University Press, 2010).

<sup>102</sup> Letter of 1 March 2010 (on file with the author). See also “Statement by Mr. Ahmed Boukhari, ‘Memorandum by the Frente Polisario on Western Sahara Peace Process’ at the Caribbean regional seminar on the implementation of the Second International Decade for the Eradication of Colonialism”, May 2009, UN Doc CRS/2009/CRP.15 at 7. “The people of Western Sahara have a permanent right of sovereignty over the natural resources of the territory. Taking into account UN relevant resolutions and principles of international law regarding Non-self-governing territories, any activity of exploitation, commercialization and trade affecting the natural resources engaged by Morocco are illegal ...”

<sup>103</sup> “It can be fairly said that under international law a breach of the obligations of an occupying State with respect to natural resources in occupied territories involves a duty to make reparation ... The obligation to make reparation is reinforced by that element of the principle of permanent sovereignty calling for restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources of territories and peoples under foreign occupation.” *Sovereignty over natural resources*, *supra* note 24 at 269.

In the export phosphate trade corporate actors may be liable within one or both of the forms of *indirect* criminal liability identified above, namely, contributing to - aiding and abetting - Morocco's taking of the resource and receiving stolen property. Establishing the necessary intent or *mens rea* to determine that liability requires demonstrating that corporate actors know the resource is illegally obtained, that is, extracted by Morocco in the circumstances of a conflict and during occupation, in violation of the prohibition against pillage. Article 25(3)(c) of the *Rome Statute* guides the analysis:

[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.<sup>104</sup>

Underscoring the liability of corporate actors in the phosphate export trade is the formality of their purchase contracts with the Moroccan state (that is, the OCP) and the enrichment of those actors from such trade. Central to this, to emphasize the intent that must be made out for a conviction to result, is the knowledge that phosphate rock is illegally produced and offered for export sale. The contributing actor mode of responsibility has been defined extensively in the Nuremburg IMT, ICTR and ICTY cases. A description of the elements necessary to make out liability for aiding and abetting a war crime was given in 2003 by the ICTY Trial Chamber in *Prosecutor v Simic, Tadic and Zaric*:

Aiding and abetting may be defined as all acts directed at assisting, encouraging, or lending moral support to, the perpetration of a certain specific offence, and which have a substantial effect on the perpetration of the offence. The acts of the principal(s), which the accused is alleged to have aided and abetted, must be established. [...]

The acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime. The *actus reus* of aiding and abetting may be perpetrated through an omission, based on a duty to act, provided that the failure to act had a substantial effect on the commission of the crime and that it was coupled with the requisite *mens rea*. No proof of a plan or agreement is required. There is no requirement that the act of assistance caused the crime of the principal in the sense that it was a *conditio sine qua non* for the principal's acts. Participation may occur before, during or after the act is committed and be geographically separated therefrom.<sup>105</sup> [Footnotes omitted.]

The ICTY's understanding of the elements needed to establish liability for assisting an occupying power's pillage of a natural resource was discussed in its April 2011 *Gotovina* decision:

Liability may be incurred by assisting, encouraging or lending moral support to the

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<sup>104</sup> *Rome Statute*, *supra* note 52.

<sup>105</sup> The Trial Chamber added: "Further, the aider and abettor must have been aware of the essential elements of the crime ultimately committed by the principal, including his *mens rea*." *Prosecutor v Blagoje Simic*, IT-95-9-T (17 October 2003) at paras 161-62 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: <[www.icty.org](http://www.icty.org)> (accessed 21 June 2011). See also the ICTR decision in *Prosecutor v Furundzija*, IT-95-17/1-T (10 December 1998) (International Criminal Tribunal for Rwanda), online: <[www.unictcr.org](http://www.unictcr.org)>.

commission of a crime. Aiding and abetting by omission requires that the accused had the means to fulfil his or her duty to act. Aiding and abetting may occur before, during, or after the commission of the principal crime. The aider and abettor must have knowledge that his or her acts or omissions assist in the commission of the crime of the principal perpetrator. **The aider and abettor must also be aware of the principal perpetrator's criminal acts, although not their legal characterization, and his or her criminal state of mind** ... The aider and abettor does not, however, need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed.<sup>106</sup> [Emphasis added. Footnotes omitted.]

On this basis, it may be preferable to ground liability not in the knowledge of natural resources being traded contrary to the sovereign rights of the Saharawi people but on the more notorious and indisputable fact of the removal of the resources in circumstances of an illegal and continuing armed occupation. Acts of supporting or assisting the taking of Saharawi phosphate need not be proved as taking place at the site of pillage. It is also not necessary to prove that a corporate actor received a benefit from such assistance, that is, traded in phosphate for profit. Moreover, the aiding and abetting form of liability, in distinction to a "joint criminal enterprise" mode of liability, does not require a *mens rea* by the corporate actor commensurate with that of the original perpetrator, Morocco. It is sufficient to demonstrate a corporate actor knew that his or her support would be material, that it would assist in the commission of the crime. But for removing purchasing phosphate and contracting for its removal from occupied Western Sahara the underlying crime of pillage cannot occur. The test of aiding a criminal act provided in Germany's Criminal Code offers a comparison: "Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider."<sup>107</sup> Here, ICTY Trial Chamber's reasoning in *Prosecutor v Kunarec* should be recalled, that it is enough to establish that a perpetrator made "the conscious decision to act in the knowledge that he thereby supports the commission of the crime."<sup>108</sup>

What then of the prospect to establish a joint criminal enterprise between individual corporate actors and Morocco when it comes to the export of phosphate? The test of liability might be framed as establishing a common effort or continuing assistance to such an extent that there has been more than incidental assistance to Morocco in the taking of the resource. Answering this turns in part on examining Phosboucraa's long term contracts with foreign corporations purchasing the phosphate. The *Rome Statute* definition of joint criminal enterprise is helpful:

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<sup>106</sup> *Supra* note 52 at para 1960. See also *Prosecutor v Perisic*, IT-04-81-T (6 September 2011) at 33-36, (International Criminal Tribunal for the former Yugoslavia), online at: <www.icty.org> (accessed 9 September 2011).

<sup>107</sup> *Strafgesetzbuches*, General Part, Chapter One, Title 3, section 28. For an example of a national prosecution of an individual who contributed to war crimes, see the *Van Anraat* case in The Netherlands Court of Appeal, The Hague, 9 May 2007, LJN BA4676 (affirming a conviction for knowingly aiding and abetting war crimes).

<sup>108</sup> *Prosecutor v Dragoljub Kunarac*, IT-96-23-T (22 February 2001) at para 392 (International Criminal Tribunal for the former Yugoslavia), [translation by the author]. See also Gideon Boas et al, ed, *Forms of Responsibility in International Criminal Law* (New York, New York: Cambridge University Press, 2007).

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [...]

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime[.]<sup>109</sup>

It is *mens rea* that is important. Showing that a corporate actor meant to “further criminal activity” or had “knowledge that a group of which it is a member intended to commit pillage” is necessary. It is enough for intent to be evidenced as one of knowing participation generally in a criminal venture that “furthers” the criminal purpose of the group or specifically toward the commission of a predicate crime under jurisdiction of the ICC or a competent national court. Although concern has been expressed about the legality of an overly broad framing of common purpose intent contrary to the principle of *nullem crimen sine lege*, the ICTY decisions suggest this mode of criminal liability can be adequately structured.<sup>110</sup> *Gotovina* held the elements of JCE liability to include a “plurality of persons” with “a common objective which amounts to or involves the commission of a crime provided for” under law:<sup>111</sup>

In relation to the first two elements of JCE liability, it is the common objective that begins to transform a plurality of persons into a group, or enterprise, because what this plurality then has in common is the particular objective. It is evident, however, that a common objective alone is not always sufficient to determine a group, because different and independent groups may happen to share identical objectives. It is thus the interaction or cooperation among persons - their joint action - in addition to their common objective, that forges a group out of a mere plurality. In other words, the persons in a criminal enterprise must be shown to act together, or in concert with each other, in the implementation of a common objective, if they are to share responsibility for crimes committed through the JCE.<sup>112</sup> [Footnotes omitted.]

The crime in question is pillage. To the extent that a corporate actor enters into a contractual arrangement which has the effect of enabling or materially resulting in the export removal of phosphate to its benefit and Morocco’s, a “joint action” at the operative level of common purpose is established sufficient to ground liability. JCE liability requires a nuanced assessment because of the nature of intent

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<sup>109</sup> *Rome Statute*, *supra* note 52 at Article 25(3)(d).

<sup>110</sup> *Prosecutor v Vidoje Blagojevic*, IT-02-60-T, (17 January 2005) (International Criminal Tribunal for the former Yugoslavia), online: <[www.icty.org](http://www.icty.org)> (accessed 6 November 2010). See also Antonio Cassese, “The Proper Limits of Criminal Liability Under the Doctrine of Joint Criminal Enterprise” (2007) 5 *JICJ* 109 at 114.

<sup>111</sup> *Supra* note 52 at paras 1948 ff.

<sup>112</sup> *Ibid* at para 1954.

to be established. Corporate actors who receive phosphate from Bou Craa might claim in their defence that the trade is legal because of the uncertain or ostensibly permissible (*i.e. de facto*) nature of Morocco's administration of Western Sahara as a matter of international humanitarian law. The case to establish a JCE is more evident when it comes to European and Russian corporate actors involved in the Saharan fishery, and European Commission and Russian officials directly responsible for their respective fisheries treaties with Morocco.<sup>113</sup>

At this stage, two important qualifications on the nature of corporate actors should be noted. The first is that international criminal law as applied by the existing tribunals - the ICC, the ICTY, the ICTR and hybrid courts - operate only at the level of the individual. National criminal law systems, whether through *Rome Statute* measures implemented nationally or universal jurisdiction or domestic legislation, are the only *fora* available for criminal prosecution of corporations in the particular form of a company. Virtually all of the international criminal caselaw has been concerned with individuals responsible for corporate participation in looting.

A second qualification is the allowable extent of remoteness for the involvement and decisions of corporate actors to allow their companies to participate in the export phosphate trade. A class of outlying actors at arm's length, including consultants, non-employee advisors, officers of lending and finance institutions, domestic state regulators and shareholders of the offending corporation are too far removed from decision-making and the direction of phosphate trading companies to attract liability. Boards of directors consciously or overtly deciding to continue trading in the natural resources of an occupied territory, if doing so with uncertain knowledge of the territory's status and the expression of its people that they neither consent to nor benefit from such trade, are less remote from the contributing forms of liability for pillage described above. A bringing-home of liability to them means making the circumstances of the occupation of Western Sahara and Morocco's direct pillage of its resources constantly obvious, that is, unavoidably known. Two categories of corporate employees have obvious liability, namely, those making decisions to directly undertake and continue the trade in Saharawi phosphate, and those who directly manage the trade for their companies. To illustrate, as a matter of the direct taking of the Saharan fishery by EU member state vessels, the categories of responsible corporate actors include, respectively, managing directors and executives of the vessel operating companies, and the masters of individual vessels. Because of the difficulty in establishing the requisite intent to assist or participate in the crime of pillage, the same liability likely cannot be established for managers of vessel owning companies engaged in the ocean transport of phosphate from the territory.

Whatever the form of liability ascribed to corporate actors in the phosphate trade, the basis for it in national courts should be complementary both customary international law and the statutory (*i.e.* treaty) basis under which the International Criminal Court operates. That is because member states of the ICC are required to adopt "national implementing measures" to ensure the required

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<sup>113</sup> The EU Parliament Legal Service admitted the fishery is illegal. See Memorandum, "Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco - Declaration by the Saharawi Arab Democratic Republic (SADR) of 21 January 2009 of jurisdiction over an Exclusive Economic Zone of 200 nautical miles off the Western Sahara - Catches taken by EU-flagged vessels fishing in the waters off the Western Sahara" (13 July 2009), online: <[www.fishelsewhere.eu](http://www.fishelsewhere.eu)> (accessed 28 July 2011). The Memorandum follows a 2006 analysis of prospective legality for fishing in Saharan waters. The EU Parliament Legal Service did not consider international humanitarian-criminal law in its opinion.



complementarity.<sup>114</sup> But among the 116 member states of the Court a “universal complementarity” has not been achieved. Many states have yet to enact legislation in parallel to the nominate crimes of the *Rome Statute*.<sup>115</sup> And differing legal traditions and evidentiary requirements may expand or limit the grounds for the liability of corporate actors involved in the export phosphate trade. Several western states offer a comparative example.<sup>116</sup> Canada’s *Crimes Against Humanity and War Crimes Act* domestically implements the *Rome Statute*, declaring its predicate crimes to be customary international crimes after 17 July 1998. Section 9(3) of Canada’s Act requires approval by the country’s Attorney General or Deputy Attorney General to prosecute pillage as a “property related crime”.<sup>117</sup> Australia’s Commonwealth government has enacted specific legislation, the *International Criminal Court Act*, for operation of the ICC in Australia and enforcement of ICC judgments.<sup>118</sup> Australia’s substantive international criminal legislation is found in the *Criminal Code Act* where “appropriation of property” as a war crime, punishable by up to 15 years imprisonment, is in part a strict liability offence for property “protected under one or more of the Geneva Conventions ...”<sup>119</sup> The crime of pillage is specifically provided for in Australia’s Act almost identically to Article 8(2)(b)(xvi) of the ICC Elements of Crimes, above:

#### 268.54 War crime—pillaging

A person (the *perpetrator*) commits an offence if:

- (a) the perpetrator appropriates certain property; and
- (b) the perpetrator intends to deprive the owner of the property and to appropriate it for private or personal use; and
- (c) the appropriation is without the consent of the owner; and
- (d) the perpetrator’s conduct takes place in the context of, and is associated with, an international armed conflict.<sup>120</sup>

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<sup>114</sup> *Rome Statute*, *supra* note 52 at Articles 1 and 17. “The Court is a court of last resort. As such the Rome Statute system of international criminal justice relies heavily on actions and activities at the national level. Under the Rome Statute, the Court will only step in when national authorities are unable or unwilling to investigate and prosecute massive atrocities. The principle of complementarity is integral to the functioning of the Rome Statute system and its long term efficacy.” *Stocktaking of International Justice: Complementarity*, ICCOR, ASP/8/Res.9/Annex IV (2010), online: <[www.icc-cpi.int](http://www.icc-cpi.int)> (accessed 24 July 2011).

<sup>115</sup> The Coalition for the International Criminal Court reports that 65 states have enacted domestic legislation to complement the *Rome Statute*. See online: <[www.iccnw.org](http://www.iccnw.org)> (accessed 24 July 2011).

<sup>116</sup> 18 U.S.C., § 2441 [*US War Crimes Act*]. Although not a member State of the ICC, the United States has legislated for international criminal law and for direct civil redress from human rights breaches through the Alien Tort Claims Act. “The U.S. War Crimes Act exemplifies a trend amongst several domestic lawmakers toward criminalizing pillage by simply cross-referencing pertinent treaty provisions within a criminal statute.” *Corporate War Crimes*, *supra* note 51 at 13.

<sup>117</sup> SC 2000, c C-45.9 (entered into force 23 October 2000), online: <<http://laws-lois.justice.gc.ca>> (accessed 22 July 2011).

<sup>118</sup> Law No 41 of 2002 (entered into force 26 September 2002), online: <[www.comlaw.gov.au](http://www.comlaw.gov.au)> (accessed 26 April 2011). See especially Gideon Boas, “An Overview of Implementation by Australia of the Statute of the International Criminal Court” (2004) 2 JICJ 179.

<sup>119</sup> Act No 12 of 1995 (as amended), Division 268.29 “War crime – destruction and appropriation of property,” online: <[www.comlaw.gov.au](http://www.comlaw.gov.au)>. See notably Joanna Kyriakakis, “Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code” (2007) 5 JICJ 809.

<sup>120</sup> *Ibid* at Division 268.54. The prescribed punishment is, again, a maximum of 15 years incarceration.

None of the national criteria mirroring the Rome Statute formulation of pillage contain an insuperable defence for corporate participation in the taking of phosphate from occupied Western Sahara. The directness of corporate involvement in this export trade is obvious. The intent to deprive here operates in concert through a chain of possession that originates with Phosboucraa. It is only the last of these criteria, establishing the existence of an international armed conflict, that presents a challenge. As with Canada's Act, the Australian *Criminal Code* does not define what constitutes an international armed conflict.<sup>121</sup> The Netherlands *International Crimes Act* offers a civil code comparative of the national enactment of crimes under the *Rome Statute*.<sup>122</sup> It virtually adopts the *Hague Convention* definition, criminalizing the pillage of "a town or place, even when taken by assault" when occurring in both international and non-international conflicts.<sup>123</sup> Common to all legislated definitions of the crime is the requirement to demonstrate a taking, that is, the appropriation of public or private property. Professor James Stewart categorizes "direct appropriation" in three ways: (i) through collaboration "with a warring army"; (ii) by "authorization of a warring army"; and (iii) "overharvesting of an otherwise legitimate concession".<sup>124</sup> The first two fit with the circumstances of Morocco's occupation of Western Sahara. In the case of phosphate purchased from Phosboucraa/OCP, "the purchase of 'appropriated' natural resources falls within the meaning of pillage, irrespective of whether corporate actors participated in the initial extraction of the resources."<sup>125</sup>

While there have been no recent prosecutions of pillage in Canada, Australia and The Netherlands each has seen criminal investigation of corporate assistance in the commission of general war crimes. (The ICC's second trial, which began 24 November 2009, includes allegations of pillage of private property in the Democratic Republic of the Congo.<sup>126</sup>) An investigation by the Australian Federal Police into the activities of Anvil Mining Limited, a Canadian company operating in The Congo in the civil case discussed was ended in 2007 at the direction of the Australian Minister of Foreign Affairs.<sup>127</sup> That was the reason for the case being brought in Canada as a civil action.<sup>128</sup> Another case is

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<sup>121</sup> The ICJ's reasoning in its *Palestine Wall* advisory opinion on defining the existence of an international conflict is recalled. See *supra* note 27 at paras. 86 ff. Common Article 2 of the four *Geneva Conventions* is also of assistance in the application of the last of the Australian criteria: "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." That Western Sahara is involved in or is the subject of an international conflict is evident from its continuing occupation, the ICJ's 1975 advisory opinion, the terms of the 1991 Frente POLISARIO-Morocco ceasefire, together with the UN's engagement of self-determination for the people of the territory. In common law criminal systems, judicial notice of such facts is all but assured. See also the discussion of judicial notice in *Portugal v Australia*, *supra* note 27 at 152 (Weeramantry dissent).

<sup>122</sup> *Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act)* (in force 1 October 2003), online: <[www.nottingham.ac.uk](http://www.nottingham.ac.uk)> (accessed 20 July 2011).

<sup>123</sup> *Ibid* Sections 5(5)(q) and 6(3)(e), respectively.

<sup>124</sup> *Corporate War Crimes*, *supra* note 51 at 34.

<sup>125</sup> *Ibid* at 37.

<sup>126</sup> *Prosecutor v Katanga and Chui*, ICC 01/04-01/07, (11 July 2011), online: <[www.icc-cpi.int](http://www.icc-cpi.int)> (accessed 29 April 2011). On the stealing of cattle, see the trial transcript from April 21, 2011 at: <[www.icc-cpi.int](http://www.icc-cpi.int)>. The trial in *Lubanga*, ICC 01/04-01/06, a DRC case not including allegations of pillage, began earlier in 2009. No "corporate actors" have been named in any pending ICC case.

<sup>127</sup> Global Witness, Accountability & Rights in Development, "The Kilwa Appeal – A Travesty of Justice" (Afrique Libération) 5 May 2009, online: <[www.liberationafrique.org](http://www.liberationafrique.org)> (accessed 20 July 2011).

<sup>128</sup> Global Witness, "Congolese victims file class action against Canadian mining company" (8 November 2010), online: <[www.globalwitness.org](http://www.globalwitness.org)> (accessed 16 July 2011).

the long running Dutch criminal trial of Guus Van Kouwenhoven, currently on appeal, for employing militias and supplying arms to Charles Taylor during the Sierra Leone conflict.<sup>129</sup>

The crime of pillage is now well established, founded broadly on precedent that continues to develop and extend its definition and the creation of the ICC with a national complementarity scheme involving 116 states.<sup>130</sup> The application of the crime to corporate actors on the grounds of direct participation, aiding and abetting, and involvement in a joint criminal enterprise is no longer controversial. In the case of taking of natural resources from Western Sahara, it is the threshold issue of there being an international conflict which must be established for criminal liability to result. While consideration of that issue will be complex and a matter for prosecutorial and judicial discretion, the trend is that of a reduced *a priori* threshold to conclude the existence of a triggering international conflict. The May 2011 announcement by ICC Chief Prosecutor Luis Moreno-Ocampo that leaders in Libya's former government would face charges for crimes against humanity from the use of force against the country's civil population in the circumstances of a conflict arguably below the threshold of an event triggering international humanitarian law exemplifies the trend.<sup>131</sup> The facts of the taking of Saharan natural resources are themselves sufficiently clear. It suffices to show that pillage is taking place in circumstances of the continuing illegal occupation of territory. That such occupation is maintained by armed force, is contrary to expressed UN resolutions both directly and generally in the instance of non-self-governing peoples, and contrary to declarations of the legitimate representative organization of the Saharawi people can only emphasize that the threshold has been achieved. Effectively the connection of a corporate actor to a conflict, as in Western Sahara, in which international humanitarian law applies is tested by asking the question: "But for this conflict or continuing occupation would the corporate actor be assisting or trading in the resources of the territory at issue?"

### **Procedural issues: Engaging criminal jurisdiction for pillage**

Civil and criminal liability for the taking of Saharan natural resources does not exist in a vacuum, as a bare right under international law incapable of vindication. For the legal protection against the pillage to be valid, there must be a means to proceed against the corporate actors involved. As a matter of both civil and criminal responsibility the necessary grounds are well established and, under the *Rome Statute* and customary international criminal law, sufficient for widespread prosecution. There are effectively three procedural issues to be contended with. They are the triggering of international humanitarian law to engage the crime of pillage, the selection of a court of competent jurisdiction over corporate actors involved and the question of who is to prosecute the crime.

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<sup>129</sup> See the website of TRIAL, the Swiss association against impunity: <[www.trial-ch.org](http://www.trial-ch.org)> (accessed 15 July 2011).

<sup>130</sup> Tunisia and Grenada are the latest members of the ICC, Tunisia joining the Court on 22 June 2011.

<sup>131</sup> *Peace and Security in Africa*, SC Res 1970, UNSCOR,(2011) referred the international criminal legal question of question of Libya's internal conflict for assessment by the ICC prosecutor. The trend toward a lower threshold of invoking international conflict is not entirely made out by the case, in part because the UN Security Council was seized of the matter and in part from the ICC's positive duty under the Statute to accept a reference and consider allegations on their merits. See Marlise Simons, "International Court Prosecutor Seeks Warrant for Qaddafi", *The New York Times* (16 May 2011). On 27 June 2011 the ICC issued an arrest warrant against the Libyan leader. See: <[www.icc-cpi.int](http://www.icc-cpi.int)>

The existence of a conflict sufficient to engage international humanitarian and criminal law has until now been obscured by the “question” of Western Sahara exclusively as a matter of self-determination for which role of the United Nations is to be respected in order to arrive at a “just, lasting and mutually acceptable” solution. For those states that recognize the SADR, the fact of a continuing armed occupation of Saharawi territory is accepted. In states that have not extended recognition, there is the problem of international humanitarian law seemingly not applying by citing the normative view (prevalent among western states) of the conflict being only about self-determination. It is the facts of the occupation of Western Sahara which need renewed emphasis in order to establish that the pillage takes place within, and as a part of, an international armed conflict.<sup>132</sup> The task, in other words, is to remind the organized international community that there exists a conflict that has engaged international humanitarian and criminal law within which the most obvious, if not serious crime, is the large-scale taking of natural resources. The fact of Western Sahara’s occupation, declared as such by the United Nations, together with recent precedent (*e.g.* the current ICC docket, the April 2011 ICTY *Gotovina* judgment and the *Palestine Wall* advisory opinion) provide much of the answer.<sup>133</sup> It should be also recalled that Morocco is a state signatory to the *Fourth Geneva Convention*, thus assuming the obligation to prevent pillage in territory not its own. That Western Sahara is clearly not Morocco’s territory, recalling the ICJ’s conclusions in the *Western Sahara* advisory opinion, is evident by the organized international community’s universal rejection of recognition of the Kingdom’s occupation and claim to Western Sahara.<sup>134</sup>

It is premature to suggest that the principles underlying war crimes jurisdiction over individuals have reached a transnational uniformity or harmony. International humanitarian law has only recently begun to be recognized as customary, the ICJ declaring in 2004, for example, that “the provisions of the Hague Regulations have become part of customary law ...”<sup>135</sup> The exercise of jurisdiction by national courts, even in states with legislation adopting the requirements of the ICC Statute, will remain a matter

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<sup>132</sup> The 1990-91 UN sponsored ceasefire terms between the Frente POLISARIO and Morocco are recalled. “[T]he parties to the conflict in Western Sahara, Morocco and the Frente POLISARIO, undertake to end all acts of hostility and to abide scrupulously by the cease-fire to be declared by the Secretary-General of the United Nations ...” *Report of the Secretary-General on the situation concerning Western Sahara*, UNSGOR, UN Doc. S/21360, (1990) at para 11.

<sup>133</sup> Notwithstanding the work of tribunals such as the ICTR, war crimes cases for perpetrators found in western states are underway or have been recently completed. Germany’s first case of universal jurisdiction under its 2002 International Criminal Code was commenced in May 2009 for crimes against humanity and war crimes in eastern Congo. See Human Rights Watch, “Germany: Q&A on Trial of Two Rwandan Rebel Leaders” (2 May 2011), online: <[www.hrw.org](http://www.hrw.org)>. In Canada see *R v Munyaneza*, 2009 QCCS 2201, [2009] RJQ 1432 where the allegation of pillage was established. The Quebec Superior Court readily accepted the fact of an international armed conflict within international humanitarian law: “Il a été démontré, et il n'est pas contesté, qu'un conflit armé non-international a sévi au Rwanda entre le 1<sup>er</sup> avril et le 31 juillet 1994”, at para 148. See also the application as a matter of common Article 2 of the Geneva Conventions, discussed in the *Palestine Wall*, *supra* note 27 at para 92.

<sup>134</sup> Read together, the ICJ’s self-determination/occupation decisions (*Namibia*, *Western Sahara*, *East Timor*, *Palestine Wall* and *Kosovo*) arguably provide an entire answer to the application of international humanitarian law in Western Sahara.

<sup>135</sup> *Palestine Wall*, *supra* note 27 at para 89. See also para 101: “[T]he Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties.” Morocco and Spain were both parties to the *Convention* at the time of Morocco’s invasion and subsequent occupation of Western Sahara.

of local particularity. However, common strands are evident.<sup>136</sup> To assess the certainty of invoking jurisdiction over the pillage of natural resources from Western Sahara, the various principles for such competence must be recalled. When it comes to Western Sahara there is now a single international tribunal with the requisite competence: the ICC. The Court's jurisdiction is over individual persons on the basis of citizenship of an ICC member state or if their impugned acts have taken place within the territory of a member state. As such, the Court is not presently competent over corporate actors operating in Western Sahara unless they are nationals of one of the Court's member states (so excluding Moroccan and Saharawi citizens). The jurisdiction is obvious when it comes to EU citizens participating in the Saharan fishery under the 2007 *Fisheries Partnership Agreement*. It would not apply to Russian corporate actors as a matter of the 2010 Morocco-Russia fishing agreement because Russia is not a member state of the Court.

The jurisdiction of the ICC over corporate actors aiding and abetting Morocco's export of phosphate rock from the territory, including FMC Foret, SA (Spain), Incitec Pivot Limited (Australia), Lifosa AB (Lithuania) and Potash Corporation (Canada), is extensive.<sup>137</sup> Although the *Rome Statute* confers jurisdiction on the ICC equally (co-extensively) to that of national courts, the practical result has been that the Court will defer to national prosecutions. "In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely carry out the investigation or prosecution."<sup>138</sup> For practical reasons, then, it is necessary to prosecute corporate actors in the particular ICC member states in which they are to be found or through which their corporations trade.

The grounds for states to exercise jurisdiction over war crimes generally include territory (geographic scope or extent of jurisdiction), nationality of the offender ("active personality"), nationality of the victim ("passive personality"), protection of the state, treaty-based jurisdiction and universality. While these grounds to assert jurisdictional competence theoretically apply in the case of natural resources taken from Western Sahara, those of the nationality of the victim and protection of the prosecuting state are at best theoretical.<sup>139</sup> Each category of territorial, nationality of offender, treaty-based and universal jurisdiction can be considered briefly in turn.<sup>140</sup>

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<sup>136</sup> A more accurate assertion is that there is some concurrence on the principle of states exercising universal jurisdictional competence over specified crimes, including genocide, crimes against humanity and war crimes. However, the trend away from prosecuting piracy in many states, together with restrictions in national law in such jurisdictions (for example, Belgium in 2003 and Spain in 2010) obviates any uniformity.

<sup>137</sup> See "The Companies" at the website of Western Sahara Resource Watch: <www.wsrw.org>. Article 12(2)(a) of the *Rome Statute*, *supra* note 52 conferring the Court's jurisdiction over persons aboard vessels registered in member states applies to the trade and taking of natural resources from Western Sahara by ships.

<sup>138</sup> Statement of the ICC, see "Jurisdiction and Admissibility", online: <www.icc-cpi.int> And see "Situation in the Republic of Kenya" ICC Doc. 01/09 (31 March 2009) (Pre Trial Chamber II) at paras 51 ff., online: <www.icc-cpi.int>.

<sup>139</sup> "International law recognises that each state may exercise jurisdiction over crimes against its security and integrity or its vital economic interests. Most criminal codes contain rules embodying in the national idiom the substance of this principle, which is generally known as the *protective principle*." Ivan A. Shearer, *Starke's International Law*, 11th ed (Sydney: Butterworths, 1994) at 211 [emphasis in original].

<sup>140</sup> On state criminal jurisdictional competence see generally Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1998) at 301 and Malcolm N. Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003) [*International Law*].

Territorial criminal jurisdiction is the capacity of a state to exercise legal proceedings over offences taking place within its geographic area. As such, “all crimes committed (or alleged to have been committed) within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced . . . even where the offenders are foreign citizens.”<sup>141</sup> When the elements of the crime of pillage - a war crime having an extraterritorial basis in all states in which it might currently be prosecuted - are recalled it is not the direct taking of resources from Western Sahara that brings the crime within territorial jurisdiction, but the local direction of a corporate actor or the act of receiving (*i.e.* importing) pillaged resources into that state. So defined, this reduces the receipt or assistance in taking the resources to be participation in theft *simpliciter*. It is doubtful some states would willingly prosecute pillage if it were so characterized. States have a better recourse to the principles of nationality, treaty-based jurisdiction and universality to prosecute acts manifestly occurring outside their sovereign areas.

It is active nationality, the relationship of a corporate actor to the state proposed to have jurisdiction over pillage, which is the principal basis for the competency of national courts over corporate actors involved with Western Sahara. “The active nationality principle is generally conceded by international law to all states desiring to apply it.”<sup>142</sup> In common law states, the extra-territorial reach of criminal jurisdiction has evolved more slowly than civil code regimes, with an impetus for expansion in recent years resulting from national implementation of multilateral treaty obligations. Early examples include the 1929 and 1936 conventions for suppression of illicit drugs and counterfeiting.<sup>143</sup> More recent and universal treaties expanding personal jurisdiction include those for human smuggling and trafficking, child abduction, torture and enforced disappearances and the national complementarity requirements under the *Rome Statute*. In general, civil code states are more amenable to asserting (*i.e.* legislatively providing for) active personal jurisdiction.<sup>144</sup> Under this principle, extra-territorial jurisdiction extends to persons working directing EU flag vessels involved in the Saharan fishery. “[B]y virtue of article 91 of the 1982 Convention on the Law of the Sea, ships have the nationality of the state whose flag they fly.”<sup>145</sup> Corporate actors directing the taking of fish from Saharan waters would accordingly have a sufficient connection to national criminal jurisdiction.

A jurisdictional middle point between the criminal competency of a state over its citizens and that of states universally over all persons is what might be called treaty jurisdiction, referred to above. Expressed this way, the *Rome Statute* confers the obligation on member states to legislate locally in respect of genocide, crimes against humanity and war crimes. While this complementary jurisdiction extends to citizens and non-citizens alike, national implementation schemes (as well as prosecutorial discretion) have thus far confined it to perpetrators who are found (*i.e.* are present) in the state. That is so for current proceedings in Germany and is the result of recent changes to limit extra-territorial

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<sup>141</sup> *International Law*, *ibid* at 580.

<sup>142</sup> *Starke's International Law*, *supra* note 139 at 210 [footnote].

<sup>143</sup> Respectively, the *International Convention for the Suppression of Counterfeiting Currency*, 20 April 1929, UNTS 2623 (entered into force 22 February 1931) and the *Convention for the Suppression of the Illicit Traffic in Dangerous Drugs*, 26 June 1936, LNTS Vol 198 at 301 (entered into force 10 October 1947).

<sup>144</sup> A useful current reference is Redress/International Federation of Human Rights, “Extraterritorial jurisdiction in the European Union” (December 2010) online: <[www.fidh.org](http://www.fidh.org)>.

<sup>145</sup> *International Law*, *supra* note 140 at 589.

jurisdiction in Belgium (2003) and Spain (2010). The ICC's jurisdiction is not universal given the number of states yet to join the Court. Moreover, the intended scheme of complementarity is that national criminal courts are to eventually have competency over all persons committing *Rome Statute* crimes, and so implicitly are under an obligation to act only when persons are found within their territorial jurisdiction or where there exists another particular nexus.<sup>146</sup> In the case of Western Sahara, a substantial number of corporate actors are exposed to national complementary jurisdiction because of their citizenship (or residency) or the corporate presence of their companies.<sup>147</sup>

A final principle engaging state jurisdiction for the pillage of resources from Western Sahara is universal competency. Much has been made of the apparent right of states to exercise jurisdiction over all persons without relationship or connection to any particular state for the most serious of crimes, usually considered to include piracy, genocide, war crimes and crimes against humanity.<sup>148</sup> An example is the United Kingdom with "universal jurisdiction under the *Geneva Conventions Act 1957* (and other legislation) for a limited number of serious international crimes. It also has an obligation under international law to prosecute or extradite those suspected of war crimes or torture anywhere in the world."<sup>149</sup> In the singular case of the United Kingdom, the jurisdiction is not extended in isolation, but in part from a commitment under the *jus cogens* nature of an obligation to ensure the effectiveness of the *Geneva Conventions* scheme, a further example of treaty derived jurisdiction discussed above.

Two aspects of universal jurisdiction are notable when it comes to pillage of resources in Western Sahara. The first is the increasingly widespread treaty regime established by the *Rome Statute*. Arguably, the positive obligation upon member states to enact national complementary legislation effectively displaces a non-treaty assumption of universal jurisdiction. The limits of this are exemplified by states not yet members of the ICC including the United States' particular national legislation, the 1996 War Crimes Act, as well as member states that have yet to enact *Rome Statute* implementing legislation and, finally, states such as Belgium and Spain which exercise particular forms of the

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<sup>146</sup> Consider the complementarity-jurisdiction scheme at Article 17 of the *Rome Statute*, *supra* note 52. ICC member states have broad flexibility to define *Rome Statute* crimes in national legislation and to act. The initial assumption of jurisdiction cases in the ICC support this. See Markus Benzinger, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Criminal Sovereignty and the First against Impunity" (2003) *Max Planck Yearbook of United Nations Law* 7 at 591.

<sup>147</sup> In this assessment of jurisdictional principles it is again noted that the ICC itself can exercise a jurisdiction directly over corporate actors who are nationals of member states of the Court.

<sup>148</sup> "Universal jurisdiction today is justified more on the basis of the severity of the crime and the undesirable consequences of impunity. Under this theory, states exercising universal jurisdiction are agents of the international community enforcing obligations that are universally accepted." Beth Van Schaack and Ronald C. Slye, *International Criminal Law and Its Enforcement* (New York, NY: Foundation Press, 2007) at 100 [*International Criminal Law*].

<sup>149</sup> UK, International Affairs and Defence Section, *Universal Jurisdiction* (Parliament Briefing Paper Doc. SN/IA/5422) by Arabella Thorp, (London: Library of the House of Commons, 2010). "[O]ver 125 states have universal jurisdiction over at least one serious international crime; that since the end of the Second World War, more than 15 countries have exercised universal jurisdiction in investigations or prosecutions of persons suspected of crimes under international law, including Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, the United Kingdom and the United States of America; and that others, including Mexico, have extradited persons to countries for prosecution based on universal jurisdiction."

jurisdiction outside of the *Rome Statute* complementarity framework.<sup>150</sup> The second aspect to be considered is the commonality war crimes within the more general or predicate acts that continue to attract true (*i.e.* non-treaty based) universal jurisdiction. Pillage may be a less heinous crime under the *Rome Statute* and international humanitarian law, but its seriousness remains assured.<sup>151</sup> The policy reasons to do so, namely the prevention and suppression of resource-based conflicts, are evident.

The trade by corporate actors in natural resources taken from Western Sahara is manifestly pillage. Given the unavailability of local criminal courts (within the occupied part of the territory, and in Morocco, and the impracticality of compelling appearance before the courts of the Saharawi Republic), prosecuting pillage can be done primarily as a matter of universal jurisdiction including within that the competence of ICC member states, or in such other states with the necessary legislation to accept jurisdiction. In both cases, prosecuting states would likely act only where a perpetrator is present and, for added measure, a pillaged resource.

### The acquis

The norm to be upheld by outlawing the crime of pillage began with a goal of eliminating the consequential effects of war on civilian populations. The *Hague Regulations* and later the *Geneva Conventions* were designed to confine the result of hostilities within humanitarian dimensions. Pillage came thus to be proscribed during the course of making war and so logically during its ostensible result, occupation. The cases of the ICTR and the ICTY exemplified most recently in *Gotovina* confirm this stance even as they were brought for more serious criminal acts: genocide, crimes against humanity and grave breaches of the *Fourth Geneva Convention*. Pillage as a singular crime is not often prosecuted. Such insular treatment has led to its worst effects being apparent only after the end of occupation, demonstrated readily by Namibia, with its plundered fishery and uranium ore and by East Timor with its taken seabed petroleum. It here that the effect of pillage becomes inverted. For if pillage is not the cause of conflicts, it is at least in serious cases a perpetuation of occupation, legitimizing the invading state in the perception of those who would trade with it for resources, funding the prolongation of occupation from a return on the sale of resources, and, finally, denying the benefit of the resources to those properly having permanent sovereignty to them. In the circumstances of a continuing occupation, the act of pillage acquires a heightened criminality, an act having greater importance to be deterred and restrained.

The definition of pillage as a matter of current international humanitarian law and criminal law is broad, the *Rome Statute* exemplifying the conduct to be impugned. This is a useful thing in regulating the conduct of warfare and the situations where people and territories come to be occupied as a result. However, the promise to be realized in criminalizing pillage is in the cases to come, foremost those in

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<sup>150</sup> *U.S. War Crimes Act*, *supra* note 116. Belgium's 1993 universal jurisdiction statute was amended in 2003 after the ICJ's decision in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] ICJ Rep 3. Spain's Judicial Power Organization Act of 1985 was amended in 2009 (with effect from 2010) to limit international criminal jurisdiction to those cases with a connection to Spain, where a Spanish citizen has been a victim or where an alleged offenders is in the country. See also *International Criminal Law*, *supra* note 148 at 118 ff.

<sup>151</sup> The relative seriousness of pillage is, however, a matter for prosecutorial discretion. Few stand-alone pillage cases have been pursued in modern tribunals, including the ICC, the ICTR, the ICTY and hybrid courts, and also national courts. On a comparable reluctance to prosecute piracy see Eugene Kontorovich and Steven Art, "An Empirical Examination of Universal Jurisdiction for Piracy" (2010) AJIL 104 at 436.



which the acquisition of territory has a goal to appropriate natural resources. While the law of pillage may have come of age and been recognized as a customary norm in the years before the Second World War, its greatest potential to deter conflicts featuring natural resources lies in the future. That is why the case of Western Sahara has a significance for the international community that is at least equal to the Saharawi people's right to the resources of their territory.

In any discussion of the pillage of natural resources from Western Sahara a few things should be recalled. The first is the characterization of the conflict. Understandably the "question" of Western Sahara is widely viewed as the prerogative of the United Nations and so substantially is about the exercise of self-determination. The conflict has not been as one of a continuing armed occupation and displacement of a people notwithstanding the facts on the ground, the presence of a *de facto* UN peace monitoring mission, and the international dimensions of a conflict dormant after the parties' 1991 ceasefire. If there was any doubt that the two streams of law relevant to the taking of Saharan resources - the permanent sovereignty of non-self-governing peoples and that of international humanitarian law - apply equally the *jus cogens* and the universal obligation to respect the law within the sacred trust prescribed by the UN *Charter* were made clear by the International Court of Justice in its *Palestine Wall* advisory opinion. The Saharawi people's sovereignty over their natural resources has been recognized and upheld in annual resolutions of the UN General Assembly since at the least the time Hans Corell gave his opinion to the Security Council.<sup>152</sup> The era of the application of international humanitarian law, with its enforcement through the criminal law, is at hand in the "question" of Western Sahara.

The basis for civil compensation for the taking of Saharawi natural resources is equally clear, enjoying an established provenance, ample precedent under international law and a widely accepted policy basis. There is no question about the right of action of an entirely independent, universally recognized Saharawi Republic for reparations from the taking of natural resources by the states which occupied its territory. Even the prospect of post-independence claims against corporations is hardly novel. What could make the case of Western Sahara *sui generis* is a decision of the Saharawi Republic to now take action against corporate actors in states where the Republic is recognized. While the criminal law serves as the greatest deterrence to corporately initiated or supported pillage of natural resources, it has problems of threshold invocation and enforcement at the discretion of third party states who may be reluctant or unable to prosecute. The national jurisdictions where there exists a civil cause of action for compensation from corporate actors are numerous and capable of expansion by characterizing tort claims and civil delicts as breaches of international humanitarian law, something demonstrated by the US Alien Tort Claims Act and Quebec Civil Code cases.

If the pillage of natural resources is increasingly the cause of territorial conflict and therefore a concern of the organized international community in the prevention of armed conflict and territorial annexation, then it follows that the involvement of corporate actors is a matter requiring attention. Pillage of natural resources is meant to profit the occupying state in a conferring of legitimacy, as the European Union's long fishery in Saharan waters demonstrates, and by revenue. It is corporate actors who enable both by the trade in pillaged resources while enriching themselves. That the law is sufficient, and sufficiently knowable, is evident. It is the will to apply the law, in service of resolving the conflict that is Western Sahara and to prevent those to come in the future, which is the present challenge.

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<sup>152</sup> *Supra* note 32.