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The international legal status of Western Sahara

Status prawnomiędzynarodowy Sahary Zachodniej

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Abstract: Western Sahara is a territory lying in North-Western Africa. It borders Morocco in the north, Algeria in the north-east, Mauritania in the east and in the south, and its north-western coast borders the Atlantic Ocean. The country was colonized by the Kingdom of Spain following the decisions of the Berlin conference held in 1884. After World War 2, it was a Spanish province. When it won the independence in 1956, Morocco demanded that Western Sahara should be “liberated”, claiming that the territory belonged to it. In 1963, following the passing of the information by Spain, on the basis of Article 73 letter e) of the Charter of the United Nations, the UN entered Western Sahara in the list of areas which were not governed independently. On 14 April 1976, Morocco and Mauritania signed a convention on establishing their frontier line, on the power of which they executed a division of the territory of Western Sahara. Nowadays the western – the larger – part of Western Sahara’s territory is controlled by Morocco. The main aim of this article is to provide an answer to the question of the present condition of the international legal status of Western Sahara.

Keywords: Western Sahara, military occupation, the Polisario Front, the Sahrawi Arab Democratic Republic, international legal personality

Abstrakt: Sahara Zachodnia to terytorium położone w Afryce Północno-Zachodniej, które graniczy z Marokiem na północy, z Algierią na północnym-wschodzie, a także z Mauretanią na wschodzie i na południu, a jego wybrzeże zachodnie jest położone nad Atlantykiem. Zostało ono skolonizowane przez Królestwo Hiszpanii w wyniku konferencji berlińskiej, która odbyła się w 1884 r., natomiast od drugiej wojny światowej stanowiło prowincję hiszpańską. Po uzyskaniu niepodległości w 1956 r. Maroko zażądało „wyzwolenia” Sahary Zachodniej, uznając, że terytorium to należy do niego. W 1963 r., po przekazaniu informacji przez Hiszpanię na

podstawie art. 73 lit. e) Karty Narodów Zjednoczonych, ONZ wpisała Saharę Zachodnią na listę obszarów nierządzących się samodzielnie. W dniu 14 kwietnia 1976 r. Maroko i Mauritania podpisały konwencję o wytyczeniu ich granicy, na mocy której dokonały podziału terytorium Sahary Zachodniej. Obecnie zachodnia, większa część terytorium Sahary Zachodniej kontrolowana jest przez Maroko. Zasadniczym celem niniejszego artykułu jest udzielenie odpowiedzi na pytanie, jaki jest obecnie prawnomiędzynarodowy status Sahary Zachodniej.

Słowa kluczowe: Sahara Zachodnia, okupacja wojskowa, Front Polisario, Saharyjska Arabska Republika Demokratyczna, podmiotowość prawnomiędzynarodowa

1. Introduction

Western Sahara is a territory situated in North-Western Africa. It was colonized by Spain in 1885 and then entered on the list of dependent (non-self-governing) territories in the understanding of Article 73 of the Charter of the United Nations, in which it has remained until now (the list attached to the report of the UN Secretary General of 1 Feb. 2016). The territory of Western Sahara covers 266 thousand square kilometers and is inhabited by over 400 thousand people. In the north, Western Sahara borders Morocco, in the north-east – Algeria, and in the east and the south – Mauritania. The most important branches of economy are fishery, exploitation of natural resources, in particular phosphate rock, the deposits of which belong to the richest in the world, and growing date palms in oases (Parzymies 1976: 80; Ożarowski 2011: 114). The basic goal of the article is to give an answer to the question: What is the international legal status of Western Sahara and, especially, is the territory of Western Sahara a subject of the international law?

2. The issue of Western Sahara

On 20 Dec. 1966, the United Nations General Assembly passed Resolution 2229 (XXI) concerning Ifni and Spanish Sahara, reaffirming “the inalienable right of the peoples of Ifni and Spanish Sahara to self-determination.” It demanded from Spain as the administering Power to “determine at the earliest possible date, in conformity with the aspirations of the indigenous people of Spanish Sahara and in consultation with the Governments of Mauritania and Morocco and any other interested party, the procedures for the holding a referendum under United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination.” Next, on 20 Aug. 1974, the Kingdom of Spain informed the UN of their intention to organize – under the UN auspices – a referendum in Western Sahara. Then, on 16 Oct. 1975, upon the request of the UN General Assembly, the International Court of Justice issued its advisory opinion concerning Western Sahara,

in which it was stated that the circumstances and information given to them proved that at the moment of Spanish colonization there existed legal liaisons between the Sultan of Morocco and certain tribes inhabiting the territory of Western Sahara (The advisory opinion on Western Sahara 1975: 12). They also pointed to the existence of rights, including certain rights to the lands, which made legal bonds between the Mauritanian subject and the territory of Western Sahara. Moreover, it acknowledged that the materials and information delivered by the parties did not prove the existence of any link in the sphere of territorial supremacy between the territory of Western Sahara and Morocco and Mauritania. This meant that the International Court of Justice did not find the existence of legal connections that could impact the application of Resolution 1514 (XV) of the UN General Assembly of 14 Dec. 1960, concerning granting independence to colonial countries and nations, in particular the application of the principle of self-determination through free and genuine expression of will of people inhabiting the given territory. In this respect Resolution 1514 (XV) states as follows:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

Thus, Resolution 1514 establishes the principles which administrating powers should be governed by while exercising their responsibilities resulting from Article 73 of the Charter of the United Nations. It should be noted that Principle VI stipulates that the right to self-determination is considered to have been executed when a dependent territory becomes an independent and sovereign state or when it associates freely with another independent state, or is integrated with an independent state.

On 14 Nov. 1975 Spain, Morocco and Mauritania signed a declaration of principles (Madrid Accords, also referred to as the Madrid Agreement) which accepted transferring of rights and obligation resting on Spain as the power responsible for administering Western Sahara onto the trilateral administration. Then, on 26 Feb. 1976 Spain informed the UN Secretary General that beginning with that date it ended its presence in Western Sahara and considered itself to be released from any responsibility of the international character in connection

with administering this territory through ceasing to participate in the temporary administration that had been introduced in the above-mentioned Agreement. That did not reflect the truth fully, though, since the Kingdom of Spain has still been administering the airspace of Western Sahara, which constitutes part of the OCE sector of Flight Information Region (FIR) of the Canary Islands (see the maps published on the website of ENAIRE) and that “decolonization of Western Sahara will be accomplished when Saharan society has had the chance to effectively present their views” (Letter of 26 Feb. 1976). As a result, towards the end of 1975, the Kingdom of Spain began withdrawing its administration from the territory of Western Sahara. Simultaneously, the territory was being taken over by Moroccan and Mauritanian troops.

On 14 April 1976, Morocco drew a treaty with Mauritania in which they divided the area of Western Sahara and formally annexed the provinces assigned to it on the power of that treaty (Convention concerning the state frontier line). In the meantime, in this region there broke out a military conflict between Morocco, Mauritania and the Polisario Front. Finally, on 10 Aug. 1979, Mauritania entered into agreement with the Polisario Front and renounced the right to any territorial claims from Western Sahara.

Next, in its Resolution 34/37 of 21 Nov. 1979, concerning Western Sahara, the UN General Assembly reaffirmed the “inalienable right of the people of Western Sahara to self-determination and independence” and expressed their satisfaction with the Mauritania-Sahara agreement concluded in Algiers on 10 Aug. 1979. They also urged Morocco to “join in the peace process” and recommended that the Polisario Front as “the representative of the people of Western Sahara should participate fully in any search for a just, lasting and definitive political solution to the question of Western Sahara.” The armed conflict between the Polisario Front and Morocco lasted until 30 Aug. 1988, when both parties accepted, as to the principle, the proposition of solving the conflict presented by the UN Secretary General, which included – in particular – declaration of armistice and organization of a referendum under the auspices of the UN on the issue of the territory’s self-determination. However, until today such a referendum still has not been held and Western Sahara has remained incorporated into the territory of Morocco, without the opportunity for the people of Sahrawi to express their will in this respect in a free and independent way.

Thus, it follows from all the factual circumstances which have been outlined above that instead of being able to avail themselves of the right to self-determination, in compliance with the recommendations set out in the consultative opinion on the issue of Western Sahara and in consequence of a series of actions which led to the division of the territory of Western Sahara in 1976 and its annexation in 1976 and 1979, the people of Western Sahara has

been deprived even of a chance of exercising this right under the conditions stipulated in Resolutions 1514 (XV), 1541 (XV), 2625 (XXV) and 3458 A and B (XXX) of the UN General Assembly (van Wasylyum 2012: 3; van Wasylyum 2013: 6). What is more, while these resolutions stipulated that the right to self-determination means a free choice between three options (Principle VI of Resolution 1541 of (XV) UN General Assembly), including independence, association with another independent state and integration with an independent state, but also admit conducting a referendum (Bedjaoui 2005: 1761; Fastenrath 2012: 1834-1835). In a similar manner, not respecting Resolution 229 of (XXI) the UN General Assembly of 20 Dec. 1966, Pars 4, 5, the UN Security Council Resolution 621 (1988) of 20 Sept. 1988, Par. 2 and Resolution 43/33 of the UN General Assembly of 22 Nov. 1988, Morocco executed integration of Western Sahara with its own territory through a division and annexation of the former without consulting the people of Western Sahara and without the supervision of the UN. Thus, it follows from the above considerations that Western Sahara became incorporated into Morocco without giving the people of this territory an opportunity to express their will in this respect in a free way. Summing up, it needs stating that presently the western part of Western Sahara is controlled by Morocco which considers itself the sovereign of Western Sahara, while the Polisario Front controls a smaller and poorly inhabited part in the east of the territory. Both parts of the territory of Western Sahara are separated from each other with a wall of sand constructed and supervised by the Moroccan Army.

3. The legal status of Western Sahara and its effects

Western Sahara has remained entered on the UN list of dependent (non-self governing) territories since 1963, that is in the understanding of Article 73 of the Charter of the United Nations, according to which:

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.

Hence the conclusion that for this reason it belongs to the scope of application of Resolution 1514 (XV) concerning execution of the right to self-determination by colonial nations, as the International Court of Justice stated in Point 162 of the advisory opinion (the list attached to the report of the UN Secretary General of 1 Feb. 2016). Moreover, the letter of 29 Jan. 2002 addressed to the President of the Security Council by the Deputy Secretary General in charge of legal matters, legal advisor Hans Corell, point 6, said that: "transferring the

administration liabilities by the Kingdom of Spain onto the Kingdom of Morocco and the Islamic Republic of Mauritania in 1975 did not exert an influence on the status of Western Sahara as a non-self-governing territory” (Letter of 29 Jan. 2002 addressed to the President of the Security Council, Point 6). Thus, Western Sahara possesses – on the power of Article 73 of the Charter of the United Nations – “a separate status different from that of the territory of the state administrating it, [...] until the time when the people of the colony or dependent territory executes its right to self-determination in accordance with the Charter, in particular complying with its goals and principles.” In connection with this, Western Sahara makes a dependent territory in the process of decolonization in the understanding of this article, which also means that it is the third subject of the international law. Clearly, it needs underlining the fact, too, that it is not the so-called “disputed territory” due to the fact that according to the international law it is a territory on which there is a conflict going on aimed at demarcating its borders.

It follows from the wording of Article 73 of the Charter of the United Nations that “administrating power” means “the UN member-states which bear the responsibility for management of dependent areas”. Morocco has not been responsible for administering Western Sahara since its accession to the UNO in 1956 and has never had that responsibility since it considers itself to be the sovereign of this territory (Milano 2006: 430). Furthermore, it is exclusively the UN General Assembly that can acknowledge a territory as a non-self-governing one and appoint its administrating power (Bedjaoui 2005: 1763; Fastenrath 2012: 1836). The UNO has never acknowledged Morocco to be the administrating power of Western Sahara and persistently – even today – points at Spain as the one entered on the list of dependent territories and administrating powers (Report of the UN Secretary General of 3 Feb. 2017). This conclusion is also confirmed by the letter of 29 Jan. 2002 addressed to the President of the UN Security Council by Deputy Secretary-General in charge of legal matters, legal advisor Hans Corell, according to whom “the Madrid Agreement did not stipulate transferring sovereignty of this territory or did not grant to any of the signatories the status of the administrating power, which Spain could not transfer unilaterally by the way” (Letter of 29 Jan. 2002 addressed to the President of the Security Council, Point 6). What is more, even if it is noted that “Morocco has administrated independently the territories of Western Sahara since 1976,” which is an undisputable fact, it is added that “Morocco, however, is not entered as the power administrating this territory in the UN list of non-self-governing territories and – in consequence – does not transmit information relating to this territory on the basis of Article 73, letter e) of the Charter of the United Nations (Letter of 29 Jan. 2002 addressed to the President of the Security Council, Point 7).

If, then, Morocco is not the “administrating power” of Western Sahara, what is its international legal status with reference to the western part of Western Sahara? An answer to this question seems obvious – Morocco is an “occupying power” of Western Sahara in the understanding of Article 42 of the 1907 Hague Regulations, in accordance with the resolutions of which “a territory is considered occupied when it is actually placed under the authority of the hostile army.” Moreover, following the jurisdiction of the International Court of Justice, in order to establish whether the state whose army is occupying the territory of another state in the form of intervention, is an occupying power in the meaning given to it by *ius in bello*, it is necessary to examine if there exists sufficient evidence confirming that the authority of the hostile army has been actually established and is exercised in the given zones by the state conducting the intervention (Armed Activities on the Territory of the Congo: 168). Thus, it follows from the considerations presented above that the western part of the territory of Western Sahara remains under the Moroccan occupation. The military conflict which took place in Western Sahara between 1976 and 1988 was an international armed conflict, which makes the resolution of the International Court of Justice apply to the territory of Western Sahara as well. In practice this means that in the present situation the following are applicable: Articles 42 and 43 of the 1907 Hague Regulations, Articles 2 and 64 of the IV Geneva Convention and Article 1 Par 4 of the Additional Protocol (I) of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949, concerning protection of victims of international armed conflicts. Moreover, Article 1 Par 4 of the Additional Protocol (I) extends the application of the four Geneva Conventions of 1949 to cover “armed conflicts in which peoples fight against colonial rule and foreign occupation, exercising their right to self-determination” (Roberts 1985: 254-255). Such is exactly the case of the people of Western Sahara who has not exercised this right and finds itself in the procedure of decolonization (Milanovic 2015: 27-50; Saul 2015: 5-6).

It should also be underlined clearly that the Moroccan occupation in Western Sahara is broadly recognized (Gasser 202: 379; Arai-Takahashi 209: 140; Chinkin 2010: 197-200; Benvenisti 2012: 171; Koutroulis 2012: 171; David 2012: 192; Ruiz Miguel 2013: 107; Dawidowicz 2013: 250-276; Bothe 2015: 1459; Kontorovich 2015: 611-612; the High Court of South Africa of 15 June 2017), including Hans Corell who, as the Deputy UN Secretary General in charge of legal matters, issued a legal opinion dealing with compliance with law of the decision made by the Moroccan authorities on entering into agreement with foreign companies as regards searching for mineral resources in Western Sahara (In a letter of 29 Jan. 2002). What is more, in the opinion of the International Court of Justice, in order to establish if the state whose army stays on the territory of another state because of intervention is an ‘occupying power’ in the meaning given to

it by *ius in bello*, it needs investigating whether there exists sufficient evidence to confirm the fact that the authority of the hostile army has actually been established and is exercised in given zones by the intervening state (Armed Activities on the Territory of the Congo: 168). Such is the case with regard to the western part of Western Sahara which has remained under the supremacy of Morocco since its annexation in 1976 and 1979. Mauritania retreated from Western Sahara on 14 Aug. 1979, after signing the peace treaty with the Polisario Front. On the very same day the Kingdom of Morocco annexed the part of Western Sahara initially occupied by Mauritania. The latter acknowledged that “forced occupation” in the declaration of the Prime Minister of 14 Aug. 1979 attached to the letter of 18 Aug. 1979 addressed to the UN Secretary-General by the permanent representative of the Islamic Republic of Mauritania at the UNO A/34/427. Since that time it has been administered in an ordered way by Morocco, without an agreement of the people of Western Sahara, who so far has not exercised its right to self-determination (Dessantis 1975: 463-465; Santucci 1976: 359-361).

4. The Sahrawi Arab Democratic Republic

The Polisario Front, according to Article 1 of its status, established on 10 May 1973, is “a national liberation movement, a fruit of the long-lasting Saharan resistance against various forms of foreign occupation” and has been acknowledged by the UNO as the representative of the people of Western Sahara, with its mission to protect its rights that stem from the international law, that is the right to self-determination and permanent sovereignty and control over the natural resources of Western Sahara (as stated in the letter of 29 Jan. 2002 addressed to the President of the UN Security Council in Point 24: “If the resources existing on dependent territories are exploited to the benefit of peoples of these territories, it is on their behalf or upon consultations with their representatives that the exploitation is considered compliant with the duties of administrating powers on the basis of the Charter and in agreement with resolutions of the UN General Assembly, as well as with the principle of »permanent sovereignty over natural resources« expressed in the Charter”). In fact, the UN General Assembly regard the Polisario Front as the second representative of the Western Saharan people (Resolution of the UN General Assembly concerning Western Sahara of 21 Nov. 1979 and of 11 Nov. 1980). It does not hold any special national status of a liberation movement within the auspices of the UNO, like in the case of the Palestine Liberation Organization, which does not mean that it does not possess the legal personality in the international law. On the contrary, the Polisario Front is regarded as a national liberation movement by a number of states (e.g. by the Republic of Benin, the Republic of Yemen, the People’s Democratic Republic of Algeria, the Republic of Cabo Verde, the Lao

People's Democratic Republic, Grenada, the Republic of Tunisia, the Islamic Republic of Iran and the Republic of Zambia).

On 27 Feb. 1976, the Polisario Front proclaimed the establishment of the Sahrawi (Saharan) Arab Democratic Republic (SADR). Consequently, in March that year, the Government was formed which consisted (and still does) of almost exclusively members of the Polisario Front. The Government was recognized by Algeria on 6 March 1976. Since that time the state authorities have remained in exile in the City of Tinduf in Algeria and have controlled about 25% of the territory of Western Sahara. The year 1999 saw the declaration of the Constitution of the SADR. According to it, the head of state is the President and the executive power rests on the Government composed of 18 members led by the Prime Minister. The legislative power is in the hands of Parliament – the Sahrawi National Council consisting of 53 deputies. The polity of the SADR is the multiparty democracy based on free market economy. Moreover, there functions in the SADR an independent judiciary, as well.

The practice of different states regarding the treatment of the SADR varies, similarly as in the case of the Polisario Front. So far the SADR has been recognized by 84 states, 34 of which have withdrawn their recognition. Moreover, the national parliaments of the following countries voted their states' recognizing the Sahrawi state: Chile (2009), Australia (2004), Brazil (2014), Sweden (2012). Additionally, the SADR is a party of numerous multilateral treaties (African Charter of Human and Peoples' Rights (1986), African Charter on the Rights and Welfare of the Child (1992), African Continental Free Trade Area (2018), African Convention of Preventing and Combating Corruption (2003), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009), African Union Non-Aggression and Common Defense Pact (2005), Convention of the African Energy Commission (2006), OAU Convention on the Prevention and Combating of Terrorism (2002); Treaty Establishing the African Economic Community (1992), as well as bilateral ones, like agreements drawn with the Islamic Republic of Mauritania and the Kingdom of Morocco: Mauritano-Sahraoui Agreement signed in Algiers on 10 August 1979 between the Islamic Republic of Mauritania and the Polisario Front, a compromising agreement between the Kingdom of Morocco and the Polisario Front, concerning the suspended questions of identification, signed in London on 19-20 July 1997 and the compromising agreement between the Kingdom of Morocco and the Polisario Front, concerning armies, prisoners-of-war and prisoners or persons arrested for political reasons, signed in Lisbon on 29 Aug. 1997. The SADR is also a party of the Geneva Convention of 12 Aug. 1949 on protecting victims of war, as a result of submitting a unilateral declaration on the basis of Article 96 Para 3 of the Additional Protocol relating to prevention of international armed conflicts of 8 Aug. 1977. The SADR exercises the right

of legation and maintains diplomatic relations with 39 states (missions of the third states accredited to the SADR: 15 states: Angola, Cuba, Ecuador, Ethiopia, Ghana, Lesotho, Mexico, Namibia, Nicaragua, Nigeria, South Africa, Uganda, Venezuela, Vietnam, Zimbabwe; diplomatic missions of the SADR: Argentina, Brazil, Chile, Columbia, Haiti, the USA, India, Indonesia, Japan, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovenia, Spain, Sweden, Switzerland, Great Britain, Australia; missions accredited to international organizations: African Union, the EU, the UNO (Geneva and New York). It holds the status of both a member, observer and a guest in numerous international organizations (membership of international organizations with the status of: (1) a member: African Union (1981), Committee of Intelligence and Security Services of African, International Coalition against Enforced Disappearances, International Union of Socialist Youth, Pan-African Lawyers Union, World Federation of Democratic Youth, World Federation of Trade Unions; (2) an observer: Andean Community, International Federation of Red Cross and Red Crescent Societies; (3) a participant: EU-Africa summits, Central American Parliament, Ibero-American summits, New Asian-African Strategic Partnership, Permanent Conference of Political Parties of Latin America and the Caribbean; (4) a guest: Non-Aligned Movement and Socialist International). The SADR performs also *ius standi*, including before the Court of Justice of the European Union in the case the Council versus the Polisario Front (Orz. TSUE z 21.12.2016). The stances assumed by international organizations towards the SADR vary, as well. Such organizations as: the African Union, the European Union, the UNO, Organization of Islamic Cooperation, Rio Group, Union of South American Nations, Non-Aligned Movement, Caribbean Community, support the right to self-determination, the League of Arab States supports the territorial integrity of Morocco, whereas the Arab Maghreb Union has not taken their standpoint.

All in all, it needs stating that the accession of the SADR to the African Union and other international organizations, exercising the active and passive right of legation, concluding bilateral international agreements with Mauritania and Morocco (the ones listed above), obligation to respect the Geneva Convention of 12 Aug. 1949 on protecting war victims, or possibility of using the right of *ius standi*, provide ample evidence which speaks in favour of recognizing legal personality of the SADR in the form granted to states by international law.

5. Conclusion

The basic aim of this publication was to answer the question what the legal international status of Western Sahara is and whether its territory is a subject of

the international law. The legal status of Western Sahara is defined in Article 73 of the Charter of the United Nations, which means that it is a non-self governing territory going through the process of decolonization, whose administrating power is still the Kingdom of Spain. This also means that it is not a subject of the international law. Thus, one cannot but agree with the statement of Advocate-General Melchior Wathelet who concluded that Western Sahara is not a territory whose international status is not defined nowadays: what is not determined presently is not its status, but its future.

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