Paper by The Hon John Dowd AO QC, President International Commission of Jurists, Australia presented on 29 October 2011 at the 2nd International Conference, Peoples' Right for Resistance: the Case of Sahrawi People, Dar Diaf – Bouchaoui, Algiers

"The Western Sahara and the United Nations"

Mr Chairman, Mr President, Members of Parliament, distinguished delegates.

In the year since most of us here were in Le Mans, the world has very much changed. It is called the "Arab Spring", but in fact is much more than just changes within the Arabic speaking countries.

We have a new world of electronically adept free thinking liberated young people who can now communicate and exchange views and attack governments, particularly totalitarian governments if they don"t provide for human needs and democratic processes. The world of television and the internet now provides young and, indeed, not so young people with higher aspirations to fulfillment of their lives than is available under most military regimes and culturally repressed regimes.

There is no answer to mass dissemination of information and the success of the education revolution through which the world is passing. It is one reason why I am a chancellor of an Australian university.

Education not only informs and teaches critical analysis, it also raises aspirations. A younger generation can"t see why it can"t have all the freedoms that democracy brings.

This comes in conflict with totalitarian and repressive governments which are not susceptible to change and to fulfilling people"s aspirations. Very large numbers of non democratic regimes are thinly veiled covers for a military dictatorship or many governments are in a convenient partnership relationship of mutual support of military regimes, some military regimes don"t even invoke the trappings of democracy.

The world will not go back to the dinosaur regimes of the past. Like the dinosaurs, some will last longer than others, but in time will be consigned to history.

Totalitarian regimes often, not only oppress minority racial regimes and religious minority regimes, they often oppress their own people. Not even the Sinhala people of Sri Lanka are free of government oppression. There an elite is protected. It is common with repressive regimes that the press is also

controlled or oppressed, something which is now increasingly difficult to do with use of internet and international multi-level communication.
Repressive regimes also use kidnapping and detention of people such as we have seen in Morocco with its invasion of a refugee camp. Intimidation has an effect but not the effect it once had, if the world keeps such a country under surveillance and under international pressure.

One of the partners and supporters of tyranny is complacency and trade interest. So many countries, such as a large number on the United Nations (UN), are not prepared to stand up and oppose repressive regimes. Some do it out of self interest, some do it out of disinterest and some do it for trade reasons.

That a country, like Australia, with its heavy demand for phosphates can fail to acknowledge the source of the phosphate, which is the people of Western Sahara, is a matter I will deal with later in the paper.

Clearly the young people of Morocco, whether sympathetic to the cause of Western Sahrawis or not, will themselves become increasingly dissatisfied with the regime under which they live. Morocco will not be immune from the changes happening throughout the world and we hope that eventually a free democracy will triumph there and that will be the pathway to a free and independent democracy for the Western Sahrawis.

Brief history

Spain colonised Western Sahara and its mostly nomadic people in 1884 claiming it as a protectorate of the Spanish Crown. Spanish rule over Western Sahara was codified in Berlin in 1885, where Africa was carved up among the European powers. The period of Spanish rule was marked by ongoing resistance, revolts and armed clashes with the indigenous population, with its liberation movements being brutally repressed by the Spanish authorities.
A 1966 UN resolution called for the Sahrawis people‟s right to self-determination to be exercised via a referendum which never eventuated. The lack of political developments led to the formation of the Popular Front for the Liberation of Saguia el Hamra and Rio de Oro (the Polisario Front) in 1973. The Polisario was conceived as a nationalist front with the aim of achieving independence, and encompassed all Sahrawis political trends.
The Polisario launched a guerrilla war against Spanish rule, fought Mauritania‟s occupation of part of Western Sahara (from 1975 to 1979) and Morocco‟s occupation from the invasion in 1975 until 1991.

In 1975 Spain relinquished its control of Western Sahara and, contrary to the1966 UN resolution for self-determination, purported to hand the Western

Sahara over to Mauritania and Morocco. Spain had no legal power or legal authority to execute the Madrid Accords. The same year, the Morocco regime organised the so called “Green March"", in which 350,000 Moroccans, brandishing flags and pictures of King Hassan II, invaded Western Sahara in order to settle and “reclaim the territory"". This strategic march was supported by 20,000 Moroccan troops, who were met with some armed resistance from the Polisario. November 6, the day of the “Green March”, has become a national holiday in Morocco.

Morocco and Mauritania"s war against the Polisario and the Western Sahrawi people was financially supported by the United States, France and Spain to the tune of billions of dollars.
Apart from engaging in aerial bombardment, which included napalm and cluster bombs, Morocco built the 2500-kilometre-long, heavily mined wall through Western Sahara, dividing almost every Sahrawis family.

On February 27, 1976, the Polisario proclaimed the Sahrawis Arab Democratic Republic (SADR), which is a full member State of the African Union.
While Morocco"s occupation is not recognised by any other country in the world, around 50 governments recognise the SADR and its government-in-exile, led by the Polisario Front; 13 have suspended relations with Morocco and 22 have cancelled recognition. The SADR was the first country to establish relations with East Timor. The SADR and Polisario currently control 32% of Western Sahara"s territory; the remaining 68% is resource rich and occupied by Morocco.

A 1991 ceasefire, overseen by a UN peacekeeping mission, ended the armed conflict but the Sahrawi people are still waiting for a UN-sponsored referendum on self-determination that was to have taken place in 1992. The frustration at the lack of progress and lack of support from the international community for a political solution to the conflict is palpable, especially among Sahrawi youth.

The Sahrawi people have been left to their own devices, due to the fact that Morocco has very powerful allies, such as the US, Spain and France.

A landmark advisory ruling by the International Court of Justice (ICJ) in 1975, recognising the right of self-determination by the Sahrawis people, was rendered ineffective since because France and the US blocked the Security Council from recognising this decision. Both of their governments sought to undermine growing communist and radical Arab nationalist movements during the Cold War by strengthening the reactionary Moroccan monarchy.

In more recent years Morocco has become known as a “moderate Muslim nation“ to the West, a friend of Israel and an important ally in the struggle against Islamist extremism.
Many Western governments and companies, including Australia‟s, are knowingly engaged in the acquisition of the Sahrawi people‟s natural resources, through lucrative trade deals with Morocco. Western Sahara has high-grade phosphate mineral rock, excellent fishing grounds. Offshore oil exploration is being conducted.

It seemingly has been of no relevance to Western governments that Morocco has been condemned many times for its torture, disappearance and arrest of Sahrawis in Morocco proper and in the occupied territories, as well as for its repression against its own population and trade union activists.

International legal position – right to self-determination

Article 1 of the **United Nations Charter**, of which almost all countries of the world are a member, sets out the purposes of the UN, I remind you of articles 1.1 and 1.3.

> 1.1 To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 1.2 …
> 1.3 To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

Article 2 of the Charter states that „The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

> 2.1 ...
> 2.2 All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
> 2.3 ...
> 2.4 ...
> 2.5 All Members shall give the UN every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the UN is taking preventative or enforcement action.

The article is a reminder that each member of the UN must do everything within its power to uphold international peace and security measures to support the terms of and resolutions of the UN and to prevent breaches of the peace and achieve international co operation. The obligation to do this is mandatory under the Charter and the obligation of each State member to assist is clearly established.

It is not just a matter for the members on the Security Council or to any of the various UN bodies to carry out this obligation, it is an obligation on all members of the UN but particularly those holding high office such as the members of the Security Council.

Australia and the US on Indonesia-Timor-Leste and Western Sahara invasions

After the invasion of East Timor (now Timor-Leste) in 1975, we the International Commission of Jurists, Australia and other organisations as part of Australian civil society helped keep the issue of Timor-Leste alive in Australia from 1975 to the extent that eventually the Australian Prime Minister persuaded the President of Indonesia to hold a referendum on Timor-Leste to stop the issue being an open wound between Australia and Indonesia, one of Australia‟s significant trade, and otherwise partners.

The referendum was presented in the usual terms of a protocol to create a so-called “autonomous” status for Timor Leste which ultimately, in Indonesian terms, is of no meaning whatsoever. There was an understanding that if the Timor-Leste community rejected the false autonomous status, then the vote would be treated as an act calling for secession from Indonesia. This was not how it was expressed, the people were encouraged to vote for the so-called “autonomy” but rejected it overwhelmingly by 78.5% of the vote. We saw ballots beat bullets. Timor-Leste became a new nation.
In that period of occupation, as a result of the Indonesian invasion 185,000 East Timorese died.

Australia and the US supported the invasion of Timor-Leste by Indonesia and the US supported the invasion of Western Sahara, they said little or nothing publicly. Australia and the US some 6 years earlier condoned a takeover of the West Papuan people and saw them go through a process of a staged managed, so called, referendum in 1969 which demonstrated nothing in terms of the will of the people. The UN also largely stood by and approved this process. Indeed, only recently, we have seen photographs of the atrocities that continue to happen in West Papua. It is now increasingly a problem of executions and arrests following upon a demonstration, only in the last couple of weeks. There is increased Indonesian Security Forces activity in West

Papua. The overriding problem is the passive acquiescence of the international community and the suppression of the press as to events that are occurring in West Papua. If Indonesia has nothing to hide, why does it stop press supervision.

Legal Parties to the issue of self-determination

Article 73 of the UN Charter sets out that only three parties are involved in the achievement of self-government for a former colonial power: In the case of Western Sahara, these parties are the administering country; Western Sahara itself; and the UN. They are the only parties to the matter. Spain having abdicated its role as administering power does not entitle any other country to become involved. Spain is, of course, possibly entitled to reinstate its involvement and assist in a referendum.

Article 73 paragraph (b) of the UN Charter says that a UN member State which is responsible for „administration of territories whose peoples have not yet attained a full measure of self-government" shall „...develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.'

Spain was the only administering power in Western Sahara, even if the administrative structures now in place are set up by Morocco, which exercises effective control over most of the territory. Both Article 73 of the UN Charter and the subsequent resolutions adopted by the UN General Assembly apply both the terms „inhabitants" and „peoples". These two are not necessarily the same, and it is the *peoples,* including indigenous peoples, who have the rights over the natural resources of a Non-Self-Governing Territory. *Inhabitants* is a wider category than *peoples*, and includes also those not originating from the territory.

Morocco has established its own political bodies in Western Sahara, which might currently represent the majority of the *inhabitants* in Western Sahara, as Moroccan settlers outnumber local Sahrawis. However, these bodies cannot be said to represent the *people* of Western Sahara. In matters relating to natural resources, it is hence the only all-encompassing body for the Sahrawis, namely the SADR, which must be consulted.

The issue of entitlement to self-determination as to whether the Western Sahrawis want to be a State on its own, or join with some other country may only be addressed by the UN Security Council. As well as having moral and legal obligations, the Security Council is a body on which there are political pressures. There are countries represented on the Security Council who are

sympathetic to Morocco for largely selfish political and trade reasons, one of those, in particular, being the country on which we stood last year: France.

The arguments that have occurred between Morocco and members of the Security Council and the SADR as to who is entitled to vote in a referendum is, in law, totally specious. Morocco is not an administering power, it is an occupying power. It should not be accommodated in the decision as to who is or is not entitled to vote on a referendum that is entirely a matter for the SADR or any other group that represents the indigenous Western Sahrawi people. There is no legal impediment to their carrying out of a referendum except the Security Council itself. This point should be emphasised in international debate to endeavour to persuade countries that purport to be concerned about human rights and humanitarian issues to cause this referendum to go ahead.

The votes of the Security Council on MINURSO, the body set up by the UN to include monitoring of human rights, there is no reason why that should not occur. It has been debated thus far, but if there is nothing going wrong in Western Sahara occupied, what is wrong with having human rights monitors? It is a no brainer. If there is nothing going wrong why should they object? The UN Security Council does not have to be polite to the invading Moroccans. The invading Moroccans are in breach of the UN Charter, they are in breach of international law and it is about time the rest of the nations of the world who benefit from anything like the phosphates that Australia buys from Morocco, remind the Security Council and its members of their own obligations to uphold the UN Charter.

The UN Security Council must also pay attention to those nations like the European Union (EU) who are indulging in commerce with Morocco with Western Sahrawis assets – fishing, mining and other matters that should be held separately for the Western Sahrawi people. If this protection is not carried out then we are in effect morally and almost legally receiving stolen goods. In failing to provide this protection the governments of the EU, and particularly the country on which we stood last year with its threat of a veto, are morally reprehensible in allowing trading to occur on the assets of the people of Western Sahara.

Western Sahara, Self-determination and trade with Morocco

Doing trade with Morocco for Western Saharan natural resources perpetuates the denial of the Sahrawis people their right to self-determination as a former colonial ruled people (UN General Assembly Resolution 1514).[1]
Certainly, it detracts from the power of the democratic nations of the UN that would be necessary to pressure for UN action in the final implementation of Western Sahara as a Non-Self-Governing Territory as laid out in Principle VI of General Assembly Resolution 1514 (XV).

Article 1.2 of the UN *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* provides that:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

It is considered that the phrase „deprived of" is of most relevance in this context of assessing the right of peoples to self-determination, when resources are exploited against the will of the original inhabitants, as is the situation in Western Sahara.

Notably, Western Sahara is a territory rich in minerals, and its coastal waters are a robust area for fishing. Natural resources (such as oil and phosphates) have been the subject of international trade activity, Australia being one such trading State. These Western Saharan resources are traded by Morocco to all too willing customers…customers that are complicit in the violation of the Western Saharan sovereignty over its natural resources as a Non-Self-Governing Territory, and the activity properly characterised as theft.

As we know from the letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel („Corell"), addressed to the President of the Security Council regarding the legality of agreement taken by the Moroccan authorities with foreign corporations for the exploitation of mineral resources in Western Sahara, State practice and opinio juris directs

[1] UN Resolution 1514 (XV) „Declaration on the granting of independence to colonial countries and peoples" reads in paragraph 5:

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

that activities undertaken by the administering power regarding the natural resources of a Non-Self-Governing Territory „cannot be in disregard of the needs, interest and benefits of the people of that Territory." Exclusively the administering power to Western Sahara is Spain, having acted in accordance with Article 73 of the UN Charter. This title is one that Spain cannot unilaterally transfer, and therefore was not affected in any way by the so-called Madrid Accords of 1975. Accordingly, the only status of Morocco in relation to Western Sahara in international law is that of an occupying power.

Spain formally withdrew from the territories in 26 February 1976. Spain however, according to Corell, never did in a legal way „…transfer sovereignty over the territory…",[2] as this can only be done in accordance with the procedures set down by the UN. Hence, Spain is still the „administering power" of Western Sahara.

No other State has acknowledged Morocco"s territorial control over significant parts of Western Sahara. Legal evidence shows that Morocco, by preventing the right of the people of Western Sahara to exercise their right to self-determination in accordance with UN Resolution 1514, acts in violation of international law.

Western Sahara is referred to as a so-called „Non-Self-Governing Territory". At the same time, Western Sahara is dealt with by the Fourth Committee of the UN General Assembly, which addresses matters relating to decolonisation. The term „occupied" is not applied by the UN, but for all practical purposes, it is reasonable to hold that Western Sahara is under Moroccan military occupation.[3]

An occupation implies that certain provisions of the *IVth Geneva Convention relative to the Protection of Civilian Persons in Time of War* would apply, in conformity with Article 6, which reads:

> …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: I to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77 and 143.

[2] S/2002/161 (Letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council), paragraph 6; at http://www.arso.org/UNlegaladv.htm.

[3] General Assembly Resolution 34/37 of 1979 („Question of Western Sahara") paragraph 5 reads: „Deeply deplores the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco", while paragraph 6 calls upon Morocco to „..terminate the occupation of the territory of Western Sahara."

The most relevant of these provisions, in light of the Moroccan policy of encouraging Moroccan settlers, is Article 49.6, which reads:

> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Moreover, the *Charter of Economic Rights and Duties of States* reads in paragraph 16.2:

> No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force.[4]

The Moroccan investments made particularly in and around Layoune for the purpose of facilitating exploitation of the natural resources must be considered to represent an obstacle to the liberation of a territory occupied by force. These investments contribute to integrating the economy of Western Sahara more strongly into the economy of Morocco.

The 2002 letter from Corell lists several UN resolutions that have been adopted concerning Non-Self-Governing Territories.[5] These resolutions do not prohibit exploitation or investments of resources, if this is undertaken in collaboration with and according to the wishes of the peoples in these territories in order to assist their self-determination.

The CIA has confirmed that natural resources represent crucial economic assets for Western Sahara in stating that: „Western Sahara depends on pastoral nomadism, fishing and phosphate mining as the principal sources of income for the population."[6]

In defence of the illegal trade with Morocco for Western Saharan resources, States have argued that their trade is compliant with Corell"s articulation of international customary law regarding trade with Non-Self-Governing bodies, being in accordance with the needs, interests and benefits of the people with that Territory. The Fisheries Partnership Agreement between the EU and the Kingdom of Morocco was such a contract justified by the EU, which has adopted this mistaken approach. A closer analysis of Corell"s review of the applicable law will reveal just how damaging the treatment is.

Although Corell does by way of analogy appear to, in his letter addressed to the Security Council, apply the law applicable to administering powers to his

[4] UN General Assembly Resolution 3281 (XXIX) of 1974.
[5] Above n. 2, paragraphs 10-12.
[6] The World Factbook: Western Sahara; at: https://www.cia.gov/cia/publications/ factbook/-geos/ wi.html.

analysis, he also explicitly reinforces the exclusive and unalienable status of Spain as the administrative power. Moreover, particular attention should be paid to Corell‟s choice of wording in point 8 of the letter.

> 8. Notwithstanding the foregoing, and given the status of Western Sahara as a Non-Self-Governing Territory, it would be appropriate for the purposes of the present analysis to have regard to the principles applicable to the powers and responsibilities of an administering Power in matters of mineral activities in such a Territory.

The problem with Corell‟s letter it is somewhat self-contradicting: he clearly re confirms Spain as the exclusive administering power, makes the cautious prelude to his analysis in point 8; stating that principles applicable to administering powers will be regarded, yet then appears to conclude that on the basis of the laws applicable to administering powers, contracts executed with Morocco for the exploitation of Western Saharan natural resources will be legal as long as they comply with the obligations and principles established from administering power State practice and resolutions. This is confusing, and more importantly it dangerously eases the justification for occupying powers to justify the violation of the sovereignty of Non-Self-Governing Territories over their natural resources.

Curiously, the examples of State practice and UN resolutions from which Corell demonstrates where one State may *legally* enter into activities to exploit a Non-Self-Governing Territory‟s natural resources are in fact highly specific to UN recognised administering powers, such as Portugal for Indonesia. Furthermore, Corell does in fact cite the case for Namibia whereby South African exploitation of its uranium and other resources was illegal flowing from South Africa‟s continued illegal presence. It is not a hard conclusion to draw that any exploitation of Western Saharan resources by an illegal occupier is also illegal, yet it is one that Corell fails to do. And there is no distinction to be made between the present case and that of Namibia which some might draw, in that the latter was occupied by South Africa, the occupation of which was illegal due to resolutions condemning their racist apartheid policies – illegal is illegal.

There is a lot of State practice on the illegality of the breach of sovereignty over natural resources by an occupying power. One only has to look to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, where the ICJ in 2004 confirmed the applicability of international human rights law to situations of military occupation,[7] and of *Armed Activities on the Territories of the Congo* where

[7] Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4 &code=mwp &case =131&k =5a>.

the ICJ delivered a binding judgment and applied international human rights law to an occupation.[8] There the Court said:

> The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the **applicability of international human rights law instruments outside national territory** in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*…It thus concluded that both branches of international law, **namely international human rights law and international humanitarian law, would have to be taken into consideration.** The Court further concluded that **international human rights instruments are applicable „in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories**.[9]

However, despite the disappointments in Corell"s letter of advice, it can only be assumed that the Under-Secretary-General was attempting to apply a minimum standard to any power exploiting natural resources in Western Sahara, in order to ensure that at least some sort of control was put in place as a practical measure, given the reality of the situation. The trouble is that as a matter of policy, while it may encourage contracting parties to ensure that any activities carried out to exploit Western Saharan resources are positively done for the benefit of the people, it simultaneously legitimises Morocco as a party, and indeed a power to the Western Saharan conflict. Furthermore, it dangerously creates a new class of occupying power – that of the *de facto administering power*, thus creating rights for illegal occupying powers which act to do anything but encourage the illegal occupation to cease.

The damage of this treatment is evident: the EU defends its fishing agreement with the Kingdom of Morocco as a „de facto administering power" thus conferring it with the associated powers. Again, in terms of international law, those powers administering a territory *de facto* but not *de jure* are defined as *occupying powers* and therefore have no right over occupied territories. Therefore, any exploitation of natural resources is illegal and would allow Morocco to profit from an illegal occupation.

Although those under the terrible fiction of a legitimate Morocco acting as a de facto administering power must adhere to the rules applicable to their fiction. If States choose to become complicit in the violation of Western Saharan resources by engaging in trade with Morocco under the „de facto

[8] Available at: <http://www.icj-cij.org/docket/files/116/10455.pdf>.
[9] International Court of Justice, *Armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda),* ICJ Reports (19 December 2005), at 216.

administration" fiction, then they must prove, in their inevitably fallible argument, that such an activity is in fact done in compliance with the needs, interests and benefits of the people of that Territory.

Morocco"s argument that the exploitation of Western Saharan natural resources is carried out to satisfy this standard, is not correct. Firstly, the monies do not go into a special trust or fund exclusively for the people of the Western Saharan territory, they go into a Moroccan consolidated revenue fund. Secondly, the argument that the Corporate Registers Forum is used to finance the building of infrastructure in the territory is by no means for the people of that territory. The Green March, which saw thousands of Moroccans illegally enter the Western Saharan territory to commence their illegal occupation, has not only meant that the infrastructure expenditure is not exclusively spent on the bona fide peoples of the territory, but indeed runs in direct opposition to their needs, interests and benefits, in sustaining the illegal Moroccan occupation.

International pressure should be exercised on Morocco to get a Moroccan approval and loyal implementation of the widely recognised peace plan as set out in the so-called „Baker II".[10]

While awaiting a solution to the conflict over the Western Sahara territory, in accordance with principles of international law, as well as Security Council Resolution 1495, there should be no involvement in resource exploitation from the territory of Western Sahara by any companies.

There is nothing in the Corell opinion which justifies occupying governments becoming de facto administering powers. Corell merely sets out, by analogy, minimum standards but his opinion does not justify any rights on the part of an occupying power and should not be used as a fiction by governments wishing to trade with countries such as Morocco to justify what in fact is an illegal activity. Exploitation of an occupied territory covered by the ICCPR as set out earlier requires censure by the international community and requires democratic processes within countries such as Australia to expose this illegal fiction. An occupying power is not an administering power.

[10] The Peace plan for self-determination of the people of Western Sahara (Baker II) is included as Annex II to Report S/2003/565 of the UN Secretary-General to the Security Council. The Security Council adopted the plan unanimously by Security Council Resolution 1495 of 31 July 2003, which States in paragraph 1: „...support strongly the efforts of the Secretary-General and his Personal Envoy and similarly support their peace plan for self-determination of the people of Western Sahara...."

Australia using natural resources from Western Sahara?

Phosphates

At the time of the signing of the so-called Madrid Agreement,[11] 70 per cent of Morocco‟s foreign currency income came from the phosphates trade. The Moroccan motivation for gaining control over the phosphates resources of Western Sahara were obvious, as Morocco by such control would be able to control world phosphates trade. Still, Morocco is the biggest phosphates exporter in the world.

A proposal from the Western Sahara Resource Watch is that all governments simply must reject receiving such bulks of phosphates shipped from the port of Laayoune.[12]

Australia is one of the world‟s biggest phosphate importers with fertiliser derived from the mineral phosphate playing a crucial role in Australian agriculture. Most of the phosphate used on Australian farms however is from the illegally annexed Western Sahara and phosphate is Western Sahara‟s richest natural resource.

Unless Australia and Australian based companies insist that phosphates come from Morocco only and not from the occupied Western Sahara there should be a public debate within Australia to insist that we refuse to take stolen goods from the Western Sahara unless the proceeds of that purchase is hypothecated to insure those funds are held for the Western Sahrawi people however unlikely that is, Australia should not use its own self interests to condone and benefit from theft.

The primary problem is that Morocco, the occupying power, has close friends on the UN Security Council, specifically France and the US which have used and threat of a veto power to prevent the UN from enforcing resolutions calling for Morocco's withdrawal or at least to have a free and fair referendum.

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[11] The Madrid Agreement, which purported to divide the territory of Western Sahara between Morocco and Mauretania (withdrew in 1979), while Spain kept certain economic interests, is contrary both to UNGA Resolution 1514 (XV) from 1960 („Declaration on the granting of independence to colonial countries and peoples‟), the advisory opinion of the International Court of Justice of 16 October 1975, and a number of specific UN resolutions.

[12] See „New Zealand‟s Phosphate Trade with Western Sahara And Why It Is Wrong‟ (Rod Donald, Green Party Trade Spokesperson, 28th July 2005), where the following arguments are given http://www.greens.org.nz/searchdocs/other9018.html:

- participating in the pillage of Western Sahara;
- assisting in financing the illegal Moroccan occupation;
- giving legitimacy to this occupation.

For its part, the Australian Government has expressed its support for a referendum, but in the absence of formal UN sanctions, it will continue to trade in the Saharan phosphate, which of course offers little comfort to the people of Western Sahara. By continuing to buy phosphates and in other ways, supporting the occupation economically, any stance to the contrary by Australia in support of the Sahrawis is totally unconvincing.

There must be clear support expressed and exercised by the international community, including Australia for self-determination of the people of Western Sahara. This would be in accordance with the fact that no country recognises Morocco's occupation of Western Sahara and by contrast 80 countries recognise the government of Western Sahara - the SADR, which is also a member of the African Union. Furthermore, international court rulings have confirmed Morocco has no legal rights in Western Sahara. Yet, the occupation remains, kept in place by a well-funded and well-resourced military. This occupation includes the Berm, a 2700 km long sand wall constructed by Morocco and manned by 140,000 Moroccan troops. This wall, separating communities and even families is wound in barbed wire, riven with trenches and security boulders, dotted with radars and dog patrols, as well as over 3 million landmines.

Australia should pursue an active middle power role in Western Sahara given its clear vested interest over the export of phosphates from the region. It is apparent that Australia's agricultural sector could not easily survive without Western Saharan phosphate.

Such action by Australia should include a vote in favour of self-determination resolutions for Western Sahara at the UN General Assembly; a clear stand against violations of human rights in the occupied territories of Western Sahara; and formal recognition of the SADR.

The way ahead

It must be remembered that the UN, which started out dealing with „We the peoples" in fact represent governments, not peoples. Not all governments operate in terms of will of their peoples.

The primary means of exposing the illegality of Morocco"s occupation is, particularly in Westminster style parliaments, to rely on parties who can rarely be part of a government, such as minority parties to expose matters. Oppositions, which may in fact become a government or have been a government, will often be reluctant to speak out on potentially trade conflicted issues but the minority parties or independents normally thrive on publicly and will get the support of the press because they represent an opinion contrary to the government of the day.

All interested groups concerned with Western Sahara and, indeed, other occupied territories should use this mechanism.

That is not to say that opposition parties should not be used. They usually quite happily will expose a government for offences which they themselves would have done had they been in power.

That is not to say that one should write off governments and government members. In well resourced countries such as the US, a Senator or a member of the House of Representatives will usually have a vast staff. It is worthwhile concentrating on some of these staff members who will be the people that often write speeches for their member which helps to raise the profile of that member.

Randolph Churchill, the father of Sir Winston Church, who was, at one time, a future Prime Minster or considered as a future prime minister for the United Kingdom, in fact built his reputation on speaking out on moral matters and speaking out on unpopular issues such as Home Rule for Ireland and the status of India, because he was familiar with both of those countries.

Never write off the capacity of any member of Parliament. Most are addicted to publicity of any sort. Heroes can be created.

In Westminster style Parliaments, the Upper House or Senate or House of Lords is often a good place to seek champions since they are not as responsive to people‟s rights and often have more flexible rules for the raising of non mainstream issues.

The issue of Western Sahara is something which can be, by use of social media and the internet, more able to be raised now and placed on people‟s radar than in less electronically advanced times.

The involvement of young people in issues of justice is now more easily advanced. Many young people will now take up issues once brought to their attention because of the sheer injustice of the issue. A strategy for this recruitment needs to be developed.

The other area where pressure can come about is from an examination of those treaties establishing norms and scrutiny for conduct to which Morocco has become a party. The various rights protected by the treaties cannot be denied by Morocco if they contend they legally occupy the Western Sahara. Claims are answerable brought within the Moroccan occupied portion of the Western Sahara. This is one way of protecting that part of the Western Sahrawi people but also publicising the nature of that occupation.

Concluding remarks

Essentially, Spain purported to hand over to Morocco the administering power for Western Sahara by a declaration which is invalid. The people of Western Sahara have a right to self-determination.

Despite The UN having, since 1991, overseen a ceasefire and constructed a mandate to administer a referendum to allow local Western Saharans to decide upon independence or autonomy within Morocco,[13] the region remains embroiled in uncertainty amid major power indecision and unwillingness. The referendum has not yet been held.[14] If Morocco were to allow any free and fair referendum on self-determination for the Sahrawi people probably, even with the participation of the Moroccan settlers residing in the territory, this would surely lead to the independence of Western Sahara. After all, the territory is not Moroccan.[15]

At international law, Morocco does not exercise any legal territorial sovereignty or even administering power over Western Sahara.[16]

Informal talks between the parties largely remain in stalemate due to Morocco‟s refusal thus far to discuss in any substantive way the proposal of the Polisario presented to the UN on 10 April 2007 entitled *Proposal of the Frente Polisario for a mutually acceptable political solution that provides for the self-determination of the people of Western Sahara*.

[13] Morocco and Polisario accepted the UN-OAU jointly elaborated Settlement Plan that was approved by the Security Council in its Resolutions 658 (1990) and 690 (1991). The plan provided for the entry into force of a ceasefire to be followed by a free and fair referendum on self-determination, without any administrative or military constraints, in which „the Sahrawis people would choose between independence and integration into Morocco*'* (para. 4 and 6 of the Settlement Plan S/21360). It was also agreed that the electoral body for the referendum would be based on the last Spanish census of the indigenous population made in 1974 (para. 53, S/21360).

[14] Morocco also exhibited similar delay and obstructionist tactics following the Houston Agreements that were negotiated and signed by both parties in September 1997 under the auspices of James Baker III, the then Personal Envoy of the Secretary-General for Western Sahara. The plan envisaged four to five years period of self-governance for the territory at the end of which a referendum would be held in which both indigenous Sahrawis and Moroccan residents in the territory since December 1999 would participate.

[15] Since its rejection of the Baker Plan in 2004, Morocco repeatedly declared that it was willing to accept a solution to the question of Western Sahara only „within the sovereignty of Morocco*'*. In this context, on 11 April 2007, it presented to the UN a proposal aiming at granting „autonomy" to the territory of Western Sahara „within Morocco"s sovereignty and territorial unity*.'*

[16] As the Secretary-General stated in his report of 19 April 2006, „no member State of the UN recognises Morocco"s sovereignty over Western Sahara" (para. 37). Moreover, as clearly established in General Assembly Resolutions 34/37 (1979) and 35/19 (1980), Morocco is only an occupying power in Western Sahara.

The UN must rightfully extend to Western Sahara colonial case status to which UN doctrine and practice relating to decolonisation applies. The Sahrawi people thus have an inalienable right to self-determination and independence exercisable in a free, fair and democratic referendum on self-determination. Morocco has already recognised the right of independence of Western Sahara in statements made before the UN from 1966 to 1973 and accepted several peace plans based on the independence option. Its cooperation with the international community must be sought now through strenuous measures if this colonial war is to come to an end.

The SADR is a fully-fledged State that exercises its full sovereignty over the Sahrawi liberated territories and has the administrative and political capacity to handle its own affairs and conduct its international relations. „Africa‟s East Timor‟ needs to combat the consequences of its occupation and the occupation itself with the support of the international community through the UN and its Security Council. Then there may be at least two out of three legal parties to this issue fighting for the self-determination of Western Sahara.

The analogy drawn by Corell in referring to occupied powers as against administering powers must be put in its proper context. It is like equating the strict rules of a trustee relationship with the rules of a thief. A thief has no rules.